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ROSCOE'S

DIGEST OF THE

LAW OF EVIDENCE

AND THE PRACTICE

IN

CRIMINAL CASES

(CHIEFLY ON INDICTMENT)

IN ENGLAND AND WALES.

FOURTEENTH EDITION.

WITH MANY NEW TITLES,

INCLUDING ONE ON

TREASON.

BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PREFACE TO THE FOURTEENTH EDITION.

This edition appears after the longest interval between any two consecutive issues of this work. The War accounts for some part of this period.

The delay, however, afforded time for thorough revision, and accordingly I have endeavoured herein to correct the mistakes of previous editors (including my own) and to supplement shortcomings, especially in restoring to their chronological order (subject always to the logical) the accretions which, in passing through various hands, slip from their places. As far as it was possible, I have left untouched the work of the distinguished lawyer, who was responsible for the seventh edition (1868)—Sir J. F. Stephen.

Readers will not require to be reminded of the many "first-class" statutes which have appeared between 1908 and 1920. But the most important legal event, from my point of view, during those years has been the creation and the fruit of the Criminal Court of Appeal. It is as if a new sun had established itself in the firmament of English criminal law, which not only illuminates every nook and cranny of doctrine, practice and procedure, but reviews in detail—an innovation in our history—the multifarious facts rehearsed in a trial upon indictment. Consequently, I have considered it my duty to use its records fully in elucidating any part

or point of my subject-matter. This obligation would alone account for nearly all the increase in the size of the volume. But I may add that in no sense does it contain a treatise on the practice of that Court (except, of course, in so far as that bears directly on the trial below).

I have taken great pains to make the General Index quickly useful to the reader; it is, I hope, a sort of literary clearing-house for the preceding pages. Reported cases do not, as a rule, extend beyond 1919, but a few in 1920 of exceptional importance are inserted. In the "Additions and Corrections," pp. 1126-9, will be found references to statutes passed on dates which precluded their appearing in their natural contexts.

I am in duty bound to express here my thanks to Mr. H. Austin, the learned Clerk of the Central Criminal Court, for his unfailing readiness to share with me his very great knowledge of every topic included in this book.

H. C.

November, 1920.

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Crompton. *See* Fitzherbert.

Dalton, Michael; 'probably died' (Dict. Nat. Biog.) between 1648 and 1655; little is known about him. 'The Country Justice' appeared in 1618; there have been many editions, that used in this book being of 1742. He also published, in 1623, a work on the Office of Sheriff.

East, Edward Hyde (1764-1847); Chief Justice of Calcutta, 1813; Member of the Judicial Committee of the Privy Council. The 'Treatise of the Pleas of the Crown,' 2 vols., appeared in 1803; the 'Term Reports' (1785-1800), 5 vols., in 1817, and other (East's) Reports, in 16 vols. (1800-1812) from 1801 to 1814.

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Greaves, C. S. (1802-1881); Q.C. 1850; editor of 'Russell on Crimes,' 3rd ed. (1843 and 1851); writer on criminal law: he had much to do with the preparation of 14 & 15 Vict. c. 19 and c. 100, and with that of the Consolidation Acts of 1861.

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STEPHEN, FITZJAMES (1829-1894); Judge in 1879; of the Q. B. Div. 1881; editor of the 7th edition of this book (1868). The 6th ed. (1904) of the 'Digest of the Law of Evidence,' which first appeared in 1876, has been used in this book. The edition of the 'Digest of Criminal Law' (1877) used is the 5th, that of 1894. The 'History of the Criminal Law,' in 3 vols., appeared in 1883.

TAYLOR, JOHN PITT; sometime a County Court Judge. 'The Law of Evidence' appeared in 1848; the 10th edition, which has been used in this book, was published in 1906, in 2 vols.

VINER, CHARLES (1678-1756); not a lawyer. 'A General Abridgment of Law and Equity,' appeared from 1742-1753 in 23 vols.: it is based on Rolle's. There is an alphabetical index by Kelham (London, 1758).

WRIGHT, ROBERT (1839-1904); Scholar and Judge (1890); author of 'Law of Conspiracies and Agreements' (1873) and (with Sir F. Pollock, K.C.) 'Possession in the Common Law' (1888).

SOME ABBREVIATIONS.

A. .....Act.
B. N. P. .....Buller's *Nisi Prius*.
C. C. A. .....Court of Criminal Appeal.
C. C. R. .....Crown Cases Reserved.
c. q. .....conviction quashed.
H. L. .....House of Lords.
imp. .....imprisonment.
L. A. .....Larceny Act.
P. .....Pollock on Possession in the Common Law (1888).
p. d. .....preventive detention.
p. s. .....penal servitude.
Phips. .....Phipson's Law of Evidence (1911).
rpd. .....repealed
s. .....section.
St. Tr. .....Howell's State Trials.
T. .....Taylor on Evidence (1906).
W. .....Wright on Possession in the Common Law (1888).
w. h. l. .....with hard labour.

PART I.

GENERAL HEADS.

A. EVIDENCE.

General rules] of evidence are, at common law, the same in criminal and civil proceedings. (Accordingly under this head there are many rules seldom applicable except in civil cases.) 'There is no difference as to the rules of evidence,' says Abbott J., 'between criminal and civil cases: what may be received in the one may be received in the other; and what is rejected in the one ought to be rejected in the other.' *Watson,* 2 Stark. N. P. C. 116 at 155; 32 St. Tr. at 492, 1817; *Murphy,* 8 C. & P. 306, 1837, amplifying Buller J., *de la Motte,* 21 St. Tr. 810, 1781.

Application of rules] So Hotham B. adding 'at the same time it has been stated that one is more disposed to resist, and more cautious in receiving evidence in a case where the party has much at stake, as in favour of life,' *Cator,* at 144. See p. 80. So Reading L.C.J.: 'But they [the principles of the law of evidence] are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion and have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law. A familiar instance of such a practice is to be found in the direction of judges to juries strongly warning them not to act upon the evidence of an accomplice witness unless it is corroborated.' *Christie,* 1914, A. C. 564; 10 Cr. A. R. 164, H. L., where (59, 159) L. Moulton, accepting the general rule, went on: 'But there is a great difference in the practice. The law is so much on its guard against the accused being prejudiced by evidence which, although admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for everyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure.' Cf. 'If I were asked whether there be any difference left between a

criminal statute and any other statute not creating an offence I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law': *per* Pollock C.B., *A.-G.* v. *Sillem,* 33 L. J. Ex. 110, 1864.

Another instance of a difference is in the admission of judges' notes as evidence in civil cases only. See pp. 5, 69, 198, and *Presumptions* and *Phips.* p. 419.

Insanity] 'This proceeding is either a criminal prosecution or a civil suit. If a criminal prosecution it can neither be instituted nor carried on while the accused is a lunatic. If it be a civil suit, lunacy is no bar,' *per* Kelly C.B. (and Denman J. and Pollock J.) advising the H. L. in *Mordaunt* v. *Moncrieff,* L. R. 2 Sc. App. 381, 1874, adopted by L. Hatherley, *ib.* 394.

Witness] And it seems that in a criminal case the judge may call a witness without the consent of the parties, but not in a civil case: p. 160.

Technical rules] In a criminal case no such 'application' can be made as may be made in a commercial cause to the 'judge under the provisions of the Judicature A. 1894, and the rules thereunder, or by consent to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence and otherwise' (reg. 6 of Judges' Notice, 1895: Annual Practice 1918, p. 2388). The Admiralty Judge seems to have even greater powers 'by consent': *ib.* 2390. Hence in *Cargill,* Channell J. observed: 'I think that the ordinary rules of evidence do sometimes do an injustice. The rules are made to meet the general run of cases, and it cannot be helped if in particular cases they work an injustice: it is better to apply the rules strictly than to allow it to be supposed that a judge has a discretion to relax them if he thinks they will work an injustice' (J. P. and Cr. A. R.). Hence a judge cannot exclude a confession, though he may wish that it was not put in: *T. Fletcher,* 9 Cr. A. R. 54, 1913. See *per* L. Halsbury, *Christie,* 10 Cr. A. R. 149. *Cf.* the remarks of the C. C. A. in *Shellaker.*

Complaint by female of sexual offences] *Hearsay* (which see) is admitted only in criminal cases.

Verdict] A majority verdict cannot be accepted in criminal cases.

Parties] In a civil case they may call each other, but in a criminal case the Crown has no right to call a defendant.

Counsel] For a difference in the position of counsel see *Berens,* 1865.

Admissions] There are no admissions in criminal cases 'dispensing with proof as distinguished from admissions or confessions which are evidential' ('except by a plea of guilty,' p. 169). *Phips.* 11, 5 (and except defendant's statements sworn and unsworn); see *Confessions* and *Thornhill,* 1838. Eyre J. rebuked counsel for asking *Horne Tooke* (at 73) to look at a paper and acknowledge it, and strongly advised him not to admit it, as he might not understand the legal effect of the admission: cf. *ib.* 114. Counsel for defendant suggested (before evidence) that 'as there would be no question made

as to the facts, it might be convenient at once to discuss the law of the case. Erle J.: We cannot in a criminal case take anything as admitted, and therefore the evidence must be gone into': *Bateman,* 1 Cox C. C. 186, 1845, forgery.

Inadmissible evidence] The court must object if party or counsel do not: *per* Abbott J., *Watson,* 491, 1817. Until the Judicature Acts it vitiated verdicts, both criminal and civil: *per* L. Coleridge C.J.: *Gibson,* 1887. Now [in 1905], according to T. 1881 c, if no objection is taken 'in civil cases there is no remedy, while in criminal a conviction is void even if there is enough evidence *aliunde,*' citing *Gibson.* But for the law in the C. C. A. see this title below.

Where evidence was improperly received but the jury voluntarily said that they had not been influenced by it, and there was ample material for a conviction without it, Parke B. stated that the rule in civil and criminal cases was different in this respect: *Forster,* 6 Cox C. C. 521, 1855, C. C. R.: conviction affirmed.

Best evidence] It is the 'first and most signal rule' (*Gilb. Ev.* p. 3) of evidence that the best evidence of which the case is capable shall be given; for if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it: *ib. Best, Ev.* Bk. 1, s. 87 and foll.; but see p. 5. What is 'best' in each case is a matter of law; the testimony of an observer (*i.e.,* through one of the five senses) is always preferred. But the best often may be 'secondary.' 'The court must be reasonably satisfied that due diligence has been used' [*i.e.,* to produce 'primary evidence']. But 'it is not necessary to negative every possibility—it is enough to negative every reasonable probability—of anything being kept back,' *per* Alderson B., *M'Gahey* v. *Alston,* 2 M. & W. 214, 1836: secondary evidence of contents of a cheque let in after proof of sufficient search for it.

Writings] See *Documentary evidence.* A most important application of this principle is that which rejects secondary and requires primary evidence of the contents of relevant written documents of every description. 'The contents of every written paper are, according to the ordinary and well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence.' The rule was so stated by the judges on the occasion of the trial of *Queen Caroline,* 2 Brod. & B. 286, 1820. The only exceptions to it may be divided into the following classes (each of which is dealt with below):—(1) Where the written document is lost or destroyed; (2) Where it is in the possession of an adverse party who refuses or neglects to produce it; (3) Where it is in the possession of a party who is privileged to withhold it, and who insists on his privilege; (4) Where the production of the document would be, on physical grounds, impossible, or highly inconvenient; (5) Where the document is of a public nature, and some other mode of proof has been specially substituted for reasons of convenience. It is apparent, therefore, that, in order to let in the secondary evidence in these cases, certain preliminary conditions must be fulfilled.

In *Banks,* 1916, appellant was cross-examined about the contents of an incriminating letter of his not to 'prosecutrix' and the reply thereto, without either being produced: the C. C. A. commented on this pro-

ceeding (but applied 'the proviso to s. 4 (1)' of the C. A. A.): 'it was not regular to insist that the appellant should give an answer . . .' *i.e.* according to the rule, *Phips.* 473: 'he may be *asked* on cross-examination . . . as to any documents, yet he cannot be compelled to make such admissions in the box.' See *Cross-examination.*

It is not necessary, in every case where the fact that is to be proved has been committed to writing, that the writing should be produced, but (unless the contents of the writing are themselves a fact or facts in issue) only in those cases where the documents contain statements of facts, which, by law, are directed or required to be put in writing, or where they have been drawn up by the consent of the parties for the express purpose of being evidence of the facts contained in them. Indeed, in many cases the writing is not evidence, as in *Layer,* 16 St. Tr. 214, 1722; 12 Vin. Ab. 96.

Instances] In an indictment for setting fire to a house with intent to defraud an insurance company, in order to prove that the house was insured, the policy must be produced, as being the best evidence—*Ellicombe,* 5 C. & P. 522; 1 Moo. & R. 260, 1833; *Kitson,* 1 D. & P. C. C. 187; 22 L. J. M. C. 118, 1853—where, however, *Phips.* 518, gives the reason that 'the matter is collateral' (and if not *aliter*)—and the insurance office cannot give other evidence in the absence of a notice to produce: *Doran,* 1 Esp. 127, 1791; but *per Curiam* in *Kitson* it is not 'absolutely necessary in all cases to produce the policy, but the intent to defraud alleged must be proved by proper evidence.'

Matter of record] On the same principle, the records and proceedings of courts of justice, existing in writing, are the best evidence of the facts there recorded. Thus where it was necessary to prove the day on which a cause came on to be tried, L. Ellenborough said that he could not receive parol evidence of the day on which the court sat at *nisi prius,* as that was capable of other proof by matter of record, *Thomas* v. *Ansley,* 6 Esp. 80, 1806. So, on an indictment for disturbing a protestant congregation, L. Kenyon ruled that the taking of the oaths under the Toleration A. (1688), being matter of record, could not be proved by parol evidence. *Hube,* Peake, N. P. 180; 5 T. R. 542, 1792-4. In *Rowland,* 1 F. & F. 72, 1858, Bramwell B. held in perjury, that in order to prove the *proceedings* of the county court, it was necessary to produce either the clerk's book, or a certified copy therefrom bearing the seal of the court; the County Court A. of 1846 directing that such minutes should be admissible. And 'even where the transactions of courts which are not, technically speaking, of record are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic modes of proof which the law recognises.' 3 Stark. Ev. 1043, 1st ed., 1824; 717, 4th ed., 1853. See p. 192. On indictment for perjury, where there was in existence the information in writing, on the hearing of which defendant was sworn, but it was not produced, an acquittal was directed. *Dillon,* 14 Cox C. C. 4, 1877. On an indictment under a rpd. statute (1697), it was necessary to show that the prosecution was commenced within three months after the offence committed. It was proved, by parol, that defendants were apprehended within three months, but the warrant was not produced nor proved, nor were the commitment or the depositions given in evidence to show on what transactions, or for what offence, or at what time, they were committed. On conviction, a question was reserved for the judges, who held that there was not

sufficient evidence that they were apprehended for the offence in the indictment within the three months. *Phillip,* R. & R. 369, 1818.

Judgments] 'All judgments are conclusive of their existence as distinguished from their truth. . . . Every judgment is . . . conclusive evidence for or against all persons (whether parties, privies, or strangers) of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered.' *Phipson,* 373; and see the whole of the chapter; on the effect of an acquittal, *ib.* 376: on that of a plea of guilty, see p. 258, below. On the whole subject of estoppel, see *Everest* on *Estoppel.* The award of an arbitrator about a given fact was mere matter of opinion and wrongly received as evidence of that fact *in perjury:* new trial granted. *Fontaine Moreau,* 11 Q. B. 1028; 17 L. J. Q. B. 187, 1848.

Parol] But, on the other hand, where a memorandum of agreement was drawn up, and read over to the defendant, which he assented to, but did not sign, it was held that the terms of a letting might be proved by parol, there being no written agreement in existence. *Doe* v. *Cartwright,* 3 B. & Ald. 326, 1820; *Trewhitt* v. *Lambert,* 10 A. & E. 470, 1839. So facts may be proved by parol, though a narrative of them may exist in writing. Thus a person who pays money may prove the fact of payment, without producing the receipt which he took. *Rambert* v. *Cohen,* 4 Esp. 213, 1802. So where, in trover, to prove the demand the witness stated that he had verbally required the defendant to deliver up the property, and at the same time served upon him a notice to the same effect, L. Ellenborough ruled that it was unnecessary to produce the writing; *aliter,* if the verbal 'had any reference' to the written demand. *Smith* v. *Young,* 1 Campb. 439, 1808. So a person who takes notes of a conversation need not produce them in proving the conversation, as they would not be evidence if produced. Thus in *Layer* an under-secretary of state gave evidence of defendant's confession before the council, though it had been taken down in writing. Cf. *Sheridan,* 1811. Similar illustrations of the same principle will be found at p. 76. So on an indictment for perjury in a county court trial any witness called there, *The Crescent,* 62 L. J. P. 63, 1893, C. A., or any person present at the time, is competent to prove what evidence was given. *Morgan,* 6 Cox C. C. 107, 1852, *per* Martin B.; only the judge could produce and use his own notes: *ib.—Child,* 5 Cox C. C. 203, 1851, *per* Talfourd. J. of a commissioner of assize. See p. 2. So the *fact* that a certain person occupied land as tenant may be proved by parol, although there is a written contract. *Inhabs. of Holy Trinity, Hull,* 7 B. & C. 611, 1827. But the parties to the contract, the amount of rent, and the terms of the tenancy, can only be shown by the writing. S. C. and see *Strother* v. *Burr,* 5 Bing. 136, 1828; *Doe* v. *Harvey,* 8 Bing. 242. 1832; *Inhabs. of Merthyr Tydvil,* 1 B. & Ad. 29, 1830; *Cooper* v. *Marsden;* and *Phips.* ch. 44.

Printed matter] All the impressions are originals, and according to the usual rule of multiplicate originals, any copy will be primary evidence. Thus, where a copy of a placard was produced by a person who had printed it, and offered in evidence against defendant, who it appeared had called at the printer's, and taken away twenty-five copies, it was objected that the original manuscript ought to be produced (after notice), or proved to be destroyed, or in defendant's possession; but it was held that the evidence was admissible; that he had adopted

the printing by having fetched away the twenty-five copies; and that being taken out of a common impression, they must be supposed to agree in the contents. 'If the placard,' said Bayley J., 'were offered in evidence to show the contents of the original manuscript, there would be great weight in the objection, but when they are printed they all become originals [and not secondary, and no notice to produce is necessary]; the manuscript is discharged; and since it appears that they are from the same press, they must be all the same.' *Watson*, 32 St. Tr., at 83; 2 Stark., at 129.

Public meetings] It has been said that these transactions &c. may be proved by parol, as in the case of resolutions entered into, although it should appear that the resolutions have been read from a written or printed paper. And in support of this proposition a case is referred to where, in a prosecution for an unlawful assembly (on August 16, in order to prove the reading of certain resolutions (on July 21 preceding), a witness produced a copy of the resolutions which had been delivered to him by defendant, who was chairman of both meetings, as the resolutions intended to be proposed, and proved that the resolutions he heard read corresponded with that copy; this was held sufficient, though it was objected that the original paper from which the resolutions were read ought to have been produced, or that a notice to produce it ought to have been given. *Hunt (and others)*, 3 B. & Ald. 572; 1 St. Tr. N. S. 272-3, 490, 1820. But this decision was thus explained by Abbott C.J., who delivered the judgment of the K. B.: 'the paper produced was proved to have been received from the hands of' Hunt 'at the time and place of passing the resolutions as containing the resolutions then actually in progress and then in the act of being passed by or proposed to the persons assembled and as against the party to whom this proof applied the paper produced was as good, if not better, evidence than any other could have been,' *i.e.*, he treats the delivery by defendant of the copy to the witness as an admission that it contained a true statement of the resolutions passed at the meeting. An indictment under the Irish Convention A., 1793, averred that divers persons assembled together, and entered into certain resolutions, and charged the defendant with doing certain acts for the purpose of carrying the resolutions into effect. To show what was done at the meeting in question, a witness stated that, at a general meeting, the secretary proposed a resolution, which he read from a paper. The proposition was seconded, and the paper was handed to the chairman and read by him. It was objected that the absence of the paper should be accounted for, before parol evidence of the contents of it was received. But the court were of opinion that this was not a case to which the distinction between primary and secondary evidence was applicable; that the issue was, and the proposed evidence was, intended to show, not what the paper contained, but what one person proposed, and what the meeting adopted; in short, to prove the transactions and general conduct of the assembly; and that such evidence could not be rejected because some persons present took notes of what passed. *Sheridan*, 31 St. Tr. 671, 1811; Ir. K. B.; cf. *Layer* and *Moors*, 1801.

Handwriting] See *Attesting Witness*. 'When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call [i] the *writer* himself, or [ii] some person who *actually saw the paper or signature written*

When evidence such as this cannot be procured, as must often be the case, recourse may be had, either [iii] to the testimony of witnesses, who are *acquainted with the handwriting,* or [iv] to a comparison of the document in dispute with any writing proved to the satisfaction of the judge to be genuine. These last modes of proof, indeed, may in all cases be given in the first instance since the law recognises no distinction between them and the ocular proof just mentioned; but as they are obviously of a less satisfactory character than direct testimony, any unnecessary reliance on them is calculated to raise suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.' T. s. 1862. *Phips.* 489, adds: '[v] by experts . . . [vi] by the admissions of the party against whom the document is tendered . . .' all these methods are 'equally primary.' Nor do the slightness and infrequency of the opportunities which the witness has had of judging of the handwriting make any difference in his competency. *Alg. Sidney,* at 854. These are only matters of observation to the jury, affecting the weight of his evidence; as also is the fact that the witness has had no recent opportunities of forming a judgment. Pratt L.C.J. accepted evidence of the former master of a clerk who had been in correspondence with the latter within five years: *Layer,* at 296, 1722. In *Horne Tooke,* 25 St. Tr. 71, 1795, the witness had not seen defendant's handwriting for nineteen years previous to the trial; and in *Lewis* v. *Sapio,* M. & M. 39, 1827, the witness had only seen the defendant write *Mr. Sapio* several times (and not the signature in question, *L. B. Sapio*). There Abbott L.C.J. declined to follow L. Ellenborough in *Powell* v. *Ford,* 2 Stark. 164, 1817, who rejected a witness who had never seen the Christian name in question written, and the surname only once. Cf. Eldon C. in *Eagleton* v. *Kingston,* 8 Ves. 473, 1803.

Disproof] If the evidence of third persons be admissible to prove handwriting, it seems necessarily to follow, that it is equally admissible for the purposes of *disproving* it, the question of *genuine* or *not genuine* being the same in both cases. Accordingly, although, in 1768, where it was allowed that certain alterations in a receipt were forged, it was held that the true writer of the receipt could alone prove it, and the evidence of the writer's partner was rejected (proof of the former's death being insufficient); *Smith,* 2 East, P. C. 1000: yet in later cases of forgery it has been held that the genuineness of the handwriting may be disproved by any person actually acquainted with the genuine handwriting. *Hughes,* 2 East, P. C. 1002, 1802; *M'Guire, ib.,* 1801; 1 Lea, 311; *Bank Prosecutions,* R. & R. 378, 1819; *Hurley,* 2 Moo. & R. 473, 1843—to disprove authority to sign another's name, latter need not be called 'circumstances showing guilty knowledge are enough': see p. 670.

In criminal cases the jury may form their opinion on the genuineness of a document by a comparison of it with any other documents already in evidence, and shown to be the genuine production of the person whose handwriting is in question: in *Layer,* 193, Pratt L.C.J. said of a *witness* whose handwriting was tested in court: 'the character which she now writes is like what she writ in those [produced] papers and so confirms her evidence.'

Where a witness to any instrument is abroad, proof of his handwriting is proof of the execution (only) of the instrument he subscribed: 'a mere instrumentary witness': *per* L. Kenyon, *Cooper* v. *Marsden.*

And now by 28-9 Vict. 18, 8, 'Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.' See p. 206.

'The question of the genuineness of handwriting is for the jury, as a question of primary evidence': *per* Alderson B., *Boyle* v. *Wiseman*.

Evidence of want of consent] In certain prosecutions it is necessary to prove that the act charged was done without the consent, or against the will, of some person; and a question has been raised, whether the evidence of that person himself is not the best evidence for that purpose. Although at one time it appears to have been thought necessary to call the person himself, it is now settled that the want of consent may be proved in other ways. Where on an indictment under a rpd. A. 6 Geo. 3, 36, for lopping and topping an ash timber tree without the consent of the owner, the land steward was called to prove that he himself never gave any consent, and from all he had heard his master (who had died before the trial, having given orders for apprehending defendants on suspicion) say, he believed that he never did—Bayley J. left it to the jury whether they thought there was reasonable evidence to show that in fact no consent had been given. He adverted to the time of night when the offence was committed, and to defendants' running away when detected as evidence to show that the consent required had not in fact been given: they were found guilty. *Hazy*, 2 C. & P. 458, 1826. So on indictments, one for killing fallow-deer, and others for taking fish out of a pond without consent, evidence was given that the offence was committed in such circumstances as to warrant a finding of non-consent; and the managers of the different properties were called, but not the owners. The judges held the convictions right. *Allen*, 1 Moo. C. C. 154, 1826. Cf. *Hurley*, 1843, and *Wood*, 1856.

Modern rule] Thus, 'in the present day, it is not true that the best evidence must be given. . . . All admissible evidence is in general equally receivable': *Phips*. 38, who gives many instances of the relaxation of the old rule, and adds, 'nor, to prove or disprove consent, need the person alleged to have consented be called.'

Chattels] 'So, the production of 'real' evidence—*e.g.*, on questions of the genuineness of a ring, the soundness of a horse, the equality of bulk with sample (*Francis*, 1874) . . . though often satisfactory, is not now compulsory; although where the real evidence is of a documentary character, *e.g.*, an inscription on a ring [see *Farr*, 1864] the ordinary rule as to primary evidence applies.' *Ib.* On a trial for an attempt to obtain an advance from a pawnbroker upon a ring by false pretence, evidence was tendered to show that the prisoner had offered *another* ring to another pawnbroker upon a previous day; *this* ring was not produced, but the pawnbroker stated that it was a sham. The evidence was held admissible. L. Coleridge C.J. made the following remarks: 'No doubt if there was not admissible evidence that this ring was false, it ought not to have been left to the jury; but though the non-production of the article may afford ground for observation more or less weighty, according to circumstances, it only goes to the weight, not to the admissibility of the evidence, and no question

as to the weight of this evidence is now before us. Where the question is, as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that when the issue is as to the state of a chattel, *e.g.*, the soundness of a horse or the equality of the bulk of the goods to the sample, the production of the chattel is primary evidence, and that no other evidence can be given till the chattel is produced in court for the inspection of the jury.' *Francis,* L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 30 L. T. 503; 22 W. R. 663; 12 Cox C. C. 612, 1874.

Conduct—persons acting in an official public capacity] Where persons acting in a public capacity, have been appointed by instruments in writing, those instruments are not considered the only evidence of the appointment, but it is sufficient, *primâ facie,* to show that they have publicly acted in the capacity attributed to them. Thus in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters without producing their appointments: *per* Buller J., *Berryman* v. *Wise,* 4 T. R. 366, 1791 (cf. *Budd,* 1805): of an attorney, *Gordon,* 1789; 1 Leach, 515; 1 East, P. C. 352: though he may have once ceased to take out his certificate, it being presumed that he has been re-admitted. *Pierce* v. *Whale,* 5 B. & C. 38, 1826. Of a deputy county court judge; *Roberts,* 14 Cox C. C. 101, 1878: of a surrogate; *Verelst,* 3 Campb. 432, 1813. Of an officer of inland revenue; 53-4 Vict. 21, 24 (3). Of a clergyman, *Cresswell,* 1876. So, where the overseers of a parish were by a local Act to sue and be sued in the name of their vestry clerk, it was held that proof of the latter having acted as such was sufficient *primâ facie* evidence of his having been properly appointed; *M'Gahey* v. *Alston.* That a soldier is engaged in the recruiting service is evidence that he is attested; *Wolton* v. *Gavin,* 16 Q. B. 48, 1850. So of a commissioner for taking affidavits; *Howard,* 1 Moo. & Rob. 187, 1832. So of the appointment of a presiding officer at an election booth; *Garvey,* 16 Cox C. C. 252, 1887. So of a person sitting in the House of Lords that he is a peer; p. 182. But in *Essex,* D. & B. 369; 27 L. J. M. C. 20, 1857, defendant, who was a clerk to a savings bank, was convicted of embezzlement of property laid in A. B. The only evidence of A. B. being a trustee was his own statement that he had so acted, but that, before the commission of the offence, he had attended one meeting only. He was also manager of the bank, and it did not appear that any act had been done by him which was not consistent with his holding that office only. This was held by the C. C. C. R. to be insufficient. For the presumption *omnia rite esse acta,* see p. 21. See some cases under *Libel—Prosecutor's Particular Capacity.*

Conduct—'admission' by defendant] So where defendant is charged as an office-bearer. In an action for penalties against a collector of taxes, the warrant of appointment was not produced, it being held that the act of collecting the taxes was sufficient to prove him to be collector. *Lister* v. *Priestly,* Wightwick, 67, 1810. On an information against an officer for receiving pay from government for a greater number of men than had mustered, L. Ellenborough held, that the fact of his being commandant might be proved from the returns, in which he described himself as major commandant, without direct evidence of his appointment by the king. *Gardner,* 2 Campb. 513, 1810. In an action against

a clergyman for non-residence, the acts of defendant as parson, and his receipt of the emoluments of the church, will be evidence that he is parson without further formal proof. *Bevan* v. *Williams,* 3 T. R. 635 *a,* 1776; cf. *Smith* v. *Taylor,* 1 New Reports, B. & P. 196, 1805. On the trial of a letter-carrier, proof that he acted as such was held to be sufficient proof of his appointment. *Borrett,* 6 C. & P. 124, 1833. See under *Post Office.* Cf. *H. J. Lawson,* 1905.

A bond from defendant to a parish incidentally admitting that his trade in a former residence was a nuisance is admissible on a later trial: *Neville,* 1792. So of action or acquiescence on a correspondence: *O'Brien,* 1911. There does not, on principle, seem any reason why the admissions of a defendant should not be receivable in evidence as well when they relate to the contents of a written document in issue not produced, as when they amount to direct confessions of guilt. This kind of 'admission' differs from that considered on p. 2. Any admission against himself which a defendant makes in his (unsworn) statement to the court or on oath—more properly called a 'confession'—is not only good evidence, but the best: *optimum habemus testem confitentem reum.* For false admissions, see under *Plea of Guilty.*

Secondary evidence—lost documents] 'Secondary evidence means inferior or substitutionary evidence, that which itself indicates the existence of more original sources of information': *Phips.* 2, 511. The most frequent case is that in which a document has been lost or destroyed. Indenture of apprenticeship (possibly burned 20 years before) proved by parol: *Inhabs. of St. Marylebone,* 4 Dow. & Ry. 479, 1824, followed in *Inhabs. of Fordingbridge,* 27 L. J. M. C. 290, 1858; same point: after due search parol evidence of facts 67 years before accepted: *Giles* v. *Smith,* 1 C. M. & R. 462, 1834. In order to lay the necessary foundation for the admission of secondary evidence, it must be shown that the document has once existed, and has either actually ceased to exist, or that all reasonable efforts have been made to find it and have failed. *Reason* (*Str.*), at 500, 1722; *Dillon,* 1877. See *Depositions.*

The degree of diligence to be exercised in searching for a document will depend in a great measure on its importance and the circumstances of each case. *Gully* v. *Bishop of Exeter,* 4 Bing. 298, 1827; *Gathercole* v. *Miall,* 15 M. & W. 319, 335; 15 L. J. Exch. 79, 1846. The question is for the judge: *Boyle* v. *Wiseman,* 11 Ex. 360; 10 Ex. 647; 1 Jur. N. S. 894, 1855, where the rule was applied to a document in a foreign country, which the owners there refused to produce: cf. p. 15, and *Alivon* v. *Furnival.* In the case of a useless document the presumption is that it is destroyed: *per* Bayley J., in *Inhabs. of E. Farleigh,* 6 D. & R. 147, 1825. And, where the loss or destruction of a paper is highly probable, very slight evidence is sufficient: *per* Abbott C.J., in *Brewster* v. *Sewell,* 3 B. & Ald. 296, 1820. Where depositions have been delivered to the clerk of the peace or his deputy, and the practice is, on a bill being thrown out, to put them away as useless, slight evidence of search is sufficient, and the deputy need not be called, as they were not in his custody, it being his duty to deliver them to his principal: *Freeman* v. *Arkell,* 2 B. & C. 494, 1824; 1 C. & P. 137, 1823.

Where it is the duty of anyone in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed. *Inhabs. of Stourbridge,* 8 B. & C. 96, 1828. And where an 'attorney or officer' is asked generally for

documents, the court will assume, until the contrary is proved, that all the documents relating to the subject are produced. *M'Gahey* v. *Alston,* at 214, *per* Alderson B. But where an attorney was asked for a document which related to his own private affairs, and by his direction a search was made in his office, and the document was not found, the Q. B. refused to say that the quarter sessions were wrong in deciding that there had not been a sufficient search for the purpose of letting in secondary evidence, because the office was not proved to be the proper place of deposit, the attorney not being called. *Inhabs. of Saffron Hill,* 1 E. & B. 93; 22 L. J. M. C. 22, 1852.

It is not necessary in every case to call the person to whose custody the document is traced. *Ib.* But some doubt seems to have existed whether, if he be not called, evidence can be given of answers made by him to inquiries respecting the document. Such evidence appears to have been received in *Inhabs. of Morton,* 4 M. & S. 48, 1815, but was rejected in *Denio,* 7 B. & C. 620, 1827, where, however, a material witness was not called. In *Inhabs. of Kenilworth,* 7 Q. B. 642, 1845, a very strong court thought that for this preliminary purpose such evidence ought to be received, and L. Denman comments on the distinction between *Morton* and *Denio;* in the *Saffron Hill Case,* evidence of this kind had been received, but as the court thought that, even if receivable, it was insufficient for the purpose, the point remained undecided. However, in *Inhabs. of Braintree,* 28 L. J. M. C. 1, 1858, the Q. B. thought that answers to such inquiries were admissible to satisfy the conscience of the court that the search had been a reasonable one, agreeing with the *Kenilworth* case that hearsay might be admitted.

But in forgery, 'it is of the highest importance' to account for the loss of the original document alleged to be forged, for defendant may wish the jury to inspect it: it is, therefore, not enough for the prosecuting attorney to prove that he had it and gave it to his clerk, who, he believed, had accidentally burned it: as the clerk was not called, there was an acquittal: *per* Cleasby B., and Byles J., *Hall,* 2 Cox C. C. 160, 1872.

The construction of a lost document, by means of the secondary evidence, is for the judge, though the jury disagree: *Berwick* v. *Horsfall,* 4 C. B. N. S. 450, 1848.

Documents in the hands of adverse party—Notice to produce] When a document is in the hands of the adverse party, a notice to produce it in court must be given to him, before secondary evidence of its contents can be received. Its object is not, as was formerly thought, to give the holder an opportunity of providing the proper testimony to explain or confirm the document, but it is merely to enable him to produce it if he likes at the trial, and thus to secure the best evidence of its contents. Therefore, when a document is shown to be in court, a request to produce it immediately is enough. *Dwyer* v. *Collins,* 7 Ex. R. 639; 21 L. J. Ex. 225, 1852. A. and B. were indicted for conspiring to extort money from C., by charging him with forging a cheque for 178*l.*; the indictment set forth a letter from A. to C., referring to the cheque, and conversations were proved, relating to it. It was, in fact, in existence (in defendants' possession), but it was not produced at the trial, and such production was held to be unnecessary; for the defendants had taken on themselves to treat the cheque as existing, and it might have been that the existence of such a cheque was altogether a fabrication. *Ford.* 1 Nev. & M. 776, 1833. Defendant's letter-copy-book was read: *Francia,* 15 St. Tr. 941, 1717. In

Layer, 1722, it was proved by a witness, that defendant had shown him a paper partly doubled up, which contained the treasonable matter, and then immediately put it in his pocket; and no objection was made to the witness giving parol evidence of the paper. Defendant not producing, after notice, letters from himself to C., on the ground that they might incriminate him, the Crown was allowed to read copies they had got: *Le Merchand, coram* Eyre B., 1 Lea. 300 *n.*; 2 T. R. 201 *n.*, 1772. Cf. *Nisbett,* 6 Cox C. C. 321-2, 1853. When the contents of a lost letter may be put to a witness 'in chief,' see *Courteen* v. *Touse.*

But where it was proved that a ring which had been stolen had an inscription on it, and that defendant had been seen with a ring like it, and with an inscription on it, the crown was not permitted to ask what was the inscription on the ring seen in his possession, no notice to produce it having been given him. ('*Sed quære,*' headnote.) *Farr,* 4 F. & F. 336, 1864. But cf. *Francis,* 1874, and *Aickles,* 1784. Where a witness accidentally dropped a medal, the subject of an indictment, on the floor of the court while giving evidence and after more than half an hour's strict search by him and the ushers, it could not be found, he was not allowed to describe the reverse from memory. *Robinson,* 1865.

So, when the document appears to have been in the hands of the agent or servant of defendant in such circumstances, as that it might be presumed to have reached him. Col. Gordon was indicted for the murder of Lieut.-Col. Thomas in a duel. Gordon's challenge was carried by his servant, and delivered to Thomas's, who brought an answer and delivered it to Gordon's; but it did not appear in fact, that this letter was ever delivered to Gordon himself. Eyre B. permitted an attested copy of the latter letter to be read against defendant, and left it to the jury as evidence, if they were of opinion that the original had ever reached defendant's hands. Hotham B. concurred; but Gould J. thought that positive evidence ought to be given that the original had come to defendant's hands. *Gordon,* 1 Lea. 300 *n.*, 1784. Where defendant's attorney produced a deed as part of the evidence of his client's title on an ejectment, in which defendant was lessor of the plaintiff, and the deed was delivered back to the attorney after the trial, it was held to be in defendant's possession, and he not producing it after notice, secondary evidence of it was received—as had been previously done by the grand jury: *per* Vaughan B. *Hunter,* 4 C. & P. 128, 1829.

The proper course for an attorney, on *subpœna duces tecum,* seems to be to deliver incriminating documents to his client: *per* L. Mansfield *Dixon,* 3 Burr. 1688, 1765. But in order to render a notice to produce available, the document must be shown to be 'in the power' of the opposite party, or of some person in privity with him, who is bound to give up possession of it to him. Therefore, where a document is in the hands of a person as a stakeholder between defendant and a third party, a notice to defendant to produce will not let in secondary evidence. The right must be 'not merely to inspect but to retain.' *Parry* v. *May,* 1 Moo. & R. 279, 1833. See also *Laxton* v. *Reynolds,* 18 Jur. 963, 1854.

Notice to produce—when unnecessary] Where defendant is charged with the theft of the document in question (or, generally, must be aware from the nature of the case that it will be assumed that it is in his power, as in *Ford,* 1833), such a notice is unnecessary. Thus it was held by the twelve judges on a charge of stealing a bill of exchange,

where a *subpœna duces tecum* had been served on the person last seen with it, parol evidence of its contents might be given, without any proof of a notice. *Aickles*, 1 Lea. 297 *n.*, 1784; 2 East, P. C. 675. So, on a trial for administering an unlawful oath, it may be proved by parol that defendant read the oath from a paper, although no notice to produce that paper has been given, *per* L. Alvanley, *Moors* 6 East, 421 *n.*, with which *Farr*, above, seems inconsistent.

But an indictment for arson with intent to defraud an insurance office is not such a notice to defendant as will dispense with a notice to him to produce this policy, so as to let in secondary evidence. *Ellicombe, Doran, Kitson.* Perjury being assigned on defendant's statement that there was no draft of a statutory declaration, it was held that secondary evidence of the (alleged) draft last seen in his possession was inadmissible, no notice having been given and that the indictment charged did not operate as a notice, on the ground that in the course of the trial, 'the exact contents of that draft became essential,' and so did the alterations alleged: *Elworthy*, L. R. 1 C. C. R. 103; 37 L. J. M. C. 3, 1867: c. q.

The notice is not necessary if the document can be proved to be no longer in existence. *Haworth*, 4 C. & P. 254, 1830; *Spragge* (before 1800), cited in *How* v. *Hall*, 14 East, 276 *n.*, nor where the document tendered in evidence is a duplicate original: *per* L. Ellenborough, *Philipson* v. *Chace*, 2 Campb. 110, 1809; *Colling* v. *Treweek*, 6 B. & C. 394, 1827; cf. *Watson*, 1817; or a counterpart; *Burleigh* v. *Stibbs*, 5 T. R. 465, 1793; *Roe* d. *West* v. *Davis*, 7 East, 363, 1806; cf. *Mayor of Carlisle* v. *Blamire*, 8 East, 487, 1807: both of these executed by the other side being primary. Or notices served on the adversary, *e.g.*, of action; *Jory* v. *Orchard*, 2 B. & P. 39, 1799; or to quit, *ib.* 41; or of the dishonour of a bill of exchange, *Kine* v. *Beaumont*, 3 B. & B. 288, 1822, where a copy of the letter giving notice was admitted. Nor is the notice necessary to one who has fraudulently or forcibly obtained possession of the document, as from a witness in fraud of his *subpœna duces tecum*. *Leeds* v. *Cook*, 4 Esp. 256, 1803. On 'what are originals,' duplicate originals, and counterparts, see *Phips*. 509.

In *Bate* v. *Kinsey*, 1 Cr. M. & R. 38; 4 Tyrwh. 662, 1834, where an attorney pleading his privilege refused to produce a deed *in court*, parol evidence of the contents was not allowed, but cf. *Dwyer* v. *Collins* above.

Notice to produce—Form] It is not necessary that a notice to produce shall be in writing: *Smith* v. *Young*. But it is better, and it is the universal practice, to give it in writing. No particular *form* is requisite in criminal proceedings, provided it sufficiently appear what the document is which is required, and when and where it is to be produced: *Lawrence* v. *Clark*, 14 M. & W. 251, 253, 1845. So the contents of a notice to an alleged habitual criminal may be proved without notice to him to produce it: *Turner*, at 157, 1909. Where under a notice for 'all letters, papers, or documents touching or concerning the bill of exchange mentioned in the declaration,' the person served was called on to produce a particular letter, Best C.J. was of opinion that the notice was too vague, and that it ought to have pointed out the particular letter required: *France* v. *Lucy*, Ry. & Moo. N. P. C. 341, 1825; *Jones* v. *Edwards*, M'Cl. & Y. 139, 1825—letter written nine years before. But a notice to produce 'all and every letter written by' plaintiff to defendant 'relating to the matters in dispute in this

action,' *Jacob* v. *Lee,* 2 Moo. & R. 33, 1837, or 'all letters written to and received by you [plaintiff] between 1837 and 1841, both inclusive, by and from' defendants, 'or either of them, or any person in their behalf, and also all books, papers, &c., relating to the subject-matter of this cause,' *Morris* v. *Hauser,* 2 Moo. & R. 392, 1841, has been held sufficient to let in secondary evidence of a particular letter not otherwise specified: and see *Rogers* v. *Custance,* 2 Moo. & R. 179, 1839.

Notice to produce—to whom and when—third persons] It is sufficient to serve the notice to produce, either on the defendant himself, or on his attorney: *Cates, q. t.,* v. *Winter,* 3 T. R. 306, 1789. So *Le Merchand,* 1772. Cf. *Hunter,* 1829, and *Hughes* v. *Budd,* below. And it may be left with a *servant* of the party at his dwelling-house: *per* Best C.J., *Evans* v. *Sweet,* R. & M. 83, 1824. It must be served within a reasonable time, but what is a reasonable time depends on the circumstances of each case. Commission day was the 15th of March, and a trial for arson came on on the 20th. Notice to produce a policy of insurance was served on defendant in gaol on the 18th. His residence was ten miles from the assize town. On objection that this notice was too late, Littledale J. (and Parke J.) said: 'We are of opinion that the notice was too late. It cannot be presumed, that the prisoner had the policy with him when in custody, and the trial might have come on at an earlier period of the assize. We therefore think that secondary evidence of the policy cannot be received.' *Ellicombe,* 1833; *Haworth,* 1830. So, where the notice about a policy was given to defendant in the middle of the day preceding the trial, his residence being thirty miles from the assize town, it was held to be too late: *Kitson.* Notice served on the attorney at his office on the evening before the trial, at half-past seven, too late for him to communicate with the client, was held by L. Denman C.J. to be insufficient to let in secondary evidence of a letter in his client's possession. *Byrne* v. *Harvey,* 2 Moo. & R. 89, 1838; and *Lawrence* v. *Clark.* Cf. title, *Subpœna.*

In *Barker,* 1 F. & F. 326, 1858, a notice about policies served on defendant's attorney on Tuesday evening, the policies being then twenty miles off, and the trial taking place on the Thursday, was held sufficient, it being shown that there was an opportunity of procuring them, if defendant had chosen to do so.

For documents in the hands of *third persons,* not compellable by law to produce, and refusing, the general rule is that secondary evidence is admissible: *per* Parke B., *Doe* v. *Ross,* 7 M. & W. 122, 1840; cf. *Boyle* v. *Wiseman.* See, generally, *Privilege of Solicitors.*

Service of a notice on Sunday is bad: *per* Patteson J., in *Hughes* v. *Budd,* 8 Dowl. P. C. 315, 1840.

Effect of disregarding notice] For the general consequences of giving this notice, see above; it does not authorise any inference about contents. Cf. *Doe* v. *Whitehead,* 8 A. & E. 571, 1838; *Cooper* v. *Gibbons,* 3 Campb. 363, 1813. *Semble,* however, that the refusing to produce is matter of observation to the jury: *per* L. Lyndhurst C.B., *Bate* v. *Kinsey.*

If defendant refuses to produce a document, and secondary evidence of its contents is thereby let in, he cannot afterwards produce it as part of his own case, in order to contradict that evidence. *Doe* v. *Hodgson,* 12 Ad. & E. 135, 1840; *Laxton* v. *Reynolds.* Secondary evidence of papers cannot be given earlier than the primary could, *i.e.*,

in the defence (where defendant has given the notice), before which time there can be no cross-examination on the contents. *Graham* v. *Dyster,* 2 Stark. N. P. 23, 1816; but this rule is not strictly enforced. T. *s.* 1817.

Stamps] See that title. The presumption is that a lost document is properly stamped: *Crisp* v. *Anderson,* 1 Stark. N. P. 35, 1815; *Closmadeuc* v. *Carrel,* 18 C. B. 36, 1856, against a party refusing, on notice to produce: but it may be proved that it was not, and so kept out. See *Garnons* v. *Swift,* 1 Taunt. 507, 1809.

Privileged documents] See p. 183, and foll.

Physical inconvenience] The nature of the obstacles which render it impossible, or highly inconvenient, to produce a document, on physical grounds, must be proved in the usual way. This being done to the satisfaction of the court, secondary evidence of the contents will be admitted. Thus, where the question was, what were the devices and inscriptions on certain banners carried at a public meeting, it was held that parol evidence of the inscriptions was admissible: *Hunt,* 1820. So the inscriptions on a monument may be proved by parol: *Doe* v. *Cole,* 6 C. & P. 359, 1834. But where a notice was suspended by a nail to the wall of an office, it was held that it must be produced: *Jones* v. *Tarleton,* 9 M. & W. 675, 1842. Secondary evidence may be given of an original which is in a foreign country and cannot by law be removed: *Alivon* v. *Furnival,* 1 C. M. & R. 277; 4 Tyrw. 75, 1834. Cf. *Boyle* v. *Wiseman.*

Public documents] For 'public documents,' see T. s. 1479, and *Phips.* 316; as in all other cases, the person who seeks to give secondary evidence of the document must satisfy the court that the document is of a 'public' nature. Many documents of this kind will be found mentioned under *Documentary Evidence.* It is to be observed, that there is here this peculiarity, that a particular kind of evidence is *required* by the law to be substituted for the original, and *no other evidence* of contents of public documents *is admissible, e.g.,* in probate. But see below.

Duty of judge] The preliminary question of fact on which the admissibility of the evidence depends, is for the judge, not the jury. And in order to decide this question, he 'must do everything that is necessary,' including the determining a question of fact. When in a trial (libel) a question arose whether a letter produced was or not the original of which a witness was giving secondary evidence, it was held that the judge was wrong in not deciding the question at once, and a new trial was granted: *Boyle* v. *Wiseman.*

Degrees of secondary evidence] There are no degrees of secondary evidence: *Doe* d. *Gilbert* v. *Ross,* 7 M. & W. 102, 1840; *Hall* v. *Ball,* 3 M. & Gr. 242, 1841. In *Brown* v. *Woodman,* 6 C. & P. 206, 1834, it was held that a defendant might give parol evidence of the contents of a letter, of which he had kept a copy, and that he was not bound to produce the copy. But if one has better secondary evidence than he produces, the jury *may* infer that it would have been adverse to him: *per* L. Abinger, *Doe* v. *Ross.* So where two parts of an agreement were prepared but one only was stamped, which was in the custody of

defendant, who, on notice, refused to produce it, the court ruled that plaintiff might give a draft in evidence without putting in the part of the agreement which was unstamped. *Garnons* v. *Swift,* 1 Taunt. 507, 1809. Cf. *Waldy* v. *Gray,* L. R. 20 Eq. 250, 1875.

Even in the case of public documents, if good reason can be shown why neither the original nor the proper substituted evidence can be produced, secondary evidence of the ordinary kind will be admissible. *Thurston* v. *Slatford,* 1 Salk. 284, 1700; *M'Dougall* v. *Gowry,* Ry. & M. 392, 1826; *Anon.,* 1 Vent. 257, 1675.

It is hardly necessary to say that, even if secondary evidence be admissible, a copy of a document is, *in itself,* no evidence of the contents of the original; and it can only become so when verified by the oath of a witness: *Fisher* v. *Samuda,* 1 Campb. 190, 1808. Still less is a copy of a copy any evidence of the contents of the original. Where a declaration had been taken down from the lips of a dying man, but not signed by him, and the writer had himself made a copy, the court declined to let him swear this was a true copy, regarding the former as the original. *Reason* (Str. at 500), 1722; *Everingham* v. *Roundell,* 2 Moo. & Rob. 138, 1838; *Liebman* v. *Pooley,* 1 Stark. N. P. 167, 1816. But it might become so, if, in addition to being itself verified, the copy from which it was taken was verified also.

PRESUMPTIONS.

Nature of presumptive evidence] 'A presumption means,' in *Dig. Ev.*, by Stephen J., p. 2 (see also p. 161), 6th ed. (1904), 'a rule of law that courts and judges shall draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved.'

'Presumption is the opposite of proof. It supplies the starting-point for proof, and when complete proof fails it may afford legitimate means of arriving at an affirmative legal conclusion. Where the truth of fact is known there is no need or room for presumption. Where evidence is forthcoming to the contrary, with rare exceptions, . . . presumptions are rebuttable and must yield to proof. A question so raised is a question of fact and of probability depending on the circumstances.' 'We have to decide this, in fact, as jurymen,' says Mellish L.J. in a case cited: *per* Hamilton L.J., *A.-G.* v. *Horner*, 1913, 2 Ch. 189; 82 L. J. Ch. 339; 108 L. T. 609; 77 J. P. 257; 29 T. L. R. 451. No subject of criminal law has been more frequently discussed than that of presumptive evidence, and no subject can be more important; the nature of the presumption 'of innocence' made in criminal cases being the feature of English law which distinguishes it most strongly from all the continental systems. The principle may be traced back to Bracton: '*In hoc dubio* [whether or not there was an agreement for a gift] *standum erit presumptioni, cum nulla sit pro aliqua parte vera probatio quae vincere possit presumptionem*,' or '*ib.—donec probetur in contrarium*': de Ass. Nov. Dis. f. 214 b.; B. 4, c. 33. 'A presumption of any fact is properly an inferring of that fact from other facts that are known: it is an act of reasoning': *per* Abbott C.J., *Burdett*, 4 B. & Ald. 161, 1820; *ib.* 121-3, *per* Best J. 'It has been said that there is to be no presumption in criminal cases. . . . We are not to imagine guilt where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen. . . . Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence and yet offers none; for then we have something like an admission that the presumption is just.' 'The general rule applicable to the doctrine of presumption is that we are to presume that which reasonably accounts for the actual existing state of things': *Inhabs. of St. Marylebone*, 4 D. & R. 479, 1824, *per* Bayley J. The instance selected by Coke (Litt. 6 *b*), to illustrate the nature of very strong presumption is, where a man is discovered suddenly dead in a house, where there is no other man, and another is found running out in haste with a bloody sword. '*Violent* presumption is many times equal to full proof. . . . Light or rash presumptions have no weight or validity at all': *Blackst.* 3 *Comm.* 371.

It is evident that, in every trial, numberless presumptions must be made by the jury; many so obvious that we are hardly aware that they

are necessary, and these present no difficulty; but with regard to others, great care and caution are necessary in making them, and it is for this reason that there are certain practical rules which it is always desirable to observe.

There are indeed some presumptions which, as the phrase is, the law itself makes; that is, the law forbids, in certain circumstances and for certain purposes, any other than one inference to be drawn, whether that inference be true or false. There are but few such presumptions in criminal cases, and those few mostly in favour of the defendant. Where presumptions against the defendant have been imperatively directed by the law, the rule has generally been looked on with disfavour.

Law—Fact] Presumptions are generally distinguished as either of law or of fact. With regard to those of law, there is not much difficulty, the circumstances in which they arise being generally pretty clearly defined. It is not so, however, with regard to those of fact, there being frequently the difficulty not only of deciding whether a particular presumption ought to be made at all, but which of several possible inferences from the same state of facts is the right one. 'In practice, however, the distinction . . . is by no means well defined, and the line of demarcation, even when visible at all, is often overlooked.' *T.* s. 111.

Innocence] The difference in civil and criminal cases seems to come to this: 'One of the most important of disputable legal presumptions is that of *innocence*. This, in legal phraseology, 'gives the benefit of a doubt to the accused,' and is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. In civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burthen of proof, may constitute sufficient ground for a verdict. To affix on any person the stigma of crime requires, however, a higher degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt.' *T.* s. 112; *Phips.* c. 48, citing *White*, 4 F. & F. 383, 1865—a *locus classicus* on this doctrine.

Onus] Thus when intent is an ingredient of a crime, the prosecution must show that the act charged was not accidental; it is not on the defendant to prove the contrary. Hence when the judge directed the jury that it was, the C. C. A. quashed the conviction: *W. Davies*, 8 Cr. A. R. 211; 29 T. L. R. 350, 1913: shooting with intent to resist apprehension. Other cases will be found under *Onus;* and cf. *Mens rea*. Thus in criminal cases, there is always a result open to the jury, which is practically looked upon as merely negative, namely, that which declares the accused to be *not guilty* of the crime with which he is charged. In cases of doubt it is to this view that juries are taught to lean. (For a statutory recognition of 'not proved,' see p. 403.)

Great caution is doubtless necessary in all cases of presumptive evidence; and, accordingly, L. Hale has laid down two rules with regard to them. 'I would never convict any person for stealing the goods *cuiusdam ignoti*, merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods.' And 'I would never convict any

person of murder or manslaughter, unless the fact were proved to be done, or, at least, the body found dead.' 2 P. C. 290. So it is said by Blackstone, 4 Comm. 359, 'all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape, than that one innocent suffer.' The following case was cited by Sjt. Garrow, *arguendo* in *Hindmarsh,* 2 Leach, 571, 1792: the mother and the reputed father of a bastard child were observed to take it to the margin of the dock in Liverpool, and after stripping it, to throw it into the dock. The body of the infant was not afterwards seen, but as the tide of the sea flowed and reflowed there, the judge who tried them observed that it was possible the tide might have carried out the *living* infant, and directed the defendants to be acquitted. This ruling must have turned on the form of the indictment.

Probability a form of presumption—circumstantial evidence] With respect to the comparative weight due to direct and presumptive evidence, it has been said that 'circumstances are in many cases of greater force and more to be depended on than the testimony of living witnesses'; inasmuch as 'witnesses may either be mistaken themselves, or wickedly intend to deceive others; . . . but circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie': *per* Mounteney B., *Annesley* v. *Lord Anglesea,* 17 St. Tr. 1430, 1743. *T.* s. 66, vigorously criticises Mounteney B.'s *dictum.* 'In no sense is it possible to say that a conclusion drawn from circumstantial evidence can amount to absolute certainty, or, in other words, that circumstances cannot lie.' It has been observed, that 'it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognisance of the judge,' *i.e.* a greater surface is exposed for testing. *Bentham's Rationale of Judicial Evidence,* vol. 3, p. 251, 1827. 'On the other hand, it may be observed, circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences. Not unfrequently a presumption is formed from circumstances which would not have been noticed as a ground of crimination but for the accusation itself;—such are the conduct, demeanor and expressions of a suspected person, when scrutinised by those who suspect him. And, again, any circumstantial evidence, which comes through the medium of witnesses, may, no less than direct evidence, be discoloured, exaggerated, or perverted.' 1 *Ph. Ev.* 468, 10th ed. See further *Starkie* on *Ev.* 4th ed. p. 838; *Best* on *Ev.* 10th ed. p. 256, Bk. 3, Pt. 2, ch. 3. The charge of Martin B. in *White,* 1865, is a strong caution about circumstantial evidence.

Instances] As almost every fact is capable of being proved by inferential as well as by positive evidence, it would be impossible to enumerate the various cases in which the former evidence has been admitted. It may be useful, however, to give a few varied instances of presumptive proof which have occurred in the course of trials. For a fuller list, see *T.* Pt. 1, ch. 5, ss. 70-216.

Proof of the possession of land, or of the receipt of rent, is *primâ facie* evidence of seisin in fee. *Best* on *Ev.* s. 366, and on *Presumptions,* 1844, ch. 3, s. 76, citing *Jayne* v. *Price,* 5 Taunt. 326, 1814,

and *Denn* v. *Barnard,* Cowp. 595, 1777. Cf. Co. Litt. 15 *a.* So possession is presumptive evidence of property in chattels. A deed or will thirty years old is presumed to have been duly executed, provided some account be given of the place where it was found, &c. *T.* s. 87. See *Potez* v. *Glossop,* 2 Ex. 195, 1848. The licence of a lord to enclose waste may be presumed after twelve or fourteen years' possession, the steward of the lord having been cognisant of it. *Doe* v. *Wilson,* 11 East, 56, 1809. The flowing of the tide is presumptive evidence of a public navigable river. *Miles* v. *Rose,* 5 Taunt. 705, 1814. Cf. *Montague,* 4 B. & C. 602, 1825, for presumption of extinction of right of navigation. The existence of an immemorial custom may be presumed from an 'unexplained and uncontradicted' usage of twenty years. *Joliffe,* 2 B. & C. 54; 3 D. & R. 240, 1823. So the continuance of things *in statu quo* will be generally presumed; as where plaintiff being libelled in his official character proves his appointment to the office before the libel, his continuance in office at the time of the libel need not be proved though averred. *Budd,* 5 Esp. 229, 1805 (*vice versâ,* p. 9). Cf. *Holland,* 1787.

Consequences] So the law presumes that a person intended that which is the immediate or probable consequence of his act. *Dixon,* 4 Campb. 12; 3 M. & S. 15, 1814. See *T.* s. 80. See *Malice,* below. So a letter is presumed, as against the writer, to have been written upon the day on which it bears date: *Hunt* v. *Massey,* 5 B. & Ad. 902; 3 Nev. & M. 109, 1834; and whether written by a party to the suit or not: *Potez* v. *Glossop;* and a bill is, as a rule, presumed to be made on the day it is dated, by 45-6 Vict. 61, 13 (1).

Date of documents] So the presumption is that indorsements on a note admitting the receipt of interest were written at the time of their date. *Smith* v. *Battens,* 1 Moo. & R. 341, 1834. Indeed, it is a general presumption that all documents were made on the day they bear date. *Davies* v. *Lowndes,* 7 Scott, N. R. at 214, 1843; *Potez* v. *Glossop.*

Innocence and legality] The law presumes a man to be innocent until the contrary is proved, or appears from some stronger presumption: *Bracton,* as above, f. 192 b. c. 22 ('*quod sit bonus homo*'). In other words, a man cannot be presumed to have committed an illegal act without some evidence of it. Thus, a criminal information was granted against a theatre proprietor for representing on the stage as a murderer a man charged with (and afterwards executed for) murder. *Williams and Romney,* 2 L. J. K. B. 30; 26 R. R. 624, 1823. 'And this presumption is not confined to proceedings instituted for the purpose of punishing the supposed offence . . . but it holds in all proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally. . . . It is, however, in general, sufficient to prove a *primâ facie* case.' *Best, Ev.* s. 346. Cf. *White,* 1865. Conversely, there is a presumption that a confession is true.

Against immorality] There is also a general presumption against *any* immoral conduct. Thus legitimacy is always presumed: *Banbury Peerage case,* 1 Sim. & S. 155, 1811; and reputation of cohabitation is generally presumptive proof of marriage: *Doe* v. *Fleming,* 4 Bing. 266, 1827; except in cases of bigamy. Where a woman, whose husband

twelve months previously had left the country, married again, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the duration of life: *Twyning, Inhabs. of,* 2 B. & Ald. 386, 1819. So it will not be presumed that a trespass or other wrong has been committed: *Best, Ev.* s. 350; and there is always a presumption in favour of the truth of juridical testimony. *Ib.* s. 352.

Conflict of Presumptions] But observations in *Twyning, Inhabs. of,* on conflicting presumptions were questioned by the court in *Inhabs. of Harborne,* 2 Ad. & E. 544, 1835. It has now been decided that no presumption arises that the person is alive, but that it is a question for the jury: see *Lumley,* 1869; and on *conflicting* presumptions, *Middleton* v. *Barnard,* 4 Ex. 241, 1849; *Phips.* c. iv. p. 26; and *The course of Nature,* below.

Omnia ritè esse acta] This well-known presumption, 'which is nearly akin to that of innocence' (*Phips.* c. 48, p. 645), is of very common application. The presumption may be rebutted: *Inhabs. of Hastingfield,* 2 M. & S. 558, 1814. See *Holland,* 1787. In *Stewart,* 13 Cox C. C. 296, 1876, it was presumed that a consul at New York had taken proper steps with regard to the transmission of witnesses. But in *Frankland,* L. & C. 276; 32 L. J. M. C. 69; 9 Cox C. C. 273, 1863, the court held that the incorporation of a company could not be presumed from the fact that persons called themselves and purported to be a trade corporation and acted as such, whatever might be the case with respect to a corporation 'for public purposes' or by prescription.

In *Langton,* 1876, it was held that it was not necessary to produce the certificate of incorporation of a company, but that the existence of a limited company was sufficiently proved by evidence that it had carried on business as such. On public capacity, see p. 9.

The course of nature] It is a presumption of law that males under fourteen are incapable of sexual intercourse. *Philips,* 8 C. & P. 736, 1839; *Brimilow,* 9 C. & P. 366, 1839. So it is a presumption of fact that the period of gestation in women is about nine calendar months. The exact limits of this period are, both legally and scientifically, very unsettled; and if there were any circumstances from which an unusually long or short period of gestation might be inferred, or if it were necessary to ascertain the period with any nicety, it would be desirable to have special medical testimony upon the subject. The subject was elaborately discussed in the *Gardner Peerage case,* and the scientific evidence given in that case will be found in the report of it by Le Marchant (London: Butterworth, 1828); and see *Best,* ss. 339-40. For ordinary purposes, however, it will be a safe presumption that fruitful intercourse and parturition are separated by a period not varying more than a week more or less from nine months.

There is no presumption of *law* that life will not continue for any period however long, and juries are not justified in presuming, as a fact, that a person is dead who has been heard of within seven years: *Hopewell* v. *De Pinna,* 2 Campb. 113, 1809; but 'the presumption of the continuance of life ceases at the expiration of seven years from' the last news. *Best,* s. 409 (see s. 408); this is in analogy to the period fixed by rpd. 1 Jac. 1, c. 11, s. 2 (see now 24 & 25 Vict. c. 100, s. 57), which absolves from the penalties of bigamy after an absence

of seven years, and cf. 18-19 Car. II. 11 (or 19 Car. II. c. 6), 2. See *Wiltshire*, 1881.

Possession of stolen property] It has already been stated that possession is presumptive evidence of property; but where it is proved, or may be reasonably presumed (1) from the proved circumstances, that the property in question is stolen property, the *onus probandi* is shifted, and the possessor, to rebut an accusation, is bound to explain reasonably that he came by it honestly; and, if he fail to do so, the presumption is that (2) he is the thief *or* the receiver, according to circumstances.

1. The circumstances in which the presumption of theft may be safely made are tolerably obvious. 'Thus,' it is said by *East*, P. C. 657, 'a man being found coming out of another's barn, and upon search corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt. So persons employed in carrying sugar and other articles from ships, and wharfs, have often been convicted of larceny at the Old Bailey, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could not otherwise be proved. But this must at least be understood of articles like those above mentioned, the identity of which is not capable of strict proof from the nature of them.' *Dredge*, 1 Cox C. C. 235, 1845, was indicted for stealing a doll and other toys. The prosecutor proved that he kept a large toy-shop, and that *Dredge* came into the shop dressed in a smock frock. After remaining there some time, on some suspicion, he was searched, and under his smock were found concealed the doll and other toys. The prosecutor could not go further than to swear that the doll had once been his, but he could not swear that he had not sold it, and he had not missed it; and from the mode in which he kept his stock it was not likely that he would miss that or any other of the articles found on defendant. Erle J. directed an acquittal. *Burton*, Dears. & P. 282, 1853, was indicted for stealing pepper. He was found coming out of a warehouse in which there was a quantity of pepper both loose and in bags; when stopped and accused, he threw some pepper on the ground, and said, 'I hope you will not be hard with me.' On *Dredge* being cited, Maule J. pointed out the distinction that in this case defendant had, in fact, admitted that the pepper had not been honestly come by; and he added 'if a man go into the London Docks sober, and comes out of one of the cellars, wherein are a million gallons of wine, very drunk, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was missed.' *Hooper*, 1 F. & F. 85, 1857, was charged with stealing 190 lbs. of Lydney coal. He was left with a ton of that sort in a cart at twelve o'clock, and delivered them, according to his orders, at one o'clock. At half past twelve o'clock he sold 190 lbs. of *Lydney* coal to a person living in the same town, but there was no evidence of the quantity delivered being less than a ton, or of any coal having been missed. Willes J. left it to the jury to say whether the 190 lbs. sold by defendant were stolen: not guilty.

2. And 'it is clearly established that, in order to put the accused on his defence, his possession of the stolen property must be *recent;* although what shall be deemed recent possession must be determined by the nature of the articles stolen, *i.e.* whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused

would be likely from his situation in life, or vocation, to become possessed innocently.' *Best,* s. 211.

Where stolen property (it does not appear of what description) was found in the possession of a person, but sixteen months had elapsed since the larceny, Bayley J. held that he could not be called on to account for its coming into his possession. *Anon.,* 2 C. & P. 459, 1826; *Cockin,* 2 Lew. C. C. 235, 1836. Where two ends of woollen cloth in an unfinished state, of about twenty yards each, were found in defendant's possession, two months after they had been stolen, Patteson J. held that he ought to explain how he came by them. 'The length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time; but here that is not so.' *Partridge,* 7 C. & P. 551, 1836. But Parke B. directed an acquittal where the only evidence against defendant was that certain tools had been traced to his possession, three months after their loss: *Adams,* 3 C. & P. 600, 1829. *Crowhurst,* 1 C. & K. 370, 1844, was indicted for stealing a piece of wood; on the piece of wood being found by a constable in defendant's shop about five days after it was lost, he stated that he bought it of one Nash, who lived about two miles off. Nash was not called as a witness for the prosecution, and no witness was called by defendant. As Alderson B. said to the jury, 'in cases of this nature you should take it as a general principle that, where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that the account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the *onus* of proving its truth lies on him'; it appears, therefore, he thought that in this case defendant's account was sufficiently reasonable to shift the burden of proof back again on to the prosecutor; the jury acquitted, but it is not clear whether the case was left to their consideration. Maule J. did the same as Parke B. in *Adams,* where a horse, alleged to have been stolen, was not traced to defendant's possession until six months after the theft: *Cooper,* 3 C. & K. 318, 1852: relying on which Channell B. did the same where a sheep missed in September was found in March in the flock of a neighbouring farmer against whom there was 'no evidence of the taking, and the only evidence of guilty knowledge was some contradictory statements' by him 'when it was found': *Harris,* 8 Cox C. C. 333, 1860. Where defendant was the servant of a firm which owned a large number of shovels, four of which were found in his possession—some they could only prove to have been in their possession eighteen, and some eight months previously—it was held that the question of larceny was properly left to the jury, although there was no evidence to show when they were missed, or how long they had been in his possession: *Knight,* L. & C. 378, 1864, where, however, there was some other evidence against defendant. Several of these cases were cited to the C. C. A. in *W. Smith,* 1909, where the interval was six weeks: sentence was reduced partly because L. Alverstone doubted whether the interval was not too long for the presumption to operate. *Wilson,* 26 L. J. M. C. 45, 1857, was indicted for stealing some articles of dress. It was proved that the property was stolen, and sold by defendant, who on being apprehended said, that C. and D. brought them to his house and that he sold them. In consequence of this C. and D. were apprehended, and C. was convicted for stealing other articles taken from

prosecutor's house at the same time as those in question; D. was discharged. A constable made inquiries about the statement made by defendant how he came by the goods, but no evidence of the outcome of such inquiries was received, being objected to by defendant's counsel. Neither C. nor D. was called as witness for the prosecution, and no witness was called by defendant. A conviction was upheld by the C. C. C. R. on the ground, as stated by Pollock C.B., that there was some evidence for the jury on which defendant might be convicted, though he disapproved of the verdict.

Hale urges great caution in cases of this sort: 'I would never convict any person for stealing the goods *cuiusdam ignoti* merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods': 2 P. C. 290; and East, 2 P. C. 665, does the same in the case of the 'common mode of defence, to state a delivery by a person unknown, and of whom no evidence is given'; though 'little or no reliance can consequently be had upon it. . . . Where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence, from the time when the goods might be presumed to have first come into his possession.'

Statutory presumptions] Instances are the possession of filings or clippings of gold or silver coin, of more than five pieces of foreign counterfeit coin, of coining tools, the possession of instruments or paper for foreign exchequer bills and bank notes, the possession of deer, or implements for taking deer, of implements for housebreaking, of goods belonging to ships wrecked or stranded, the possession of naval and military stores, &c.—for which, respectively, see *Index*.

Malice—Consequences] This phrase is traditional but useless. The late W. F. Craies was 'almost tempted to the conclusion that the meaning [of 'malice'] varies almost infinitely *secundum subjectam materiem*, and that the only sense which the term can safely be predicated not to have in any given legal context is that which it has in popular language, *viz.*, spite or ill-will. It certainly has different meanings with respect to responsibility for civil wrongs and responsibility for crime; and even with respect to crime it has a different sense according as it is used with reference to murder, libel or the capacity of an infant to commit crime, expressed by the rule *malitia supplet aetatem*. 'Malice' is a term which has crept into law books with a result so confusing that the law has suffered by its presence, and cannot be correctly interpreted except by explaining it away or relegating it to its proper place in ethics or religion': 8 *Encyc. of Laws of England*, 2nd ed. 1907, art. 'Malice.' For practical purposes all that is wanted under this head is the rule as stated by Prof. Kenny: 'A sane adult is presumed to intend all the consequences likely to flow directly from his intentional conduct': *Outlines of Criminal Law*, 8th ed. 1917, p. 329, citing *Philpot*, 7 Cr. A. R. 140, 1912; *W. Davies*, 1913. The judge did not explain that 'the consequences of his acts' 'can only mean of his *conscious* acts, not of his mistakes': *per* Channell J.; cf. *Dixon*, 1814. So where a jury found murder, but 'they believed it was done without premeditation,' Byles J. refused to receive the verdict, saying, 'the prosecutor is not bound to prove that the homicide was committed from malice prepense. If the homicide be proved, the law presumes the malice; and, although that may be rebutted by evidence, no such attempt has been made here.' *Maloney*, 9 Cox C. C.

6, 1861. Blackburn J., speaking *generally,* said: 'A person may be said to act maliciously when he wilfully does an unlawful act [act injurious to another: *L. R.*] without lawful excuse.' *Pembliton* (Cox C. C.).

Thus, when *Dixon,* 1814, who was employed to make bread for a military asylum, was charged with delivering bread made from unwholesome materials, it was held to be unnecessary to allege intention to injure anyone's health.

Presumption of intent] See *Onus,* above, and under individual crimes.

Husband's coercion] See that title.

Mens rea] 'In most cases the law regards the criminal [*i.e.* prohibited] act itself as sufficient *primâ facie* proof of the presence of this *mens rea':* Prof. Kenny (c. 3, p. 41, as above), who then repeats almost verbally the rule there quoted, citing *Sheppard,* 1810. For other cases, see Index; for those in which there may be a breach of the law without *mens rea* (and which Brett J. declined to call 'crimes': *Prince,* 2 C. C. R. 163, 1875) and generally, see *Agency* (*of Servants*) and *Craies* on *Statute Law* (1911), pp. 463-8. The K. B. D. quashed a conviction for aiding and abetting an offence against the Sunday Observance A. 1677, where appellant had bought cigarettes at an eating-house, but there was no evidence of his knowledge that vendor was carrying on his ordinary business, because 'there was nothing to show a *mens rea': Chivers* v. *Hand,* 24 Cox C. C. 520; 84 L. J. K. B. 304; 112 L. T. 221; 79 J. P. 88; 31 T. L. R. 19; 13 L. G. R. 537; W. N. 381, 1914. Cf. *Onus,* above.

The maxim *actus non facit reum nisi mens sit rea* is not traced beyond *Co. Litt.* 247 b.

HEARSAY.

Its nature] Evidence of facts with which the witness is not acquainted of his own knowledge, but which he merely states that he has *heard* someone else—unless it be the defendant—*say* is, as a rule, inadmissible on two grounds: (i) That the person originally stating the facts does not make the statement under the sanction of an oath; and (ii) that the person against whom the evidence is offered would lose the opportunity of examining into the means of knowledge of the maker of the statement. But where there is a presumption that hearsay evidence is true, it is admissible. It is, in fact, a form of secondary (or 'secondhand,' as it was called in previous editions) evidence.

Evidence to explain the transaction] The term *hearsay* evidence is frequently improperly applied. Thus, where the inquiry is into the nature and character of a certain transaction, what was done, including what was said by *anyone* present during its continuance, may be admissible; and this is sometimes represented as an exception to the rule which excludes hearsay evidence. But this is not hearsay evidence; it is original evidence of the most important and unexceptionable kind. In such a case it is not a second-hand relation of facts which is received, but the declarations of the actors of the facts themselves, or of others *connected with them* in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances: cf. *Relevancy,* p. 101. Thus it has been held that the cry of a mob who accompanied defendant may be received on his trial for treason as part of the transaction: *L. Geo. Gordon,* 21 How. St. Tr. 535; 2 Doug. 591, 1781; *Damaree,* Fost. Cr. Ca. 214; 15 St. Tr. 522, 1710, treason.

Res gestae] Where card-sharpers swindled a man of 2*l.* in a train, and when he spoke to the police at a station they all disappeared, but a total stranger at that moment gave him 2*l.*, the C. C. A. held that incident admissible: *J. Moore,* 10 Cr. A. R. 54, 1914. On the other hand, in *Bedingfield,* 14 Cox C. C. 341, 1879, where a woman came from a house with her throat cut, it was proposed to ask what she said; but Cockburn C.J. said: 'Anything uttered by the deceased at the time the act *was being done* would be admissible, as for instance, if she had been heard to say something, as 'Don't, Harry.' But here it was something stated by her *after it was all over,* whatever it was, and after the act was completed.' This decision gave rise to some discussion, of which a note will be found in the report above; 'it has generally been thought that Cockburn C.J. applied the rule too strictly': *Phips.* 47; whether that ruling was correct depends on the question whether it is to be taken as a fact, that the transaction was *entirely* at an end. See letter of Cockburn C.J., cited below, and cf. the facts in *Christie,* 1914. *Phips.* 44-6 states the general rule thus: 'Acts, declarations and incidents which *constitute* or *accompany and explain* the fact or transaction in issue are admissible for or against either

party as forming parts of the *res gesta*': the 'main conditions' being that 'the matters tendered should form the natural incidents of the act, . . . substantially contemporaneous with it and qualify, explain or complete it in some material respect.' Thus, when there were two indictments for two murders at practically the same time, on the trial of one, evidence of the other was admitted (owing to the nature of the defence): *Greenley*, 10 Cr. A. R. 273, 1914.

The rule against hearsay evidence generally operates in favour of the accused; it cannot be relaxed when it tells against him: *Thomson*, 1912, 3 K. B. 19; 81 L. J. K. B. 892; 76 J. P. 431; 23 Cox C. C. 187; 28 T. L. R. 478; 107 L. T. 454; 7 Cr. A. R. 279, approving *Gloster*, 1888; use of an illegal instrument; deceased's statement five days before her death, which was quite unconnected with the charge, that 'she had done it herself,' to a witness (whom counsel was not allowed to cross-examine thereon) was inadmissible and was not part of the *res gestae*.

Early complaint by females in sexual cases] The evidence which is almost always given in such cases that the female made an early complaint, out of the hearing of defendant, of having been attacked, is not hearsay, but original evidence of a fact, which is most important, and which cannot be ascertained in any other way. There has been considerable difference of opinion among judges on the admissibility of the details of the complaint, but it has now been decided by the C. C. C. R. that 'in cases of rape, indecent assault and similar offences upon females [but not in civil cases], the fact that the prosecutrix made a complaint shortly after the outrage, of the matters charged against the prisoner, together with the *particulars* of the complaint, are admissible as evidence in chief for the prosecution, not to prove the truth of the matters stated, but (1) to confirm her testimony and (2) where consent is in issue, to disprove consent': *Phips*. p. 99, citing *Lillyman*, 1896, 2 Q. B. 167; 65 L. J. M. C. 195; 18 Cox C. C. 346; and *Osborne*, 1905, 1 K. B. 551; 74 L. J. K. B. 311; 69 J. P. 189; 21 T. L. R. 288; 92 L. T. 393. It was laid down in the former by Hawkins J., who delivered the judgment of five judges, that it is the duty of the judge to impress on the jury in every case that 'they are *not entitled to make use of the complaint as any evidence whatever' of the facts complained of*,' or for any other purpose' than that 'of enabling them to judge for themselves whether the conduct of the woman was consistent with her testimony on oath and even in the witness-box, negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman in the circumstances detailed by her.' But 'the precise scope of this decision is, however, still far from clear; opinions differing whether (*a*) the details or even (*b*) the mere fact of the complaint will now be admissible in all crimes, or only in offences against the person, or—still more probably—even only in sexual ones (*Osborne*), or perhaps only in sexual ones against females': cf. *Norton*, 1910. *Kenny*, Outlines of Criminal Law, p. 367 (1917). See, generally, under *Rape*. *Lillyman* and 'those cases which followed it,' *viz.*, *Osborne*, &c., were accepted by Haldane C. and, apparently, by the H. L.: *Christie*, 9 Cr. A. R. 154; neither of these two cases has been criticised by the C. C. A. 'Perhaps' the complaint must not be *written: Ingrey*, 64 J. P. 106, 1900; *Kenny*, *ib.*, who cites Wright J. as refusing, in 1900, a letter written four hours after offence, though he did not *rule* it inadmissible.

The complaint must be volunteered, and not in answer to questions. *Merry,* 19 Cox C. C. 442, 1900. But this was qualified and restricted to 'suggestive or leading' questions in *Osborne,* above, which reviews previous cases, including *Kingham,* 66 J. P. 393, 1902, and *Kiddle,* 19 Cox C. C. 77, 1898, indecent assault, where the complaint was not at the earliest opportunity, but was admitted; and shows that *Lillyman* is to be followed, even where consent is immaterial. In *Kiddle* the child was not sworn. Pressure by a proper person (*e.g.,* a mother) to state the cause of visible mental disturbance does not invalidate the answer: *Norcott,* 12 Cr. A. R. 166, 1916.

Complaint in other cases] 'It is now settled that such evidence is admissible only in cases of rape and kindred offences against females . . . and not, *e.g.,* in sexual charges against men. . . These cases overrule' *Wink,* 6 C. & P. 397, 1834, robbery; and *Ridsdale, Stark. Ev.* 4th ed. 469 *n.,* 1837, shooting, and other cases: *Phips.* 99. 'These cases' mean *Osborne* and *Hoodless,* 64 J. P. 282, 1900, indecency with a male; Q. S. rejected the complaint. But the New Zealand C. A. (four judges) thought that the principles in cases of females equally applied in those of males (and two judges thought that they should be extended to all complaints of personal injury) provided that the complaints were spontaneous and only used to corroborate deponent's credibility: *McNamara,* 36 N. Z. R. 382, 1917, unnatural offence on a boy; conviction affirmed.

Foster, 6 C. & P. 325, 1834, was charged with manslaughter. A waggoner was called, who stated that immediately after the accident he went up to the deceased, who was groaning, and asked him, in the absence of defendant, what was the matter. It was objected that the reply of the deceased (which went to explain the cause of the accident) was not evidence, but Park J. said that 'it was the best possible testimony that, in the circumstances, could be adduced to show what it was that had knocked the deceased down'; and that *Aveson* v. *Lord Kinnaird* bore strongly upon the point; two other judges concurring. There L. Ellenborough said of a husband's action against an adulterer, 'If she declared at the time that she fled from immediate terror of personal violence from the husband, I should admit the evidence,' citing *Thompson* v. *Trevanion,* Skin. 402, 1693, where, in an action for wounding the wife, Holt C.J. 'allowed what the wife said *immediaté* upon the hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence.'

The controversy is now closed, in the sense indicated by *Phips.* above (and dealt with at length). The older cases are discussed in the correspondence between Cockburn C.J. and Mr. John Pitt Taylor, consisting of a letter in the *Times* newspaper of Nov. 17, 1879, the reply of the Chief Justice, in which he defended his ruling in *Bedingfield* (London: Vacher & Sons, 1879), and Mr. Taylor's answer (London: Maxwell & Son, 1880).

Exceptions] There are a considerable number of exceptions to the rule, which appear to be founded partly on the principle of necessity—hearsay being sometimes almost the only kind of evidence which is available—and partly on the statement, of which evidence is given, having been made in circumstances which render its being false highly improbable. They may be conveniently divided into the following heads:—1. Evidence which has already been given in judicial proceedings, and which cannot be obtained from the original source.

2. Statements contained in ancient documents on the subject of ancient possession. 3. Statements of deceased persons on questions of pedigree. 4. Evidence of reputation on questions of public or general right. 5. Statements of deceased persons against their own interest. 6. Statements of deceased persons in the form of entries, &c., in the regular course of their duty or employment. 7. Statements having reference to the health or sufferings of the person who makes them. 8. Dying declarations. Of these only some need further notice.

1. See for such *oral* evidence, *Depositions*.

2—5. Evidence under these four heads seems to be unknown in criminal cases (and almost under No. 6)—the few sometimes cited, *e.g.*, *Inhabs. of Sourton*, 5 A. & E. 180, 1836; *Inhabs. of Rishworth*, 2 Q. B. 467, 1842; settlement: *Bliss*, 7 A. & E. 550; 7 L. J. Q. B. 1837; *Inhabs. of Milton*, 1 C. & K. 58, 1843; *Berger*, 1894, 1 Q. B. 823; highway (criticised *A.-G.* v. *Horner*, 1913, 2 Ch. at 155)—being only criminal in form. The subjects of these and No. 6 are amply discussed by *Phips*. cc. viii. and xxii.—xxvi.

6. See last paragraph. 'Declarations, oral or written, made by deceased persons in the ordinary course of duty, contemporaneously with the facts stated and without motive to misrepresent, are admissible in proof of their contents': *Phips*. c. xxiv.

Defendant had been convicted of larceny in November, 1872, on the evidence of Green, a constable, and after a month's imprisonment 'had been heard to mutter threats of vengeance against the latter.' On Feb. 26th G.'s dead body was found full of wounds in a canal some distance from a spot on his beat, which included defendant's abode and 'might be on the way to it' on Feb. 24th; where he was last seen alive (not on duty, soon after dark). On that day he had accidentally met his inspector alone, and made a statement to him—as constables 'at times' did, only orally. Giffard Q.C., for the Crown, asked what the report was: Bowen Q.C., for defendant, objected. Lush J. thought that it was admissible, and consulted Mellor J., who 'had no doubt at all,' and it was received: it was that defendant was 'thieving again' and that G. 'intended to watch his movements that night alone, 'about dusk': not guilty. *Buckley*, 13 Cox C. C. 293, 1873. But this decision has been doubted by so good an authority as the late W. F. Craies, 2 *Russ. Cri.* 2096 (7th ed., 1909: more strongly than 6th ed., 1896, p. 386), who says: 'This ruling can apparently be justified, if at all, only on the ground that the report was officially made in the course of the duty of the deceased': and by *Phips*. p. 272, who says: 'It seems doubtful whether declarations as to *acts to be done* are admissible: they were . . . rejected in *Rowlands* v. *De Vecchi*, 1 Cab. & E. 10 [1882], and the principle of the . . . cases' which he cites 'would seem to exclude future acts.' On p. 67 he remarks: 'No reasons are given; and the statement may have been received' as part of the *res gesta*. In *Rowlands* v. *De Vecchi*, Day J. refused to receive a postage book in which it was the duty of a deceased office boy to enter all letters given to him to post, on the ground that the book would only show the letters *to be posted*, and—even when plaintiff's clerk proved that on the day plaintiff swore he wrote the letter a letter from plaintiff to defendant was read over to him, a copy was taken, the letter was placed in an envelope directed to defendant, was given with others to the deceased to post, he (witness) and the deceased

left together, the latter having all the letters to post in his hand, and that no complaints had been received of the miscarriage of any one of them—still held 'that this was merely evidence of possession of a letter for . . . posting, but not sufficient proof of postage itself.' *Buckley,* was not cited.

Statements under this head may be oral: *per* L. Campbell, *Sussex Peerage,* 11 Cl. & F. 113, 1864; *Fawke* v. *Mills,* 27 T. L. R. 202, 1911; *Buckley,* above.

7. See *T.* s. 580; *Phips.* pp. 50-1. *Blandy,* 18 St. Tr. 1135, 1752, was charged with having poisoned her father, who died on the 14th, and the doctor, who was called in on the 10th, was allowed, without objection, to state all that deceased said in answer to inquiries respecting his health; but not only was he allowed to do this, but he also went on, still without objection, to state the answers of deceased to inquiries put by him, who administered the poison which deceased had taken? though no evidence was given to show that deceased was then *in articulo mortis;* this case would not now be considered an authority on the latter point; on the former it is confirmed by *Johnson,* below. *Aveson* v. *Lord Kinnaird,* 6 East, 188, 1805, was an action on a policy of insurance, effected by a husband on the life of his wife. The defence was that the wife was a hard drinker, and was in ill-health at the time the policy was effected. The surgeon who had examined the woman on behalf of the office was called by plaintiff, and he swore positively to his belief of her good health at the time, and said that he formed his opinion principally from the satisfactory answers which she gave to his inquiries. A witness was then called for the defence, who stated that shesaw deceased a day or two after the surgeon had examined her; that she then complained of being unwell; and said that she was unwell when she went to see the surgeon, with other similar statements. A verdict was found for defendant, and a rule for a new trial obtained by plaintiff on the ground that evidence of these statements ought not to have been received, was discharged. It was assumed by all the judges, that what was said by deceased to the surgeon was evidence of her state of health at the time; and they all thought that this evidence having been produced by plaintiff, it was open to defendant to rebut it by showing that she had made different statements on another occasion on the same subject. In the *Gardner Peerage case,* many doctors were examined for the claimant on their experience of protracted gestation. To ascertain the circumstances of these cases, it was necessary to inquire into the *data* on which the witnesses had formed their calculations, and these depended on the answers of women to certain medical inquiries about facts which had taken place some months previously. Evidence of what these answers were was repeatedly objected to, and finally rejected by the Committee on the advice of LL. Giffard and Redesdale. In *Guttridge,* 9 C. & P. 472, 1840, Parke B. said: 'What a man says as complaint to his surgeon, is evidence': approved by Pollock C.B. in *Nicholas,* 2 C. & K. 248, 1846. *Johnson,* 2 C. & K. 354, 1847, was charged with having murdered her husband, and to prove his state of health before the day of his death, a witness was called who had seen him a day or two before; being asked in what state of health deceased appeared to be when he last saw him, he began to state a conversation between deceased and himself on this subject. This was objected to on behalf of defendant, but Alderson B. said that he thought that what deceased said to the witness was reasonable evidence to prove his state of health at the time.

The result of the cases seems to be this: that, if it becomes necessary to inquire into the state of health *at a particular time* of a person who is dead, a witness may detail what that person has himself said *on that point only* at that time; and this whether he be a medical man or not. But a medical man may go farther, and, even in the case of a person who is still living, state the answers by that person to his inquiries about such person's health; this evidence is given in cases of assault, in order to prove what the person assaulted has suffered, 'in every day's experience': *per* Lawrence J. in *Aveson* v. *Lord Kinnaird; Gloster,* 16 Cox C. C. 471, 1888: statement must be confined to the state of health. 'The question is, whether A.'s death was caused by poison. Statements made by A. before his illness as to his state of health, and during his illness as to his symptoms, are deemed to be relevant facts': *Stephen, Dig. Ev.* Art 11, and *Gen. View of Crim. Law,* ed. 2, p. 255: evidence of Dr. Savage, Mr. Stephens and others in *Palmer,* 1856; and *Aveson* v. *Kinnaird.*

8. *Dying declarations*] This evidence is peculiar to homicide; it has been considered by some to be admissible from 'the fullest necessity,' since it often happens that there is no third person as an eye-witness: 1 East, P. C. 353. But it is said by Eyre C.B. that 'the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in a court of justice.' *Woodcock,* 1 Lea. 502, 1789; *Bernadotti,* 11 Cox C. C. 316, 1869. Probably it is the concurrence of both these reasons which led to the admission of this species of evidence.

The declaration must have been made by a person who, if alive, would have been a competent witness. Thus, in a trial for the murder of a girl four years of age, Park J. (and Parke B.) refused to hear evidence of her declarations, observing that, however precocious her mind might be, it was impossible that she could have had that idea of a future state which is necessary to make such a declaration admissible. *Pike,* 3 C. & P. 598, 1829. But when a child is of an intelligent mind, impressed with the nature of an oath, and expecting to die, the declaration is receivable. See *Perkins,* 1840, where the child was eleven years old. It is no objection to the evidence that the deceased was *particeps criminis* (as a woman attempting to procure abortion). *Tinckler,* 1 East, P. C. 354, 1781. So the statement of the deceased must be such as would be admissible if he were alive and could be examined as a witness; consequently, a declaration on matters of opinion, as distinguished from matters of fact, will not be receivable. *Sellers,* Carr. Supp. 233, 1796. Dying declarations in favour of the person charged with the death were admitted by Coleridge J. in *Scaife,* 1 Moo. & R. 551, 1836. It is no objection to a dying declaration that it has been elicited by questions put to the deceased. *Fagent,* 7 C. & P. 238, 1835. See also *Reason* and *Tranter,* 1 Str. 499; 16 St. Tr. 1; Foster, C. C. 293; 1 East, P. C. 320, 1722, *Woodcock,* above; and *Mitchell,* 1892, where the deceased was examined on oath by a magistrate, and the examination signed by both. See also *Smith,* 1 L. & C. 607; 34 L. J. M. C. 153, 1865.

The question, whether a dying declaration is admissible in evidence,

is exclusively for the judge: *per* L. Ellenborough. *Hucks,* 1 Stark. N. P. 523, 1816; *Bartlett* v. *Smith,* at 486. See also *Johns,* 1 East, P. C. 357; 1 Lea. 504 *n.*, 1790.

Homicide only] It is a general rule, that dying declarations are only admissible where the death of the deceased is the subject of the charge, and they concern the circumstances of the death: *per* Abbott C.J., *Mead,* 2 B. & C. 605; 4 D. & R. 120, 1824. Therefore, on an indictment for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion, when evidence of her dying declarations was tendered, Bayley J. rejected it, observing, that although they might relate to the cause of death, still such declarations were admissible only where the death was the subject of inquiry. *Hutchinson,* 2 B. & C. 608 *n.*, 1822. So, in robbery, the dying declaration of the person robbed has been frequently rejected. *Lloyd,* 4 C. & P. 233, 1830.

In one case where A. and B. were both poisoned by the same means, on the trial for the murder of A., evidence was allowed by Coltman J., after consulting Parke B., to be given of the dying declarations of B.; the ground alleged being 'that it was all one transaction.' *Baker,* 2 Moo. & Rob. 53, 1837. But in *Hind,* 29 L. J. M. C. 147; 8 Cox C. C. 300, 1860, a case similar to that of *Hutchinson* above, the C. C. C. R. followed the rule in *Mead,* above; c. q. But see *Mann,* 1885.

Condition of declarant] Dying declarations are only admissible when made by a person who is under the influence of an impression that death is impending. There must be no hope, not only of ultimate recovery, but of a prolonged continuance of life. If that impression exists in the mind of the sufferer, the fact that death does not take place till some time afterwards will not render the statement inadmissible.

To judge whether or not such was the state of the mind of the declarant, the whole of the circumstances must be looked at. A few cases may be cited with the caution, however, that it is by no means suggested that they can become precise precedents for any future cases that may arise.

In *Woodcock,* 1789, and *Johns,* above, this kind of evidence was received in circumstances which would not now be considered sufficient to render it admissible. In the first, the surgeon distinctly stated that he did not think the deceased was aware of her condition; in the second, the deceased had never expressed the slightest apprehension of danger; and in neither case were there any circumstances which led to a different conclusion. In *Woodcock,* no case was reserved by Eyre C.B. for the judges; but in *Johns,* the judges, on a case reserved, (apparently) held that the evidence was wrongly received. But they laid it down that the apprehension of danger may be inferred from the declarant's condition and need not be expressed by him (but cf. *Cleary,* 1862), and whether that apprehension existed or not is for the judge and not for the jury.

In *Christie,* Carr. Supp. 202, 1821, the deceased asked his surgeon if the wound was necessarily mortal, and on being told that a recovery was just possible, and that there had been such an instance, he replied, 'I am satisfied,' and after this made a statement; held by Abbott C. J. and Park J. to be inadmissible. In *Van Butchell,* 3 C. & P. 631, 1829, the deceased said, 'I feel that I have received such an injury in the

bowel that I shall never recover'; and, on his doctor trying to cheer him, he said that he felt satisfied he should never recover; Hullock B. rejected the evidence, saying that a man might receive an injury from which he might think that he should ultimately never recover, but still that would not be sufficient to dispense with an oath. See *Reaney,* 1857. In *Crockett,* 4 C. & P. 544, 1831, the surgeon said, 'I had told the deceased she would not recover; and she was perfectly aware of her danger; I told her I understood she had taken something, and she said she had, and that damned man had poisoned her. I asked her what man, and she said Crockett. She said she hoped I would do what I could for her for the sake of her family. I told her there was no chance of her recovery.' Bosanquet J. thought a degree of hope was shown, and struck out the whole of this evidence from his notes. In *Hayward,* 6 C. & P. 160, 1833, Tindal C.J. observed that 'any hope of recovery, however slight, existing in the mind of the deceased at the time of the declaration being made, would undoubtedly render the evidence of such declarations inadmissible.' In *Spilsbury,* 7 C. & P. 187, 1835, Coleridge J. said, 'When I consider that this species of proof is an anomaly, and contrary to all the rules of evidence, and that, if received, it would have the greatest weight with the jury, I think I ought not to receive the evidence, unless I feel fully convinced that the deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence . . . that the deceased said he thought he should not recover, as he was very ill. Now, people often make use of expressions of that kind who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow purporting that they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that showed he was convinced that his death was at hand. As nothing of this sort appears, I think there is not sufficient proof that he was without any hope of recovery, and that I, therefore, ought to reject the evidence.' Cf. next title. In *Perkins,* 9 C. & P. 395; 2 Moo. C. C. 135, 1840, a boy of about ten was severely wounded by gun-shot, and died the next morning. On the previous evening he was seen by two surgeons. One of them, who was then of opinion that he could not survive many days, said to him, 'My good boy, you must know you are now labouring under a severe injury, from which, in all probability you will not recover, and the effects of it will most likely kill you.' The other said, 'You may recover; it is impossible for me to say, but I don't think it likely that you will be alive by the morning.' The boy made no reply, but his countenance changed and he appeared distressed. From questions put to him, he seemed fully aware that he would be punished hereafter if he said what was untrue. He then made a statement to the surgeons. All the judges, except three, thought the statements made under the apprehension and expectation of immediate death. In *Megson,* 9 C. & P. 418, 1840, two days before her death, the surgeon told the deceased she was in a very precarious state. Next day, being much worse, she said to him that she had been in hopes of getting better, but as she was getting worse, she thought it her duty to mention what had taken place. She then made a statement. Rolfe B. held that this statement was not admissible, as it did not

sufficiently appear that, at the time of making it, she was without hope of recovery. But cf. *Hubbard,* below. In *Howell,* 1 Den. C. C. 1, 1844, the deceased had received a gunshot wound, and repeatedly expressed his conviction that he was mortally wounded. He was a Roman Catholic, and an offer was made to fetch a priest, which he declined. This was insisted on as showing either that the deceased had no sense of religion, or that he did not expect immediate death; but the judges were unanimously of opinion that the evidence was properly received. In *Reaney,* D. & B. C. C. 151; 7 Cox C. C. 209; 26 L. J. M. C. 43, 1857: manslaughter, deceased, eleven days before his death, signed a statement concluding with the words, 'I have made this statement believing I shall not recover.' Shortly before, he said, 'I have seen . . . the surgeon to-day, and he has given me some little hope that I am better, but I do not myself think that I shall ultimately recover.' The evidence was received by Willes J.: in the C. C. C. R. five judges were of opinion that the evidence was properly received. Much reliance was placed by defendant's counsel on the word 'ultimately,' but Pollock C.B. said, 'No doubt, in order to render the statement admissible in evidence as a dying declaration, it is necessary that the person who makes it should be under an apprehension of death; but there is no case to show that such apprehension must be of death in a certain number of hours or days. The question turns rather upon the state of the person's mind at the time of making the declaration, than upon the interval between the declaration and the death.' Wightman J. said that the statement 'must be made under an impression that . . . death must in a comparatively short lapse of time ensue.' There must be 'a settled hopeless expectation of *immediate* death,' *per* Lush J.; *Osman,* 15 Cox C. C. 1, 1881. Erle C.J. refused to infer from the nature of a wound alone, that a man must have known as soon as he had received it that he was about to die. *Cleary,* 2 F. & F. 851, 1862; but cf. *Johns,* above; *Smith,* 16 Cox C. C. 170, 1887; *Gloster,* 1888, followed by the C. C. A. in *Perry,* 1909, 2 K. B. 697; 78 L. J. K. B. 1034; 73 J. P. 456; 25 T. L. R. 676; 101 L. T. 127; 2 Cr. A. R. 270: the test is, 'has all hope of life been abandoned?' It would seem, however, that in some circumstances it may be possible to draw such an inference. *Morgan,* 14 Cox C. C. 337, 1875; *Bedingfield, ib.,* 342. In *Pickersgill,* Leeds Summer Assizes, 1869, deceased, who was suffering from the effects of poison and died the same night, said, 'I am getting worse. I am going to die.' The doctor asked her if she thought she would get better, and she said, 'No, I shall die.' Cleasby B., after consulting Brett J., said the 'evidence satisfied them that the woman was in a dying state, and that she believed it. When she said she was going to die, she meant that death was imminent.' In *Bernadotti,* where deceased had received a knife-stab in the neck, and the bleeding, after being stopped, had recommenced, so that his life was in danger, though not in immediate danger, and a magistrate was sent for, deceased said, 'Be quick or I shall die,' just before making the declaration. Brett J., after consulting Lush J., admitted it. See also *Jenkins,* L. R. 1 C. C. R. 187; 38 L. J. M. C. 82; 11 Cox C. C. 250, 1869. Where a woman who had received severe injuries was standing at a neighbour's door fainting and apparently dying, and she said, 'I am dying; look to my children,' and she died that night, Hawkins J. admitted this declaration. *Goddard,* 15 Cox C. C. 7, 1882. 'A magistrate having before him an earlier statement made by the deceased [on June 29], but not when dying, repeated portions of it in his own words to her when dying [on July 7], wrote down

such portions, and asked her if they were correct, to which she said 'yes,' and signed the paper, which ended thus: 'The statement I previously made and have now heard read over to me is true.' Held admissible: *Phips.* p. 304: *per* Darling J., *Whitmarsh,* 62 J. P. 680, 1898: *per* Bigham J. *ib.* 711 (second trial). The earlier statement, viz., answers by deceased to questions put to and signed by her on June 29, five days after arrival at a hospital, where she died on July 10, was doubtfully rejected by Darling J. and decisively by Bigham J., who, however, allowed it to be read when defending counsel, unable to keep out the later one, asked for it.

The question is, what was the belief of the declarant *at the time* of declaration, and it is immaterial that declarant afterwards took a more hopeful view of his condition. *Hubbard,* 14 Cox C. C. 565, 1881; *A. A. Austin,* 8 Cr. A. R. 27, 1912. But cf. *Megson.*

Interval between declaration and death] It is clear that, if the impression exists in the mind of the declarant that dissolution is shortly impending, it will not make any difference that death does not in fact take place until some time afterwards. *Reaney,* above. Nor does there appear to be any case in which the evidence has been rejected on this ground. In most of the reported cases, however, the statements have been made within a few days of death actually taking place, and in most cases within a few hours. In *Bernadotti,* however, declarant did not die for nearly three weeks; in *Craven,* 1 Lew. 77, 1826, 'several weeks.'

Reduced into writing] A statement giving the *substance* of questions and answers is not admissible: the actual words of deceased must be given and so must the questions put, if any; for 'answers, even if taken word for word, seem to me to be useless without the questions . . . and when a person is in such a condition the danger arising from leading questions is enormously increased': *per* Cave J., *Mitchell,* 17 Cox C. C. 503, 1892, dissenting from *Mann,* 49 J. P. 743, 1885, where, on a trial for grievous bodily harm, Denman J. admitted a statement, not a dying declaration nor a deposition, but intended as the former, as one made in defendant's presence.

Presence of accused] When a dying declaration is taken formally by a magistrate in writing, it is of no value as a *Deposition* (which see), unless made in the presence of defendant and accompanied by the proper formalities for taking depositions, including 'full opportunity' for cross-examination; nor if these formalities have not been complied with, *e.g.*, if, owing to the sufferer's state, the cross-examination cannot be finished, is it admissible as a statement made in his presence—unless the cross-examination was vexatious and frivolous, with the object of wasting time—since he would not be likely to deny at once the statements made, but would wait his opportunity for cross-examination. *Mitchell,* and see p. 57; see also *per* Hawkins J., *Smith,* 18 Cox C. C. 470; 61 J. P. 120, 1897. It has been held that, if a dying declaration has been reduced into writing, and signed by deceased, *no* secondary evidence can be given of its contents: *per* Coleridge J., *Gay,* 7 C. & P. 230, 1835, following *Reason,* Str. at 500. But mere notes of the declaration taken down by a person present would not be even admissible: p. 4.

Inherent defects] Such evidence is liable to be very incomplete, if only from the physical condition of the sufferer. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed, that animosity and resentment are not unlikely to be felt in such a situation. See *Mitchell*, above, at 507, and *Crockett*, where the declaration was, 'that damned man has poisoned me,' which may be presumed to be vindictive; and *Bonner*, 6 C. & P. 386, 1834, where the dying declaration was distinctly proved to be incorrect. Such considerations show the necessity of caution in receiving impressions from accounts given by dying persons; especially when it is considered, that they cannot be subjected to cross-examination—a power quite as necessary for securing the truth as the religious obligation of an oath can be. And, of course, the ordinary 'sanctions' of courts of justice cannot exist in this case. See *Spilsbury*, 1835. 'When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are, nevertheless, open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination': *per* Alderson B., *Ashton*, 2 Lewin, C. C. 147, 1837.

Contradiction] Dying declarations are, of course, open to direct contradiction in the same manner as any other evidence; and as defendant is at liberty to show that a prosecutor-witness is not to be believed on his oath, he seems to be equally at liberty to prove that the character of the deceased was such that no reliance is to be placed on his dying declarations. 2 Russ. Cri. 2094, citing *Macarthy*, 1842, where A. (deceased) had declared that B. (defendant) had assaulted him and knocked him down. B. had stabbed A. while A. was pursuing him to give him into custody. The judge allowed cross-examination to show that A.'s character was so bad that B. might reasonably think that A. was following him to rob him; and it was proved by two friends of A. that A. had never been knocked down at all. Perhaps, therefore, *Phips*. p. 300, goes too far in saying, 'There is no express English authority.'

There may perhaps be added

9. *Enquiries made at defendant's request*] It seems that the answers to such inquiries may be given in evidence on the authority of (*Campbell*, below, in some cases, and) *J. Gray*, 6 Cr. A. R. 242, 1911, where Alverstone L.C.J. said: 'Prisoner asked for certain inquiries to be made, and although it may be that in some cases the result of those inquiries may be given in evidence, evidence of further facts obtained as a result of those inquiries, which facts are not a direct answer to those inquiries, is not admissible. This further evidence in this case was admitted,' viz., the police gave hearsay evidence that defendant's discharge was inaccurate—which was his case—and went on to say that persons not called said it was a forgery: see *Phips*. 239. But hearsay in answer to inquiries which defendant has not asked for is not admissible: *J. W. P. Campbell*, 8 Cr. A. R. 75; 77 J. P. 95, 1912: c. q., partly because defendant was not allowed to cross-examine on the hearsay evidence.

CONFESSIONS, ADMISSIONS, INCRIMINATING STATEMENTS.

I. Before Examination of Defendant.

A. *Self-incriminating Statements.*

Definition] In criminal law, *confession* generally means an acknowledgment of guilt; *admission* is of some fact not involving criminal intent. *T.* 724, 862; *Phips.* 248. Sometimes, however, 'confession' merely means a connected statement which the prosecution offers as incriminating; *e.g.*, *Layer,* 214: 'By confession I understand not necessarily a full confession of guilt, but any statement made which, being relevant to the issue, may be put in evidence against the person making it,' *per* the C. J. in *Wong Chin Kwai.* Thus confessions of other crimes not relating to the charge, *e.g.*, showing or admitting a general *tendency* even to the crime charged, are inadmissible: *Cole,* 1810.

Confessions may be divided into two classes:—Judicial and extra-judicial.

Judicial confessions are those which are made before the magistrate or in court in 'the due course of legal proceedings': *T.* s. 866; and any such 'is sufficient by itself to support a conviction.' It is, in other words, a plea of *guilty.* Extra-judicial are those made elsewhere: 'If it be but an extra-judicial confession tho' it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court whether it be felony, tho upon the fact thus shewn, it appear to be felony, the court will not record his confession, but admit him to plead to the felony *not guilty.*' 2 Hale, P. C. 225.

Presumption of truth] The confessions of defendants are received on the same principle as that on which admissions in civil suits are received, viz., the presumption that a person will not make an untrue statement against his own interest. *T.* s. 723.

Rebuttable by (a) *facts,* (b) *law*] An admission by a defendant is not conclusive, and if it afterwards appear in evidence that the fact was otherwise, the admission will be of no weight. Thus, on a trial for bigamy, where defendant had admitted the first marriage ceremony, and it appeared that such marriage was void, for want of consent of the guardian of the woman, he was acquitted: Le Blanc J., following *Bridgwater,* 3 *Stark. Ev.* 1187 *n.*, 1st edn., 1801. So in arson of a ship with intent to injure two *other* part-owners, it was held that prosecutor could not make use of an admission that these persons were owners, if it appeared that the requisites of the Shipping Acts had not been complied with. *Philp.* 1830.

Effect of confessions] Whether extra-judicial confessions . . . uncorroborated by any other proof of the *corpus delicti* are of themselves

in general sufficient whereon to justify a conviction, has been the subject of grave doubt. *T.* s. 868. It is said to have been decided to be so in *Wheeling,* 1 Lea. 311 *n.*, 1789; but the report is very meagre, and despite this case (which he explains) Mr. Greaves in a note to 3 *Russ. Cri.* 366, 4th ed. (by him: 1865), says, 'it does not appear that it has ever been expressly *decided,* that the mere confession of a prisoner *alone,* and without any other evidence, is sufficient to warrant a conviction.' But perhaps the true rule is that in the 7th edn., 1909, vol. 2, 2156: 'An extra-judicial confession, if duly made and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroboration *aliunde* in the case of most crimes, but such a confession is not, as a rule, accepted by itself in cases of murder or bigamy or offences involving title to property, all of which may involve mixed questions of law and fact.' So *Phips.* 249. For an instance, see *Sykes,* 8 Cr. A. R. 233, 1913: murder; confession retracted. The invariable practice in serious cases is for the judge to warn the accused of the gravity of his plea and to offer him 'freely' to retract it. *Best,* s. 549. See *Kersey.*

Credibility] See last paragraph. About the degree of credit which a jury ought to attach to a confession, much difference of opinion has existed. By some it has been considered as forming the highest and most satisfactory evidence of guilt: *per* Grose J., delivering the opinion of the judges in *Lambe,* 2 Lea. 554, 1791. So it is stated by the court in *Warwickshall,* 1 Lea. 263, 1783, that 'a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it.'

On the other hand, it is said by Foster J. (*Discourses,* 243) that 'hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often mis-reported . . . through ignorance, inattention, or malice . . . and they are extremely liable to misconstruction.' Moreover, this evidence is not, in the usual course of things, 'to be disproved by that sort of negative evidence by which the proof of plain facts may be, and often is, confronted'—an opinion adopted by Blackstone, 4 Com. 357. It has been said that it is not to be conceived that a man would be induced to make confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. See *T.* s. 865. It cannot be doubted, however, that instances have occasionally occurred in which innocent persons have confessed themselves guilty of the gravest of crimes. Three men were convicted of the murder of a Mr. Harrison. One of them confessed himself guilty of the fact, under a promise of pardon; the confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison was alive. *MS. case,* cited 1 Lea. 264 *n.*; and see *T.* s. 863. Other sources of distrust are 'the zeal which generally prevails to detect offenders . . . and the strong disposition which is often displayed by persons engaged in pursuit of evidence to magnify slight grounds of suspicion into sufficient proof, together with the character of the witnesses, who are sometimes necessarily called in in cases of secret and atrocious crime.' *Ib.* s. 862. See *per* Alderson B., *Simons,* 6 C. & P. 541, 1834.

Inadmissible confessions] *Primâ facie,* as a matter of course, a confession by defendant is admissible against him. But there are certain grounds which may be shown by him sufficient to exclude the confession. The general rule is that no confession by defendant is admissible which is made in consequence of any inducement of a temporal nature, having reference to the charge against him, held out by a person in authority. But if an inadmissible confession gives a clue to other evidence in the case, that may be given. *Warwickshall,* above; cf. *Leatham,* 1860.

It is usual to speak of a *threat* or *inducement* as excluding the confession; and whether a man says, 'If you *do* confess I *will not do* so and so,' or whether he says, 'If you *do not* confess I *will do* so and so,' makes very little difference, if in fact the person accused is influenced. All that is here said, therefore, will be applicable to both threats and inducements.

In *Boughton,* 1910, both a father and a mother had told defendant that if he would sign an apology he would not be prosecuted, and the mother wrote out a form which he sent back unsigned, and this paper was not produced at the trial, but the judge treated it as 'a qualified confession' having some bearing on the question of guilt: c. q.

What is an inducement] The reported cases in which statements by defendant have been held inadmissible are very numerous, 'and far from consistent with each other.' *Best,* s. 551. Before *Baldry,* 2 Den. C. C. 430; 21 L. J. M. C. 130; 5 Cox C. C. 523, 1852, they had gone a very great length. There, all the previous cases were reviewed. A constable had said to defendant, after telling him the charge, 'that he must not say anything to criminate himself; what he did say would be taken down, and used as evidence against him.' L. Campbell C.J. received the evidence, but reserved the point for the C. C. C. R., which was unanimous that the statement was admissible. Pollock C.B. said, 'A simple caution to the accused to *tell the truth,* if he says anything, has been decided not to be sufficient to prevent the statement being given in evidence; and although it may be put that when a person is told to tell the *truth* he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. . . . It has been decided that that would not prevent the statement being given in evidence, by Littledale J. in *Court,* 7 C. & P. 486, 1836; and by Rolfe B. in . . . *Holmes,* 1 C. & K. 248, 1843; but where the admonition to speak the truth has been coupled with any expression importing that it would *be better* for him to do so, it has been held that the confession was not receivable; the objectionable words being, 'that *it would be better* to speak the truth,' because they import that it would be better for him to say something: *Garner,* 1 Den. C. C. 329; 2 C. & K. 920; 3 Cox C. C. 175, 1848. The true distinction between the present case and a case of that kind is, that here it is left to the prisoner a perfect matter of indifference whether he should open his mouth or not.'

Court was this: before a magistrate on a charge of forgery, prosecutor said, in the hearing of defendant, that he considered him as the tool of one G., and the magistrate then told him to be sure and tell the truth; on which he made a statement. It was held by Littledale J. that evidence of this statement was admissible. *Holmes* was charged with rape; the magistrate said, 'Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial.' Evidence of the statement then made by

defendant was held by Rolfe B. to be admissible. In *Garner,* 1848, a surgeon told defendant, in the presence of her master and mistress (which is the same thing as if the words had been used by either of themselves; below), that it was better for her to speak the truth; evidence of the statement thereon made was unanimously held by the C. C. C. R. to be inadmissible; see also *Jarvis, per* Willes J. and *Fennell* and *Reeve,* below.

Sleeman, 1 D. & P. C. C. 249; 6 Cox C. C. 245, 1853, a maid-servant, was taken into custody on a charge of setting fire to her master's premises. She was permitted to change her dress, being given, for that purpose, into the charge of his daughter. The latter said to her, 'I am very sorry for you, you ought to have known better; tell me the truth whether you did it or no.' She said, 'I am innocent.' The other replied, 'Don't run your soul into more sin; tell me the truth.' Defendant then made a full confession. The evidence was admitted; and the C. C. C. R. held that there was no inducement or threat, nor authority to make any, and affirmed the conviction. *Upchurch,* 1 Moo. C. C. 465, 1836, a servant-girl, aged thirteen, was indicted for attempting to set fire to her master's house. After the attempt was discovered, her mistress said to her, 'Mary, my girl, if you are guilty do confess; it will perhaps save your neck; you will have to go to prison; if W. H. [a person whom defendant had charged] is found clear, the guilt will fall on you.' She made no answer. The mistress then said, 'Pray tell me if you did it.' She then confessed. The evidence was admitted; but the judges thought that it ought not to have been received. *Hearn,* Car. & M. 109, 1841, a servant, was charged with attempting to set fire to her master's house. The furniture in two bedrooms was on fire, and a spoon and other articles were found in the pump. The master told her, that if she did not tell the truth about the things found in the pump, he would send for the constable to take her, but he said nothing to her respecting the fire. Coltman J. held that this was such an inducement to confess as would render inadmissible any statement that she made respecting the fire as the whole was to be considered as one transaction. Where defendant's master in the presence of two policemen said, 'I think it is right I should tell you, that besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue,' and, on defendant's denying having written a letter produced, 'Take care; we know more than you think,' it was held that these words did not make the evidence inadmissible. Kelly C.B. said, 'The words that have been used import advice only on moral grounds, '*take care,* &c.,' only amounted to a caution. *Jarvis,* L. R. 1 C. C. R. 96; 37 L. J. M. C. 1, 1867. So also, where the mother of some little boys in custody said, 'You had better, as good boys, tell the truth,' it was held that a statement made thereon was admissible, and that the cases to the contrary had gone too far. *Reeve,* L. R. 1 C. C. R. 362; 41 L. J. M. C. 92; 12 Cox, C. C. 179; 26 L. T. 403, 1872, followed in *Stanton,* 6 Cr. A. R. 199, 1911. Where the prosecutor said to defendant, 'The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth, it may be better for you,' and defendant immediately after made a confession to the prosecutor in the presence of the inspector, the confession was held not admissible: *Fennell,* 7 Q. B. D. 147; 50 L. J. M. C. 126; 14 Cox C. C. 507, 1881. Where defendant

was in custody of a policeman for arson, and she said to her mistress, If you forgive me I will tell you the truth,' and the mistress without cautioning her said, 'Ann, did you do it?' Williams J. rejected her confession. *Mansfield,* 14 Cox C. C. 639, 1881.

The present state of the law is illustrated by *Knight and Thayre,* 20 Cox C. C. 711; 69 J. P. 108; 21 T. L. R. 310, 1905; approved in *Booth and Jones,* 5 Cr. A. R. 177; 74 J. P. 475, 1910. K., a post-office employee, being suspected, S., a detective, who in some cases had power to initiate proceedings—and could and did suspend K.—had an interview of nearly three hours with him alone, at the commencement of which he cautioned him that any statement he made might be used against him; the questions and answers were reduced to writing, and so was a statement made by K. towards the end of the interview. S. then sent for T., with whom K. was charged with conspiring, and questioned him in K.'s presence. S. had declined to allow K. to leave except in some one's charge, which K. declined. He was in the room nearly six hours. S. stated that at the beginning of the interview he had not enough evidence for a prosecution, that he did not intend necessarily to obtain a confession, and that for two hours K. denied all knowledge of the fraud charged. Channell J. with doubt admitted the questions and answers, to which, however, there was no objection, as they contained no admission of guilt, but refused to admit the statement or 'confession,' saying, 'The difficulty I feel here is whether I ought to admit evidence of what a man has said at the end of a long interview, during which he has been pressed, as this man undoubtedly was pressed, even when a caution was administered at the beginning of the interview. The questioning was continued for a very long period, the man's denials were not accepted, and the impression conveyed by S. to the prisoner's mind may well have been this: 'You will have to tell me that you did this thing, because I shall not let you go till you do so.' This certainly cannot be said to be making a statement voluntarily. It may well be that an admission made immediately after a caution had been given by the person in authority would be admissible, but it does not follow that a suspended person can be cross-examined until the person putting the questions is satisfied.' K. was acquitted. On the general question of interrogating detained persons the judge said, 'It is, I think, clear that a police officer, or any one whose duty it is to inquire into alleged offences, . . . may question persons likely to be able to give information, and that, whether he suspects them or not, provided that he has not already made up his mind to take them into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so. I am not aware of any distinct rule of evidence, that if such improper questions are asked, the answers to them are inadmissible; but there is clear authority for saying that the judge may . . . in his discretion, refuse to allow the answer to be given in evidence . . . as K. was to all intents and purposes in custody the [im]propriety of further questions is at least doubtful.' (See on this point *Voisin* and an address to police constables by L. Brampton in the *Police Code,* by Sir Howard Vincent, 1912, p. xiv.)

Inducement—temporal] On this point there are but few authorities. *Sexton,* 1822, said, 'If you will give me a glass of gin, I will tell you all about it,' and two glasses of gin were given him. He then made a confession, which Best J. refused to admit, as he did the same con-

fession read over to defendant and signed by him in the presence of a magistrate, who told him that the charge affected his life, *and a confession might do him harm;* he would have admitted the second cconfession if the magistrate had told him that the previous one was not evidence against him—for he might think he could not (by the second) make his case worse than it was. (But see *Howes,* 1834.) Moreover, the first confession was not taken down from his lips, but from recollection, and was rejected on this ground: see below. This decision has been repeatedly doubted, partly because the confession was volunteered: *Phips.* p. 254; *Joy* on *Confessions,* 17, 1842; 2 Russ. Cri. 2180. In *Lloyd,* 6 C. & P. 393, 1834, a man and his wife were in prison in separate rooms, on a charge of stealing and receiving, and the constable said to the man, 'If you will tell where the property is, you shall see your wife'; Patteson J. held that a confession made afterwards was admissible. *Green,* 6 C. & P. 655, 1834, said if his handcuffs were taken off he would tell where he had put the property; the judge thought this was not a confession, but advised the jury to ignore it.

Religious] It is to be remarked that if it is necessary that the inducement should have reference to temporal advantage, *e.g.,* escape from the charge (p. 43), it is quite unnecessary to discuss, as was done at great length in *Gilham,* 1 Moo. C. C. 186, 1828, whether the inducement must be of a temporal nature. There the chaplain of the gaol had had repeated interviews with defendant, and had strongly impressed upon him the religious duty of confession; coupling these exhortations with an expression of belief that he was a guilty man. as indeed he himself, in general terms, admitted. The gaoler had also conversed with him on the subject, and had held, in briefer terms, similar language. Defendant, at length, after being cautioned that what he said would be used in evidence against him, made a full confession to the gaoler, and afterwards to the mayor. Both confessions were received by Littledale J., the question of their admissibility being reserved. The judges, without stating any reasons, held that the confessions (*both* according to the report) were properly received; and it is said in 2 Russ. Cri. 2178 (where there is a very lengthy report), that the ground for this decision was that 'there were no temporal hopes of benefit or forgiveness held out; and that such hopes, if referable merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded.

In *Wild,* 1 Moo. C. C. 452, 1835: murder, a witness, not in authority, but detaining defendant, a boy under fourteen, said to him, 'Now kneel down' (which he did) 'and tell the truth. I am going to ask you a very serious question. I hope you will tell me the truth in the presence of the Almighty'; the boy admitted the fatal act, 'but not purposely'; the judges thought that statement 'was strictly admissible, but they disapproved of the mode in which it was obtained'; 'the case may well be supported on the ground that the words addressed' to *Wild* had no tendency whatever to induce him to make a false statement, but on the contrary, were a most solemn adjuration to speak the truth. The decision seems fully warranted by the principle of *Gilham:* Mr. Greaves, 2 Russ. Cri. 2167 *n.* In *Nute,* 1842, *ib.* 2180, a mistress told a girl, if she would repent and confess, God would forgive her, and she confessed; some one else, in the mistress's presence but not in her hearing, told her that her mistress said she had

confessed, whereupon she confessed again. The jury thought the first confession made under hope of favour here, and the second under the influence of having made the first. The judges, who thought neither of these points were for the jury, held that on these facts the confessions ought not to have been received, though many thought the inducement was 'not hope of favour here.' This case shows, according to *Burn's Justice* (1869, 30th ed., *Confession,* 973), that 'if a confession be obtained by undue means, nothing the prisoner afterwards says under the influence of having made that confession, can be received.' So *Meynell,* 1834.

On the whole the authorities seem to be in favour of the proposition that the inducement must be of a temporal nature. See *Best,* ss. 551, 553.

Reference to the charge] This, perhaps, has scarcely been fully discussed: but see *Phips.* 251: 'A promise or threat, in order to exclude a confession, *must relate to the charge, i.e.,* must reasonably imply that the prisoner's position with reference thereto will be rendered better or worse according as he does or does not confess. . . . Neither will a confession be excluded which has been obtained from the accused by an inducement relating to some *collateral matter* unconnected with the charge' (*T.* s. 880); 'or by *moral* or *religious exhortation*' (*Gilham, Jarvis, Reeve*), &c.

Reference to a different charge] An inducement held out with reference to one charge will not exclude a confession of another offence, of which defendant was not suspected at the time of such inducement. *Warner* had been in the custody of several constables, one after another, and it was suggested on his behalf, that one of them had improperly induced him to confess, and this constable was called and stated that whilst defendant was in his custody on another charge, and when he was not suspected of the offence then on trial, he had made a statement in which he confessed himself guilty of a second charge. It was submitted, that if a promise was held out to him, it was immaterial what the charge was. Littledale J. said, 'I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge.' The confession was admitted: 2 Russ. Cri. 2174 *n.*, 1832; but cf. *Hearn,* 1841. But where a threat was held out—that if defendant did not tell, he would be given in charge—without the charge being stated, though subsequently it *was* stated, and *thereupon* a confession was made, it was held to be inadmissible. *Luckhurst,* 1 D. & P. 245; 6 Cox C. C. 243, 1853; here authority was implied because the threat was made in the presence of the prosecutor.

Inducer a person in authority] In *Spencer,* 7 C. & P. 776, 1837, Parke B. stated that there was a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement (that 'it would be better for him') held out by that person, can be given in evidence. But on *Spencer* being cited in *Taylor,* 8 C. & P. 733, 1839, Patteson J. said, 'It is the opinion of the judges, that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority.'

Who is a person in authority] And in *Moore,* 2 Den. C. C. 522; 21 L. J. M. C. 199; 3 C. & K. 157; 5 Cox C. C. 585, 1852, Parke B., delivering the judgment of the C. C. C. R., said that 'if the threat or inducement is held out by a person *in authority,* it cannot be received, however slight the threat or inducement—actually or constructively; and the prosecutor, magistrate or constable is such a person as the master or mistress may be.' In that case, defendant was charged with killing, or concealing the birth of, her infant, and had made a confession to her mistress after an inducement (that 'she had better tell the truth'), which was held admissible. *Phips.* 250, defines 'a person in authority, *i.e.,* someone engaged in the *arrest, detention, examination* or *prosecution* . . . or someone acting in the presence and without the dissent of such a person': thus in *Moore,* the mistress was not *in authority,* for the offence had nothing to do with the management of the house. See *Luckhurst,* 1853. In *Kingston,* 4 C. & P. 387, 1830, Parke J., after conferring with Littledale J., held that an inducement held out by a surgeon called in professionally was sufficient to exclude a confession—apparently the only decision on this point. In *Garner,* 1848, the inducement was held out by the surgeon, and the confession was made to him, but the master and mistress were present. *Gilham* is no authority that the chaplain of a gaol is a person in authority within the meaning of this rule. In *Sleeman,* it was held that the daughter of the master of the house who had the maid-servant in her custody for a temporary purpose was not a person in authority: *sed qu.* A paid female searcher was held to be a person in authority, and when defendant, on being searched, said, 'If I tell the truth shall I be hung?' and she replied, 'No; nonsense. Who told you so?' her statement after that was rejected. *Windsor,* 4 F. & F. 360, 1864.

Inasmuch as any one may, on reasonable suspicion, apprehend any one suspected of felony, a person in no way connected with the charge may put himself in the position of one in authority. *Parratt,* 4 C. & P. 570, 1831, a sailor, was charged with robbing another of the crew. The master said, 'If you do not tell me who your partner was, I will commit you to prison'; and he thereupon confessed. Alderson B. held the confession inadmissible. Parke B. explained this case in *Moore,* above, on the ground that the master had threatened to take part in the prosecution. And it appears from *Eliz. Laugher,* 2 C. & K. 225, 1846; *Luckhurst,* above; and *Garner,* 1848, that even if the person in authority be silent, he will be presumed to acquiesce in the inducement.

Three brothers were in custody on the same charge; one said to another in the presence of the prosecutor and the policeman, neither of whom said anything, 'Well, John, you had better tell Mr. Walker (prosecutor) the truth,' and defendant addressed thereupon made a confession; evidence of this was received, and the C. C. C. R. affirmed the conviction, probably because the inducement 'must be looked upon merely as' that 'of an accomplice.' *Parker,* L. & C. 42; 8 Cox C. C. 465, 1861: 'here the prosecutor's assent could hardly be implied.' *Phips.*

Offer or hope of pardon from the crown] The mere knowledge by a defendant of a handbill, by which a government reward and a promise of pardon are held out to any accomplice, does not furnish sufficient grounds for rejecting his confession. But where it was shown that

defendant had asked to see any handbill that might appear, and one was accordingly shown him, in which a promise of pardon was held out to an accomplice, on which he said he saw no reason why he should suffer for the crime of another, and that, as government had offered a free pardon to any party concerned who had not struck the blow, he would tell all he knew about the matter, and accordingly did so, Cresswell J. held not only the confession then made inadmissible, but also struck out from his notes a previous one he had received before the evidence of these remarks (cf. *Garner,* 1848), as it was sufficiently clear that defendant was influenced by the offer of pardon. *Boswell,* 6 Car. & M. 584, 1842. In *Blackburn,* 6 Cox C. C. 334; 3 C. & K. 330, 1853, a confession made in a room in which a large printed handbill containing an offer of reward and pardon was hanging up, was rejected by Talfourd J., after consulting with Williams J., defendant appearing to think that he would be admitted as witness for the Crown, though he said nothing about that expectation or the hope of the reward, and he was told that his statements would be used against him. *Dingley,* 1 C. & K. 637, 1845, asked the chaplain of the gaol if any offer of pardon had been made; the chaplain said there had been, but added that, if defendant made a statement, he must understand that he could offer him no inducement, as it must be his own free and voluntary act. The former afterwards signed a confession before a justice, in which he distinctly stated that no person had made any promise, or held out any inducement to him to confess anything. Pollock C.B. held that the confession was admissible.

A confession induced merely by a hope of pardon 'held out by' defendant 'to himself' is admissible: *Godinho,* 7 Cr. A. R. 12; 76 J. P. 16; 28 T. L. R. 3, 1911.

For *Accomplices'* confessions, see that title.

Inducement—at an end] 'If the impression produced by the promise or threat is clearly shown to have been removed, *e.g.,* by lapse of time or by any intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement, a confession subsequently made will be strictly receivable.' *Phips.* 252.

Thus, if the impression that a confession is likely to benefit him has been removed from the mind of defendant, what he says will be evidence against him, although he has been induced to confess. Where one, on being taken into custody, had been told by a person who was assisting the constable, that it would be better for him to confess, but, on his being examined before a magistrate on the following day, he was frequently cautioned by him to say nothing against himself, a confession in these circumstances was held by Bayley J. to be clearly admissible. *Lingate,* 1 *Phill. Ev.* 414, 10th ed., 1815. So where a constable told a defendant he might do himself some good by confessing, and the latter afterwards asked the magistrate if it would be any benefit to him to confess, on which the magistrate said, he would not say it would; defendant having afterwards, on his way to prison, made a confession to another constable, and, again in prison, to another magistrate, the judges unanimously held that the confessions were admissible, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. *Rosier,* 1821, *ibid.*

So, in similar circumstances, after the statutory caution of the

magistrate. *Bate,* 11 Cox C. C. 686, 1871. A man charged with murder was visited by a clerical magistrate, who told him, expressly to induce a confession, that, if he was not the man who struck the fatal blow, and would disclose what he knew, he would use all his endeavours and influence to prevent any ill-consequences from falling on him, adding that it was certain that some one concerned would make the matter known. The magistrate wrote to the Secretary of State, who returned answer, that mercy could not be extended to defendant; this was communicated to defendant, who afterwards sent for the coroner, and desired to make a statement to him. The coroner cautioned him, and added that no hopes or promise of pardon could be held out. Littledale J. ruled that a confession subsequently made to the coroner was admissible; for the caution given by the latter must be taken to have completely put an end to all the hopes that had been held out. *Clewes,* 4 C. & P. 224, 1830. See also *Howes,* 6 C. & P. 404, 1834; second confession, after caution by magistrate, admitted, though latter did not say first was of no effect, contradicting *Sexton,* 1822. A girl charged with poisoning was told by her mistress, that, if she did not tell all about it that night, the constable would be sent for next morning to take her before the magistrate; on which she made a statement—which was rejected. The next morning a constable was sent for, who took her into custody, and on the way to the magistrate, without any inducement, she confessed to him. Bosanquet J. said, 'I think *this* statement receivable. The inducement was, that if she confessed that night the constable would not be sent for, and she would not be taken before the magistrates. . . . The inducement therefore was at an end.' *Richards,* 5 C. & P. 318, 1832.

Not at an end—later confessions] 'In one case where hopes had been holden out . . . to confess,' and when before a magistrate defendant 'refused unless upon conditions,' Buller J. admitted the general rule with some qualification by observing that 'there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favour on that account; and it ought most clearly to appear, that the prisoner thoroughly understood such warning, before his subsequent confession could be given in evidence.' 2 East, P. C. 658. See *Sexton,* 1822. So where the magistrate told defendant, that, if he would make a confession, he would do all he could for him, and no confession was then made, but, after his committal, he made a statement to the turnkey, who held out no inducement and gave no caution, Parke J. said he thought the evidence ought not to be received after what the magistrate had said to him, more especially as the turnkey had not given any caution. *Cooper,* 5 C. & P. 535, 1833.

The rule in *Nute* on second or later confessions confirmed that in *Meynell,* 2 Lewin 122, 1834, where Taunton J. said that the second confession was not receivable, it being impossible to say that it was not induced by the promise which a constable made to defendant in the morning.

Defendant was indicted for murder. Some suspicion having fallen upon him, an overlooker charged him with the murder, which he denied. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own, and added, 'There is no doubt thou wilt be found guilty; it will be better for you if you will confess.' A constable then came in and said to the overlooker, in a tone loud enough for defendant to hear, 'Robert, do not make him any promises': he then made a confession. Patteson

J. said, 'That will not do. The constable ought to have done something to remove the impression from the prisoner's mind.' It was then further proved that the overlooker, about ten minutes after the above confession, delivered defendant to another constable, and that, when the latter received him, the overlooker told him (but not in former's hearing) that he had confessed. This constable took him to his house, and there said, 'I believe Sherrington has murdered a man in a brutal manner.' The wife and brother of defendant were there, and they said to him, 'What made thee go near the cabin?' He in answer made a statement similar in effect to the one he had made before. The constable said nothing at all, but did not caution him, and it was not more than five minutes after he received him into his charge that he made the statement. The constable was not aware that the overlooker had held out any inducement. Patteson J. rejected the second confession, saying, 'There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed, before the second confession can be received . . . the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination.' *Sherrington,* 2 Lewin, 123, 1838: acquittal directed. A servant being suspected of stealing money, her mistress, on a Monday, told her that she would forgive her if she told her the truth. On Tuesday, she was taken before a magistrate and, no one appearing against her, was discharged. On Wednesday, the superintendent of police went with her mistress to the Bridewell, and told her, in the presence of her mistress, that she was not bound to say anything unless she liked; and that if she had anything to say, her mistress would hear her, but (not knowing that her mistress had promised to forgive her) he did not tell her, that if she made a statement it might be used against her. She then made a statement. Patteson J. held that this statement was not receivable, as the promise of the mistress must be considered as still operating on the girl's mind at the time of the statement, especially as the interval was so short; but that if the mistress had not been then present, it might have been otherwise. *Hewett,* Car. & M. 534, 1842. See also *Rue,* 13 Cox C. C. 209, 1876.

Inducement must be positively disproved] It has been held by the C. C. C. R. that it must be *affirmatively* proved, before a confession is admissible, that it was not preceded by any inducement by a person in authority, or that it was not made until after such inducement had clearly been removed. *Thompson,* 1893, 2 Q. B. 12; 62 L. J. M. C. 93; 17 Cox C. C. 641; inducement *possibly* held out to defendant's brother and expected to be communicated to defendant, but not proved to be communicated: c. q. Counsel &c. must therefore satisfy themselves that a confession is admissible before putting it in. *Rose,* 18 Cox C. C. 717; 67 L. J. Q. B. 289; 78 L. T. 119, 1898. This is of great importance, for, such a statement 'once read as evidence, it would be extremely difficult, if not impossible, to prevent it from making an impression hostile to the prisoner upon the minds of an ordinary jury.' Hawkins J. in *Smith,* 1897. The same view is expressed by Patteson J. in *Garner,* 1848, who, having received a confession which he afterwards held was inadmissible, thought he ought to have told the jury to pay no attention to it: c. q. Cf. *Nute, Boswell,* and *Meynell,* 1834.

Artifice or deception] These are admissible provided there have

been no promises or threats. Thus where the confession was made through a false statement by a constable that some of defendant's accomplices were in custody, and defendant was a witness against his accomplices, but on the trial denied everything, and was then himself tried on that confession, all the judges held the conviction good: *Burley,* 1818, 2 *Stark. Ev.* 13 *n.* 3rd ed. 1842. In *Firth,* 8 Cr. A. R. 164, 1913, Avory J. in C. C. A. said: 'No one approves of the police setting traps for prisoners, but, as a matter of law, if the police made an untrue statement to a prisoner which called forth an admission, would it not be evidence?' Where a turnkey promised he would put a letter in the post, but detained it, it was received in evidence as a confession. *Derrington,* 2 C. & P. 418, 1826. So where a person took an oath that he would not mention what defendant told him: *Shaw,* 6 C. & P. 373, 1834; and where a witness promised that what defendant said should go no further, having previously told him, when he asked if he should confess, that he had better not; Coleridge J. remarking that the tendency of what had passed here was to make the confession *true. Thomas,* 7 C. & P. 345, 1836, where, and in *Reason,* 12 Cox C. C. 228, 1872, the true rule is laid down: *per* C. C. A. in *A. James,* 2 Cr. A. R. 319, 1909. One defendant had made a statement to a constable in whose custody he was, but he was drunk at the time; and it was imputed that the constable had given him liquor to make him so. (If this was so, 'it is very doubtful whether evidence so obtained would be admitted.' *T.* s. 880 *n.*) Coleridge J. said, 'I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible . . . it must either be obtained by hope or fear. This is matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury.' *Spilsbury,* 1835.

Two defendants jointly charged were purposely given facilities of communication in custody; their conversation overheard by the police was admissible: *Gardner* and *Hancox,* 11 Cr. A. R. 265; 85 L. J. K. B. 206; 60 S. J. 76; 32 T. L. R. 97, 1915; but see p. 52. H., already charged, was again charged jointly with G. when G.'s and another's statements implicating H. were read by a sergeant to the three together, purposely to elicit admissions: though evidence of what then took place is strictly admissible, the trial judge, if satisfied of *such* a purpose, ought to exclude it: *Ib.*; H.'s c. q.

Violence or restraint] The full court of Hong Kong quashed a conviction for murder where a confession was obtained 'by violence' and in answer to a question defendant believed he was compelled to answer: *Wong Chin Kwai,* &c., 3 Hong Kong L. R. 89, 1908; there the C. J. and another judge said, respectively: 'It is not voluntary if it is obtained by any sort of violence. And I am clearly of opinion that for three or four policemen to go into a man's bedroom at 5 a.m. and wake him up and ask him questions which were intended to and did make him criminate himself, is an undoubted act of violence.' 'A police officer with a posse of men goes to the house of the accused in the morning, before sunrise, and puts to him a question, the answer to which may tend to prove his participation in an alleged murder . . . he was interrogating the accused in such circumstances that I am not satisfied that the answer obtained was a voluntary one. . . . It is impossible to doubt that from the moment the police had entered the house the accused was for all practical purposes as much under restraint as if he had been formally arrested . . . if he had attempted to escape he would have been at once secured, and I think that he must have

been well aware of it: the sergeant certainly had no right to put questions without administering a caution' (112, 113).

Questioning—cautions by constables] A confession is admissible in evidence where it has been elicited by questions put by a person in authority. *Thornton,* 1 Moo. C. C. 27, 1824, where the questions were put by a constable to a boy of fourteen, in circumstances of considerable harshness. A majority of the judges thought the confession good, as there was no threat or promise. In *Kerr,* 8 C. & P. 176, 1837, Park J. seemed to think that it might not be in some cases improper for a policeman to interrogate defendant, but the practice is reprobated by most of the judges: notably so by Erle J. in *Berryman,* 1854, where there being nothing but suspicion against a girl owing to her appearance and recovery of her form, a constable extracted information from her which led to her indictment, but this evidence the judge could not exclude; the magistrate having improperly asked her what she had done with the body, the judge excluded the answer. Nor would he allow a witness to answer, '*In consequence of the answer* to the magistrate, what did you do?' See *Knight and Thayre; Gavin and others,* 15 Cox C. C. 656, 1885.

The controversy is now closed by *Best,* 1909, 1 K. B. 692; 78 L. J. K. B. 658; 100 L. T. 622; 25 T. L. R. 280; 2 Cr. A. R. 30, which practically overruled *Gavin* and *Male* (below)—for the latter see 85 L. J. K. B. 206 and 11 Cr. A. R. 267—and decided that a confession is not inadmissible merely because it is obtained by the questions of a constable arresting: for they often give defendant an opportunity of showing, *e.g.,* that the property is his own. *Liebling,* 2 Cr. A. R. 315, 1909, and *Male,* 17 Cox C. C. 689, 1893, were strong protests against anything in the nature of cross-examination by the constable about or after the time of arrest. The previous too wide ruling was carefully limited in *Rogers* v. *Hawken,* 19 Cox C. C. 122, 1898—not an instance of arrest—both L. Russell C.J. and Mathew J. thinking that it might be very much in the interest of the accused, if innocent, that his immediate answer to a question, suggesting his connection with the charge, should be put in at the trial. What is valuable in previous judgments is preserved in *Gardner and Hancox,* above. In *Miller,* 18 Cox C. C. 54, 1895, Hawkins J. said that it was impossible to discover the facts of a crime without asking questions, and as he held that the questions there were properly put after due warning, he admitted evidence of defendant's answers, saying that every case must be decided according to the whole of its circumstances; defendant was not in custody when interrogated. And where two persons were jointly charged, and a statement which had been voluntarily made and signed by one and implicated the other was read over to the latter by the police who cautioned him, a confession which had then been made and signed by the second was admitted as 'voluntary.' *Hirst,* 18 Cox C. C. 374, 1896. In *Histed,* 19 Cox C. C. 16, 1898, bigamy, there being no evidence of identity, a detective confronted defendant, without any caution, with a clergyman, saying, 'Do you know this gentleman?' She replied, 'You are the Mr. C. who married me,' &c., &c. Hawkins J. called this 'entrapping' and a 'trick,' and declined to allow her statement to be given, adding that without the usual caution, a policeman should ask no questions at all of those in custody, and that he entirely agreed with the ruling in *Gavin* (apparently on the ground of there being no caution).

In *Lewis* v. *Harris,* 24 Cox C. C. 66; 78 J. P. 68; 110 L. T. 337; 30 T. L. R. 109: 1913, Q. B. D., Darling J. (with whom Rowlatt and Atkin JJ. concurred) said: 'The true rule is that nothing must be done' to induce or threaten, 'but short of that, if the person is not in custody, it is certainly not the law that the constable may not make inquiries which may lead to his getting evidence from a person which he may use against the person': *Rogers* v. *Hawken* approved. 'It has never been laid down that a constable making inquiries whether an offence has been committed or whether a particular person has committed it, is bound to caution everybody whom he speaks to. It would be absurd that he should do so.' 'A constable ought not, if he has made up his mind that whatever the answer may be he will arrest the person to whom he is speaking, to ask that person an incriminating question.' But a constable has no right to elicit admissions from those he suspects: *A. Mathews,* 14 Cr. A. R. 23, 1919: c. q.

The authorities were considered by the Judicial Committee (Haldane C., LL. Atkinson, Shaw, Moulton and Sumner) of the Privy Council in *Ibrahim* v. *The King,* 1914, A. C. 599; 24 Cox C. C. 174; 83 L. J. P. C. 185; 111 L. T. 20; 30 T. L. R. 383. There, shortly after a murder, defendant, an Afghan in His Majesty's forces, who was in custody for it, and asked by his commanding officer, 'Why have you done such a senseless act?' replied, 'Some three or four days he has been abusing me, and without doubt I killed him': confession admitted: conviction. The J. C., *per* L. Sumner, purporting to apply English law, thought that 'if the matter is one for the [trial] judge's discretion, depending largely on his views of the impropriety of the questioner's conduct and the general circumstances of the case,' it was not improperly exercised. After reviewing the whole line of cases (above) on the point, L. Sumner added: 'The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. . . . Others less tender to the prisoner, or more mindful of the balance of decided authority, would admit such statements,' and the C. C. A. only interferes if there is a substantial miscarriage of justice.

Ibrahim v. *R.* was dealt with and followed (as was *Thompson,* 1893) by the C. C. A. in *Colpus and others,* 12 Cr. A. R. 193, 1917. There appellants, being soldiers, had made confessions at a military court of inquiry, composed of officers, which were put in against them on their trial for the offences confessed. The C. C. A. declined to hold that because the tribunal consisted of persons in authority over appellants, the latter were induced by fear to make their statements: otherwise no statement made to a person in authority would be admissible. Moreover, there was evidence by a colonel that they were not bound to make the statements (the bulk of their evidence: only a few questions were put to them). Further, the *military* regulation which released a confession from being used in any other *military* proceeding did not bind a civil court, and if that regulation had been set up at the trial as an *inducement* to the defendants, it would have been a matter of discretion for the judge whether it was of the sort that would shut out the evidence.

For questions by the police after caution, but before arrest, see *Myerscough,* L. J. Newspaper, July 7, 1917. 'It cannot be said as a matter of law,' said A. T. Lawrence J., delivering the considered

judgment of the C. C. A., 'that the absence of a caution makes the statement inadmissible': the trial judge must exercise his discretion: *Voisin,* 1918, where defendant, not under arrest, but detained for inquiries, wrote down certain words (to test spelling and handwriting) at the request of police officers: the C. C. A. held that he did so voluntarily,' and that the document was rightly admitted against him.

If there has been a caution by an official with power to have the interrogated arrested, the latter's answers to his questions are admissible, provided the interrogation preceded the decision to arrest: *Booth,* 1910.

In *Voisin,* 1918, A. T. Lawrence J. stated that in 1912 the K. B. D. agreed to the following rules: 1. When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained. 2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any question or any further questions, as the case may be. 3. Persons in custody should not be questioned without the usual caution being first administered. 4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words ('against you') of such caution should be omitted, and that the caution should end with the words, 'be given in evidence.'

Examination of defendant] See p. 59.

In legal proceedings] The rule is that what a person states in a judicial proceeding may be used in evidence against him in other legal proceedings. *Chidley* and *Walker,* 1806—cited in *Lewis,* 1833, affidavit; for the production of documents, see *Leatham,* 1860. This is subject to the common law rule that no one is bound to criminate himself, to which an exception has been made by statute in the case of bankrupts. *Scott,* 25 L. J. M. C. 128; 7 Cox C. C. 164; D. & B. C. C. 47; 2 Jur. N. S. 1906, 1856; *Hillam,* 12 Cox C. C. 174, 1872; *Widdop,* L. R. 2 C. C. R. 3; 42 L. J. M. C. 9, 1872; *Ex parte Schofield,* 6 Ch. D. 230; 46 L. J. Bkcy. 112; 37 L. T. 281, 1877.

For *Accomplices,* see that title.

Bankrupts] See 4-5 G. 5, 59, 15 (8), under *Privilege of Witnesses:* the mode of proving a debtor's admissions at his public examination there allowed does not preclude any other mode of proof, so that on his trial, under (rpd. s. 11 of Debtors A. 1869, now) s. 154 of the Bankruptcy A. 1914, where notes of his public examination had been taken, but not read over or signed by him, parol evidence of the taker of such notes was admissible to prove such admissions. *Erdheim,* 1896, 2 Q. B. 260; 65 L. J. M. C. 176; 18 Cox C. C. 355; C. C. R.

Declarations accompanying acts] have been admitted in evidence: 'the act itself must be in issue or relevant': *Phips.* 47. See also *Res gesta.* On a trial for stealing a guinea and two promissory notes, prosecutor was proceeding to state a confession procured by inducement, when Chambre J. stopped him, but permitted him to prove that defendant brought to him a guinea and a *5l.* Reading-bank note, which he gave up to him as the guinea and one of the notes that had been stolen from him. The judge told the jury, that, notwithstanding the

previous inducement to confess, they might receive defendant's description of the note, accompanying the act of delivering it up, as evidence that it was the stolen note. A majority of the judges (seven) held the conviction right. Two were of a contrary opinion, and one of the two said that the production of the money was alone admissible, and not that defendant said it was one of the notes stolen. *Griffin,* R. & R. 151, 1809. See *Jones,* R. & R. 152, 1809, where the statement of defendant, on producing some stolen money out of his pocket, that it was all he had left of it, was held inadmissible, prosecutor having said 'he only wanted his money, and that if the prisoner gave him that he might go to the devil.' The principle seems to be that the truth of the statement is *guaranteed* by the subsequent act, *e.g.* the finding or delivering up. *T.* ss. 902, 903.

Results of improper inducement] So that if a search for property or a body thus indicated is *ineffectual,* neither confession nor act can be received; a man in custody confessed, under improper inducement, to a theft, and took an officer to a house where and to a person to whom he had delivered the property; the person denied the fact and the property was not found. Held, that the conviction was wrong: neither confession nor acts were receivable. 'The influence which might produce a groundless confession might also produce groundless conduct.' *Jenkins,* R. & R. 492, 1822. Cf. *Leatham,* 1860.

The whole of a statement must be put in together] *T.* ss. 725, 870; in cross-examination, see p. 163. 'There is no doubt,' says Bosanquet Serjt. 'that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, for their consideration, precisely as in any other case where one part of the evidence is contradictory to another.' *Jones,* 2 C. & P. 629, 1827. On a trial for larceny, in addition to evidence of the possession of the goods, counsel put in defendant's statement before the magistrate, in which he asserted that he had bought the goods: Garrow B. directed an acquittal, saying, that if a prosecutor used a defendant's statement, he must take the whole of it together—that, apparently, being the whole of the evidence cited. *Ibid.* So in *Gardner and Hancox,* the C. C. A. thought that a jury should be warned to be cautious of the report of what 'only purported to be a portion' of a conversation which the witness was not intended to hear. But there is not the least doubt that a jury may believe that part which charges defendant, and reject that which is in his favour, if they see sufficient ground for so doing. Thus where, in addition to evidence of the stolen goods being found in his possession, prosecutor put in defendant's examination, which merely stated that the 'cloth was honestly bought and paid for,' Park J. told the jury (who convicted), 'If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him; but if, from his selling it so very soon after it was lost, at the distance of eight miles, you feel satisfied that the statement of his buying it is all false, you will find him guilty.' *Higgins,* 3 C. & P. 603, 1829. So where a man, charged with murder,

confessed that he was present at the murder, but said that it was committed by another person, and that he took no part in it, Littledale J. left the confession to the jury, saying, 'It must be taken all together, and it is evidence for the prisoner as well as against him; still the jury may, if they think proper, believe one part of it, and disbelieve another.' *Clewes.* See also *Steptoe,* 4 C. & P. 397, 1830. In a trial for murder, counsel said he would treat the statements of the defendants before the magistrates (*not* as confessions or any evidence against them) as their defence, and show by evidence that they were not consistent with truth; they were read. *Greenacre,* 8 C. & P. 35, 1837; and this course is frequently adopted in practice.

Confessions not within Jervis's A.] See p. 59.

Evidence only against the confesser] It is quite settled generally, that a confession is only evidence against the person making it, and cannot be used against others. With respect to *Conspiracy,* see that title.

Approvers] See *Accomplices;* and *Gillis,* 1866.

Ipsissima verba] If *Sexton,* 1822, was ever an authority that an oral confession must be repeated word for word, it was destroyed in *Godinho.*

Confessions taken down in writing] If the confession is taken down in writing and signed by defendant, or its truth acknowledged by parol, or if it be written by him, then it is put in as an ordinary document and read by the officer of the court. *Swatkins,* 4 C. & P. 550, 1831. But if it be taken down by a person who is present when the confession is made, and is not signed or acknowledged by defendant, the document is not itself evidence, but may be used by the person who made it to refresh his memory. *Ib.* note *b: Layer; Sexton,* 1882; cf. *Mitchell,* 1892. If the confession is contained in a document, which is in existence and admissible in evidence, parol evidence cannot be given of it. This follows from *Gay,* 1835.

B. *Statements Incriminating Defendant by Others.*

(i) *Before Trial.*

Silence] Hawkins J. denied in *Smith,* 1897, that *any* statement (other than a dying declaration) made in the presence of the accused is evidence against him; to make it so, evidence must 'be adduced which would justify the jury in finding that the prisoner having heard the statement, and having the opportunity of explaining or denying it, and the occasion being one upon which he might reasonably be expected to make some observation, explanation, or denial, by his silence, his conduct, or demeanour, or by the character of any observations or explanations he thought fit to make, substantially admitted the truth of the whole or some portion of it;' whether there is any such justifying evidence is for the judge (cf. *Nute*); as *Smith* only said of the adverse statement, 'This is not true,' the judge excluded it when tendered. *T.* s. 907; *Phips.* 242.

But the *dictum* in *Smith* was absolutely denied by the C. C. A. in *G. Thompson,* 1910, 1 K. B. 640; 79 L. J. K. B. 321; 102 L. T. 257; 74 J. P. 176; 26 T. L. R. 252; 4 Cr. A. R. 45, where the facts were exactly like those in *Bromhead,* 1906, except that *Thompson* strenuously denied the co-defendant's allegation, and the latter was called.

The law was settled by the H. L. (Haldane C., the E. of Halsbury, LL. Dunedin, Atkinson, Moulton, Parker and Reading C.J.) in *The Director of Public Prosecutions* v. *Christie,* 1914, A. C. 545; 83 L. J. K. B. 1097; 24 Cox C. C. 249; 111 L. T. 220; 78 J. P. 321; 58 S. J. 515; 30 T. L. R. 471; 10 Cr. A. R. 141. Part of the headnote of C. A. R. is:—It is a rule of law that an incriminating statement made in the presence and hearing of the defendant, even on an occasion which would reasonably be expected to call for some explanation from him, is not evidence against him on his trial, of the facts therein stated, save in so far as he has accepted the statement. But a mere denial by him of the truth of such a statement does not in law render that statement inadmissible against him. To this extent *Norton* [below] is overruled. In practice, however, there is a rule of prudence and discretion that such a statement should not be tendered until, in the opinion of the judge, there is a foundation for a reasonable inference by the jury that the defendant accepted it or part of it. If, notwithstanding this rule, such a statement has been given in evidence, the judge, if he thinks that it should have been withheld, should caution the jury concerning its true effect. In this respect the judgment in *Norton* represents the correct practice. It is competent (L. Moulton doubting) to prove by other witnesses who were present that the prosecutor identified the accused shortly after the occurrence of the offence charged. Held, by the Lord Chancellor, LL. Dunedin and Reading C.J. that such evidence ought to be confined to the mere fact of identification and not to be allowed to contain a repetition of the details of the offence; by LL. Atkinson and Parker that the details are admissible as amplification of the act of identification. Held (by all the lords mentioned except L. Moulton), that in this case it [hearsay evidence of what prosecutor said when he identified defendant] was not admissible as part of *res gesta.* (The C. C. A.—which could not distinguish *Christie* from *Norton*—was affirmed on another point, for which see p. 487.)

The trial, 9 C. A. R. 169, was for indecent assault on a boy of five; his mother, a witness, was asked about a statement he made to her in defendant's hearing not long after the time when (as it afterwards appeared) an assault on the child was committed; on objection taken, her evidence was postponed, and the boy called, but not sworn: the magistrate had refused to call him in view of his infancy, and the defence suggested that he ought not to be called: he gave an account of the assault, and identified defendant: he was not asked about the statement in question: the mother, recalled, said that when they and a constable were near defendant, the child said, 'That is the man, mum,' and when the constable asked, 'which man?' he went up to defendant and said, 'That is the old man, mum, who——,' describing the offence: and accused replied, 'I am innocent': corroborated by the constable: c. q. *Norton,* 1910, 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 60; 26 T. L. R. 550; 5 C. A. R. 7, 65 (carnal knowledge of a girl of six and a half: the child was not called (though, at a former trial, she was, by desire of the court). The next morning—the earliest possible moment—she went with her

mother (the latter swore) and denounced defendant, who denied (or, at any rate, did not admit) the charge. It was admitted that the jury were misdirected: c. q. on this ground: the judgment (*per* Pickford J.) is, since *Christie,* only of authority on the function of the judge under this head. It was followed in *Hickey,* 6 Cr. A. R. 200; 27 T. L. R. 441, 1911. Appellant denied the truth of a statement made by a co-defendant on arrest, and that it was made in his hearing: but the judge put it as evidence of the truth: c. q. In *A. J. Wilson,* 6 Cr. A. R. 207, 1911, the C. C. A. condemned the admission of a written adverse statement by defendant's wife, though she was not called; and in *Stroud,* 7 Cr. A. R. 38, 1911, that by two accomplices made in defendant's presence, to which he in no way assented. See *Tacit Admissions,* below.

Incriminating statements by co-defendant] But a difficulty occurs where a confession by one defendant is given in evidence, which implicates others by name, about the propriety of suffering those names to be mentioned to the jury. Several cases are collected in 1 Lewin, 107, 1829-33, which show that Littledale J., Alderson B., and Denman C.J. considered that the whole of the confession, whether verbal or written, ought to be presented to the jury, not omitting the names; Parke J. thought otherwise. See *Fletcher,* 4 C. & P. 250, 1829, and *Clewes,* in both of which Littledale J. says, that he had 'formed his opinion after much consideration,' and told the jury not to pay the slightest attention to anything implicating any one but the confesser (in *Clewes,* however, it does not appear that any one else was *then* on trial). *Bromhead* and C. were charged together with stealing and receiving, and C. while in custody made a written statement implicating Br., which was read to him by the police in the presence of C., and he made no reply; C. died before the trial; the C. C. C. R. held that the statement was properly received: 71 J. P. 103, 1906. See *Thompson,* 1910.

The confession of the principal is not admissible against the accessory. *Turner* was indicted for receiving [see that title] sixty sovereigns recently stolen by one Sarah Rich. To establish the larceny the prosecution proposed to prove a confession by her, made before a magistrate in the presence of Turner, but not on oath, in which she stated various facts, implicating herself and others, as well as him; she was not called. Patteson J. refused to receive anything which was said by Rich respecting defendant, but admitted what she had said respecting herself: Turner was convicted. Having afterwards learned that a case had occurred before Wood B. at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty, and the receiver not guilty, and that Wood B. refused to allow the plea of guilty, to establish the fact of the stealing by the principal, as against the receiver, Patteson J. thought it proper to refer to the judges the question, 'Whether he was right in admitting the confession of Sarah Rich?' They 'were unanimously of opinion that' her 'confession was no evidence against' Turner, 'and the conviction was held wrong; and many of them appeared to think that had' she 'been convicted and the indictment against' Turner 'stated not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved' *aliunde: Turner,* 1 Moody C. C. 347, 1832; and see *Appleby,* 1821. But in *Cox,* 1 F. & F. 90, 1858, Crowder J. admitted against a receiver the confession of the thief made in defendant's

presence as evidence of the fact of stealing, but on what ground it is impossible to say from the extreme brevity of the report. In *Murtrie,* 6 Cr. A. R. 128, 1911, receiving, the thief first implicated, then exonerated defendant, but the first statement, which defendant denied at the time, was given in evidence: c. q. See under *Receiving.* Where counsel opened no case against one of two defendants, and was about to detail to the jury certain statements made by that one, incriminating the other, Pollock C.B. interposed, saying that those statements ought not to be repeated merely because they were jointly charged, and that the proper course would be to take an acquittal of the one and examine him as a witness, and this was done: guilty. *Gardner* and *Humbler,* 9 Cox C. C. 332; 56 C. C. C. Sess. Pap. 708, 1862: see *Morse,* 1838.

Agents] An admission by an agent is never evidence in criminal, as it is sometimes in civil, cases, in the sense in which an admission by defendant himself is evidence. Thus, in order to make a client criminally responsible for a letter written by his solicitor, it is not sufficient to show that such letter was written 'in consequence' of an interview, but it must be shown that it was written by the instructions of the client. *Downer,* 14 Cox C. C. 486, 1880: C. C. R.: c. q. Where a person is charged with an offence through the instrumentality of an agent, then it becomes necessary to prove the *acts* of the agent; and, in some cases, as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced. Thus, on the impeachment of *L. Melville,* it was decided that a receipt given in the regular and official form by Mr. Douglas, L. Melville's attorney to transact the business of his office as treasurer of the navy, and to receive and give receipts for all money, *who was dead,* was admissible against L. Melville to establish the single fact that a person appointed by him as his paymaster did receive from the exchequer a certain sum in due course. 29 St. Tr. 746-64, 1806. Had, however, Douglas been alive at the time, there can be no doubt that he must have been called; and of course he might have proved the receipt of the money. 'In allowing this receipt of Mr. Douglas to be read nothing is proved, but that this sum was issued to' him 'under the power of attorney from L. Melville . . . but it is a totally different question in the consideration of criminal as distinguished from civil justice how' he 'may be affected by the fact when so established:—The receipt by' Douglas 'would in itself involve him civilly, but could by no possibility convict him of a crime': *per* Erskine C.

Agent's conduct] In the *Queen's case,* at 304, the judges held that evidence to show that an agent of the prosecutor, not called as a witness, had offered a bribe to some one to induce him to give evidence in support of an indictment, or to bring him papers belonging to the accused—such person not having been called as a witness—could not be admitted to discredit generally the witnesses the prosecutor did call, but they were 'by no means prepared to say' that in some circumstances it might not be proper to let such proof go to the jury, and their inclination was rather to admit than to exclude it. Cf. p. 119.

By the prosecutor] In *Arnall,* 8 Cox C. C. 439, 1861, rape, Martin B. admitted evidence of what a relative of prosecutrix said in her presence to a relative of (absent) defendant 'about making it up,'

saying: 'In criminal cases the prosecutor, although not in strict law a party to the case, is so in fact, and I think that the rule applicable to conversation in the presence of a party in a civil case might be fairly extended to a conversation in the presence of the prosecutor in a criminal case': discussed 2 Russ. Cri. 2203 *n.* The point is not of much practical importance, but see *Phips.* 257.

Incriminating statements in judicial proceedings] A deposition of a witness, or the examination of a co-defendant taken before the magistrate, is not admissible merely because the party affected by it was present, and had an opportunity of cross-examining, or denying, or commenting on the evidence; neither can any inference be drawn from his silence. *Appleby,* 3 Stark. N. P. 33, 1821; *Melen* v. *Andrews,* M. & M. 336, 1829; *Turner,* 1832; *Swinnerton,* 1 Carr. & M. 593, 1842. See *Silence,* above. In none of these cases (except *Melen* v. *Andrews*) was anything said about the regularity of judicial proceedings (which prevents the free interposition allowed in ordinary conversation: *per* Parke J.); in the others it was held that defendant was not called on to answer statements not on oath, and therefore not those of co-defendants; in *Melen,* though the plaintiff against whom a deposition before magistrates was offered could have cross-examined or commented on it, but did not, yet the deposition was (doubtfully) rejected by Parke J., who remarked that, 'of course, it would be rejected if offered against a third person who merely happened to be present in court.' *A fortiori,* a deposition on a charge dismissed before the accused had an opportunity of replying would be inadmissible under the 'regularity' rule. For other legal proceedings as evidence of *conduct,* see *Tacit Admissions,* below.

C. *Tacit Admissions.*

Inferences from demeanour and conduct] See, generally, B. above. The conduct or demeanour of a person charged, or on allusions being made to the charge, is frequently given in evidence against him. Thus, although neither the evidence nor the declaration of a wife was admissible against her husband on a criminal charge, yet observations made by her to him are within the (general) rule that 'whatever was said to a prisoner on that subject . . . to which he made no direct answer, was receivable, as evidence of an implied admission on his part': *Smithies,* 5 C. & P. 332, 1832: *per* two judges; prosecution alleged his reply was 'evasive': *Bartlett,* 7 C. & P. 832, 1837. So, also, a statement made by a wife of a defendant in his presence to a third person is admissible, at all events if made with his authority: *Mallory,* 13 Q. B. D. 33; 53 L. J. M. C. 134; 15 Cox C. C. 456, 1884: C. C. R. So evidence of a defendant's demeanour on a former occasion is admissible to prove guilty knowledge: *Tattershall: Phillips,* 1829. As the demeanour of a person on hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution.

For such a charge in a letter to a third person shown to defendant, see *Brooks,* 1911.

In *Ellis,* 1910, evidence was properly given that there had been a civil action for fraud in respect of all the articles charged in the indictment; that defendant was not called to deny the fraud; that no

witnesses were called for him; that 'large' damages were given against him; that after the first day of that trial he had gone abroad and remained away till criminal proceedings were begun: the rule is that defendant's conduct on being charged may be given in evidence; 'if he is silent it may be evidence against him.' The prosecution would not have been entitled to put in that part of the statement of claim containing charges *not* in the indictment; but it ought not to have been stated that the judge ordered documents to be impounded (nor, perhaps, what the verdict was): 5 Cr. A. R. 54: five judges: c. q. In *Firth*, 1913, the C. C. A. approved of an incriminating statement having been put in against defendant, not a proof of its contents—as it was not made in his presence—but of his conduct (silence) on hearing it. In *Page*, 1913, the answer to a charge was equally consistent with innocence and guilt: c. q.

* EXAMINATION OF DEFENDANT (INDICTABLE OFFENCES).

II. Proceedings before Justices.

A. *Depositions of Witnesses.*

Use] It is a well-known common law rule of evidence that what a witness has once stated (i) in a judicial proceeding, and (ii) subject to cross-examination, may, if (iii) that witness cannot possibly be produced again, be given in evidence, provided (iv) the inquiry be substantially the same on both occasions (or 'that the *same issues* are involved': *Phips.* 416), and between the same parties 'or those claiming under them.' *T.* s. 464. *Jolliffe,* 4 T. R. 290, 1791. This applies not only to evidence taken at different stages of the same inquiry, but to successive inquiries into the same matter; as, for instance, to a new trial granted in a case of misdemeanour.

It is also a well-known rule of evidence that on any point material to the issue, a witness may be contradicted or discredited by showing that he has on a previous occasion made statements at variance with that made by him at the trial. This includes all previous statements of the witness, whether on oath or not, and whether in a judicial proceeding or not: see 28-9 V. 18, 4, 5.

Depositions here mean those taken in magistrates' or coroners' courts: occasionally the word means the information, *e.g.*, in *Fearshire.*

See, further, *Purposes,* below.

Witness—dead, ill, kept out of the way: common law] See *Beeston,* 1854. Depositions are admissible as substantive evidence at common law should the witness be either dead; 1 Hale P. C. 305: *L. Morley* and *Bromwich,* 1 Levinz 180; 6 St. Tr. 776; Kel. 55, 1666—coroner's depositions: *Paine,* 1 Salk. 281; 1 L. Raymond 729, 1695—rule not to be extended beyond felony; *T.* s. 472; *Westbeer,* 1739—information on oath of dead accomplice; no opportunity of cross-examination; strong corroboration held to be necessary; or be in such a state as never to be likely to be able to attend the assizes; *Hogg,* 6 C. & P. 176, 1833; *Wilshaw,* Carr. & M. 145, 1841—magistrate or clerk, if convenient, to be called; or if the witness be kept away by the practices of the defendant; *L. Morley,* above; *Guttridge,* 9 C. & P. 471, 1840; *Scaife,* 17 Q. B. 238; 20 L. J. M. C. 229; 2 Den. 281; 5 Cox C. C. 243, 1851; or is insane, *Inhabs. of Eriswell,* 3 T. R. 720, 1790.

Admissibility is governed by 11-12 V. 42, 17:† 'In all cases where

* The phrase is historical, going back at least to 1-2 P. & M. 13, 4, 1554; but it survived long after judicial interrogation of prisoners died out. See *Wilson,* 1817. In a sense the phrase has been revived, since defendants as witnesses may be 'examined.'

† The provisions of this Act are best understood from the history of the law, for which see *Stephen,* 1 *Hist. Cr. L.* 219—221.

any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if, upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if it also be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or attorney, had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.' A doctor's certificate at the trial is not evidence: there must be a witness to prove inability to travel, but not necessarily a medical witness: *Totterdell.*

Criminal Law Amendment A. 1867] By 30-1 V. 35, 3, provision is made for taking the depositions of persons dangerously ill and not likely to recover, and for rendering such evidence admissible in the event of the death of such persons. The proviso to s. 6 requires that the court must be satisfied that reasonable notice of the intention to take the statement was served on the person, 'whether prosecutor or accused,' against whom it is proposed to be read, &c. This *must* be a notice in writing, and the statement is inadmissible against a defendant where he has only received oral notice, although he was present when it was taken. *Shurmer,* 17 Q. B. D. 323; 55 L. J. M. C. 153; 55 L. T. 126; 34 W. R. 656; 50 J. P. 743; 16 Cox C. C. 94, 1886, C. C. R.: c. q.

S. 17 *and s.* 6 *above—dangerous illness*] The combined effect of these ss. is that 'A justice, where a person is charged before him with an[y] indictable offence, is bound, under s. 17, . . . to take the depositions of a witness who is dangerously ill at the place where such witness is, if it is practicable for him to do so,' which he must decide *judicially:* if it is not so practicable, 'another justice may take such deposition under s. 6.' *Bros, ex p. Hardy,* 22 Cox C. C. 352; 74 J. P. 483; 55 S. J. 47; 22 T. L. R. 41, 1910, K. B. D. Cf. *Katz,* 64 J. P. 807, 1900, correcting *Simpson,* 62 J. P. 825, 1898.

The deposition of a deceased witness in a *previous* trial (of a

different charge), which was read against *Buckley,* 1873, stands on a different footing: viz., 'as affording a motive for revenge.' *T.* 467 *n.*

Witness kept out of the way] It will be observed that only two cases are mentioned in s. 17 above, 'where the witness is dead, or so ill as not to be able to travel' (but in *Austin,* below, Coleridge J. thought there might be other cases). It is not said that the deposition would be admissible if the witness were kept out of the way by defendant's procurement, but that is well established at common law. See *T.* ss. 472-8. However, in *Scaife* (above), who was indicted together with Rooke and Smith for larceny, evidence was given that by the procurement of Smith one of the witnesses for the prosecution had been kept out of the way, and her deposition was tendered; the evidence was admitted to be receivable against Smith (who was acquitted), but it was said that it was no evidence against Scaife and Rooke. In the Q. B. it was held that the judge ought to have told the jury that the evidence applied to the case of Smith *only,* and not to that of either of the other defendants, and a new trial was granted to Scaife and Rooke. Incidentally, therefore, the admissibility of the depositions against a defendant who has *himself* procured the absence of a witness, is recognised by this case.

Insane] There does not appear to be any criminal case, either before or since the statute, in which the depositions have been admitted on the ground of the witness being insane. In civil inquiries this is considered a good ground of admission: *Eriswell;* and it is said in *Marshall,* C. & M. 147, 1841, that Coltman J. thought it a good ground in criminal cases also (though the insanity was only temporary: but see *T.* s. 478); cf. *Peacock,* 1870.

Abroad] It is not a sufficient ground that the witness is absent in a foreign country. *Austin,* 25 L. J. M. C. 48; 7 Cox C. C. 55, 1856.

The Merchant Shipping A. 1894] By 57-8 V. 60, 691, 'upon due proof' that a witness cannot be found in the United Kingdom (if the proceeding is there instituted), and so of a British Possession, a deposition (previously made out of the United Kingdom or in the Possession respectively) by him on oath in relation to the same subject-matter before any justice, &c., in presence of the accused if the proceeding is criminal, is admissible. The deposition must be authenticated by the signature of the judge, &c., which need not be proved. The judge must certify that the accused was present. Where an officer of the Board of Trade, after the examination of the official records, stated that the ship of which the witnesses were officers had never been in this country, it was held sufficient evidence (under a previous A.) of their not being in the United Kingdom. *Conning,* 11 Cox C. C. 134, 1868; *Anderson,* 11 Cox C. C. 154, 1868; in *Stewart,* 1876, the witnesses, seamen in a British ship were proved by affidavit to be still at sea; the depositions were read to the grand jury and the trial adjourned to the next assizes, when on a further affidavit of like effect the judge ordered the trial to proceed. Cf. *India, &c.,* below.

Degree of illness] The following cases have been decided. Where the physician stated that the witness could not speak or hear from paralysis, and that if brought to court he would not be able to give evidence, yet that he might be brought there without danger to life,

though he, as his physician, would not permit the witness 'to roam abroad if he knew it,' it was held by the C. C. C. R. that the deposition was rightly received. *Cockburn,* Dears. & B. C. C. 203; 7 Cox C. C. 265, 1857. There may be incidents in pregnancy bringing the case within the statute. *Stephenson,* L. & C. 165; 31 L. J. M. C. 147; 9 Cox C. C. 156, 1862; and see *Goodfellow,* 14 Cox C. C. 326, 1879, and *Wellings,* below—no doctor, a deposition admitted; also *Butcher,* 1900. Where a witness came to the assizes, but returned home by the advice of a doctor, who deposed that it would have been dangerous for him to remain, Parke B. held that the witness was 'unable to travel' within this s., and allowed his depositions to be read. *Wicker,* 18 Jur. 252, 1854. A superintendent having seen a policeman in bed two days before the trial stated that he appeared ill, and that when he tried to get out of bed he could not stand, but he was unable to state what was the matter with him, 'except that he believed it to be rheumatics,' and no doctor was called. Held, that the deposition could not be admitted: *per* Piggott B., *Williams,* 4 F. & F. 515, 1865. Mary Lee, whose deposition it was proposed to read, lived not far from the court. Her doctor was called, and said, 'I know Mary Lee; she is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous to her to be examined at all. I think she could distinguish between the court going to her house and she herself coming to the court.' The C. C. C. R. held that the deposition was not admissible, and L. Coleridge C.J., who had admitted it, said 'it would be dangerous to admit any such latitude of construction.' *Farrell,* L. R. 2 C. C. R. 116; 43 L. J. M. C. 24; 12 Cox C. C. 605, 1874: c. q. See also *Welton,* 9 Cox C. C. 296, 1862; *Bull,* 12 Cox C. C. 31, 1871—48 hours since witness last seen by doctor and might have recovered: deposition refused. A medical certificate, however authentic in itself, is no legal evidence of the state of the witness. His condition must be proved on oath to the satisfaction of the judge who tries the case. *Stephenson,* above. But it is the established practice that the doctor, if witness be attended by one, *must* be called to prove his condition: *Riley,* 3 C. & K. 116, 1851; but that where a witness is not attended by a surgeon—especially if permanently ill—other evidence that the witness is unable to travel is receivable. In *Philips,* 1 F. & F. 105, 1858, Erle J. said, 'The evidence, no doubt, is as strong as it can be, short of that of a medical man, but the case may be easily imagined of a person extremely unwilling to appear as a witness, and so well feigning himself to be ill as to deceive any one but a medical man'; deposition not allowed to be read to the grand jury. Cf. *Clements,* 1851.

Documents] written by a witness below and exhibited to his deposition may be put in without calling him: *Liebling.*

In cross-examination] After the passing of the Prisoner's Counsel A. 1836, 6-7 W. 4, 114, the judges met and drew up five rules with regard to trials for felony, three of which related to the depositions on cross-examination of the witnesses for the crown. They are all set out in 7 C. & P. 676, and those three in *T.* s. '1449 *n.* who remarks that since 28-9 V. 18 they 'would appear to be no longer in force.' Consequently they are not reproduced here.

The effect of them was that the depositions returned by the com-

mitting magistrates must, if anything said at that inquiry was to be used to discredit a witness, be first put in; but these rules expressly recognised that what appeared on the depositions was not in any way conclusive of what passed thereat, which, after the depositions had been once read, might be proved by the witness's admission, or, if it was material, by other witnesses. This appears to be the view of Erle J. in *Curtis,* 2 C. & K. 763, 1848: *contra,* Holroyd J. below.

Additions] It has been suggested that, in the absence of the witness, there is a difference between *adding* to and *contradicting* depositions: *per* Alderson B. in *Coveney,* 7 C. & P. 667, 1837; 'and though it cannot be denied that, on general principles of law, a deposition may be added to, there are very good reasons why an exception should be made in this particular case, for there might be very great danger in trusting to the oral repetition,' &c. [7th and foll. edns. of this work.] Cf. *Moore,* 1869. See *T.* ss. 893-4: *Phips.* 546, who doubts the distinction suggested, but adds, 'there seems no valid reason why parol additions should not now (as formerly, *Leach* v. *Simpson,* 5 M. & W. 309 [1839, *per* Parke B.]) be admitted.'

Substantive evidence—absent witness] When depositions are used to supply the testimony of an absent person, there is then considerable authority for saying that the return of the magistrate is the best and only evidence of what was said before him. That it is the best evidencce has always been acknowledged, and was laid down by L. Mansfield in *Fearshire,* 1 Lea. 202, 1779: 'parole testimony cannot, at any rate, be given of the subject-matter of the *information* unless it be previously shown that the informant did not give his deposition on oath; and that his information was not reduced into writing': evidence rejected: acquittal; and that it is the only evidence has also generally been acknowledged, and was so said by Holroyd J. in *Thornton,* 1817; 2 Ph. & Arn. Ev. 104, 10th ed. *n.,* 1852: murder. This point was put beyond doubt in *Venafra* v. *Johnson,* 1 Moo. & R. 316, 1834: 'evidence was admissible to prove anything the party had said as part of his *information*' (*per* all the judges of the C. P.) 'either for the purpose of explanation or addition.'

A document written by a witness at the hearing and exhibited to his deposition may be put in at the trial without calling the witness: *Liebling,* C. C. A.

To discredit witness] Obviously, when a deposition of an absent person is put in, there is greater risk in adding to or varying that document by oral testimony, than if the witness is present, but these considerations do not apply with equal force to depositions produced for the purpose of contradicting or lessening the credit of a present witness. For, in the first place, many matters which do not appear material to the charge at the preliminary inquiry, and which, therefore, might not be returned, may become exceedingly important for the purpose of testing his testimony; and, moreover, the witness being himself present, his own memory and conscience can be searched about what was really said below.

The result suggested is, that to discredit a witness the depositions may be added to but not varied; but, when they are used as substantive evidence in the absence of the deponent, the return of the justices is final and conclusive; but for this distinction there is no express authority.

No deposition—informality] There is still one difficult question which is not unlikely to rise, and which has not yet been discussed; *i.e.* whether, in any case, if no deposition be returned, or one which from some *informality* cannot be used, other evidence ought to be received of what was said by the witness. It would seem that, on general principles, all the usual evidence would be let in in such a case, and this view is maintained, deponent being dead, 2 Russ. Cri. 2243 *b*, note 3, in opposition to a contrary one. In *Reed,* M. & M. 403, 1829, an 'examination of a prisoner' by a *coroner* was inadmissible, owing to an irregularity in taking it; the coroner was allowed by Tindal C.J. to give parol evidence of it. See *T.* ss. 400, 894, 1754. Cf. *Reason,* at 32 St. Tr. Cf. under *Examination of Defendant;* and see *Informality,* below.

Additional evidence—notice] It is a common practice to serve on a defendant, before trial, a copy of evidence which, he is informed, some one not called before the committing justice or coroner will depose to. The custom began after 1836, when first defendants were allowed to see depositions: *per* Cresswell J., *Ward,* 2 C. & K. 759, 1848: 'material' evidence added by witness to his deposition. Although it is a matter for strong comment to the jury, yet it is no objection in point of law that defendant has had no notice of the name of a witness not called before the magistrate or of the substance of his evidence, if relevant, against him: *Greenslade,* 11 Cox C. C. 412, 1870; and it there appears that the report of the ruling to the contrary of Willes J. in *Stignani,* 10 Cox C. C. 552, 1867, is incorrect. It is obvious that such a system may be abused. The effect on the mind of the defendant may be such as easily to lead to a confession or prejudicial statement, whether the facts alleged in the 'proof' are true or false, and as it is unsworn it would be difficult to reach those responsible if a trap had been laid for the accused. In *Firth,* 1913, Avory J. said: 'As a matter of law, if the police made an untrue statement to a prisoner which called forth an admission, would it not be evidence?': 8 Cr. A. R. 164.

It is a question for the judge to determine whether the proof of being 'so ill as not to be able to travel' is sufficient; and the C. C. C. R. would not interfere with the exercise of his discretion. *Stephenson,* above; *Wellings,* 3 Q. B. D. 426; 47 L. J. M. C. 100; 14 Cox C. C. 105, 1878; *Noakes,* 1917, 1 K. B. 581; 86 L. J. K. B. 594; 81 J. P. 140; 33 T. L. R. 201; 12 Cr. A. R. 204.

The inability of the witness to attend need not be permanent. Before the statute, it seems to have been doubted whether a merely temporary illness was sufficient ground of admissibility. *T.* s. 481; *Savage,* 5 C. & P. 143, 1831: deposition rejected.

Proof] But there can be no doubt that a judge would now exercise his discretion and decide whether, in the interests of justice, it were better to read the deposition, or to adjourn the trial in order to hear the witness. *Tait,* 2 F. & F. 553, 1861, where Crompton J. postponed the trial to the next assizes, thinking the statute gave him a discretion.

Informality] To render a deposition of any kind admissible, it must be proved to have been formally taken. The requirements of s. 17, above, must be proved, by the person tendering, to have been complied with; though the usual presumption in favour of the proceed-

ings having been regular, will be made, if the depositions are in form correct.

Improperly received below] It would seem that such a deposition would be inadmissible at the trial: *per* Darling J., *Acaster,* 7 Cr. A. R. at 190.

Mode of taking—caption] The title or *caption* need state no more than that it is the deposition of the witness, and also the particular charge to which it has reference. Where, on a trial for unlawfully obtaining a promissory note by false pretences, a deposition, proved to have been regularly taken before the committing magistrate, stated, by way of caption, that it had been taken 'in the presence, &c.' of defendant, 'who is now charged . . . for obtaining money and other valuable security for money,' &c., omitting 'unlawfully'; it was held, that such caption charged an offence against her with sufficient distinctness, 'so as to warn and apprize her of the matter to which her cross-examination should be directed,' and that the deposition had been properly received, 'and there is no authority requiring any title or . . . caption to the examination.' *Langbridge,* 1 Den. C. C. R. 448; 18 L. J. M. C. 19; 3 Cox C. C. 465, 1849. One caption at the head of the body of the depositions taken in the case is sufficient and the particular one sought to be put in need not have a separate caption. *Johnson,* 1847. So where the depositions had one caption, which mentioned the names of all the witnesses, and at the end one jurat [the official statement that the preceding contents were duly 'taken and sworn'], which also contained the names of all the witnesses, and on which was the signature of the magistrate, each witness having signed his own, Williams J. was of opinion that they were correctly taken. *Young,* 3 C. & K. 106, 1850. A deposition of a dead woman, not taken by the committing magistrate, without a caption, and therefore 'not showing on what charge it was taken,' is inadmissible, though otherwise formally taken. *Newton,* 1 F. & F. 641, 1859: parol evidence not allowed to 'eke out' what actual charge was.

Presence of defendant—cross-examination] Defendant must have an opportunity of cross-examining the witness. Where he was not present until a certain part of the deposition, marked with a cross, but heard the remaining part, and when it was concluded, the whole was read over to him, Chambre J. refused to admit that part which had not been heard by him. *Forbes,* Holt, N. P. R. 599, *n.*, 1814. But when in murder, the deposition of the deceased was tendered, it appearing that a charge of assault was preferred, and that the deposition had been taken *on that charge,* defendant not being present when the examination commenced, but having been brought in before the three last lines were taken down, and the oath was again administered to deceased in his presence, and the whole of what had been written down was read to him, and deceased was then asked whether what had been written was true, and said it was perfectly correct, and the magistrate then proceeded to examine deceased further, and the three last lines were added to the deposition, and defendant was asked again whether he chose to put any questions to the deceased, but did not, on objection taken, on the authority of *Radbourne,* that he had not been present, the deposition was admitted—rightly, as ten (to one) judges held. *Smith,* R. & Ry. 339; 2 Stark. N. P. 208, 1817. In *Beeston,* Dears.

& P. C. C. 405, 1854, Alderson B. stated that he still thought he was right in objecting, as counsel, to the admissibility of the deposition in *Smith,* on the ground that 'the prisoner had not a sufficient opportunity of cross-examination; that he had no opportunity of hearing the witness give his answers and seeing his manner of answering, and that so much of the evidence as had been taken in the prisoner's absence was inadmissible.' And Platt B. in *Johnson,* 2 C. & K. 394, 1846, very strongly blamed the practice of taking depositions in the absence of defendant (and the magistrates), and then supplying the omission by reading them over when they arrived, and asking him if he would like to put any questions. *Additional* depositions were taken in the absence of defendant (but it was not sought to read these); held, not to affect a previous confession. *Bell,* 1831. There is a presumption that if defendant was present he had a full opportunity of cross-examination, but it may be rebutted. *Peacock,* 12 Cox C. C. 21, 1870—accused insane, at hearing below; see *Arnold,* 1838, and *Painter,* 1846.

Presence of a magistrate] Defendant had a full opportunity of cross-examining by his attorney, and 'the heads' of what they [witnesses] could prove were taken down by a clerk. Afterwards another clerk, not present before, examined the witnesses from the notes so taken, in the absence of the magistrate, wrote down the answers, and obtained their signatures. The attorney was not there, though he might have been if he had liked, and defendant was not asked if he would then cross-examine. He and the witnesses were then taken before the magistrate, and the evidence taken was read over to them. He was not then asked if he would cross-examine, nor was his attorney present, though he might have been. The magistrate then cautioned him, he then signed his own statement, and the magistrate signed the depositions: held, that the depositions were not taken in accordance with the statute, and were inadmissible. *Watts,* 9 Cox C. C. 395; 33 L. J. M. C. 63; L. & C. 339, 1863: c. q. See also *Christopher,* 1850.

Omissions] Parke B.'s exhortation to magistrates in *Thomas,* 7 C. & P. 817, 1837 to 'be extremely careful in preparing depositions, and' making a 'full statement of all the witnesses say upon the matter in question,' is not less pertinent since the statute. Where there was an omission of a conversation sworn to at the trial, as having been deposed to the magistrate, L. Denman C.J. thought the complaint of counsel, that such omission was unfair to defendant, was well founded. *Grady,* 7 C. & P. 650, 1836. Nothing should be returned as a deposition against defendant, unless he had an opportunity of cross-examining the deponent: *per* L. Denman C.J., *Arnold,* 8 C. & P. 621, 1838: defendant absent. Where a witness has undergone several examinations, it is proper to return them all. Thus, where a witness for the prosecution had made three statements at three different examinations (once as defendant), all of which were taken down, but only the last was returned—that on the day of committal, Alderson B. said that every one of them ought to have been returned, as 'it is of the last importance that the judge should have every deposition that has been made,' that he may see whether or not the witnesses have at different times varied their statements, and if they have, to what extent they have done so. All depositions that have been made at *all the examinations* touching the offence to be tried ought to be returned: *Simons,* 1834; and whether of witnesses bound over or not (and so,

witnesses for the prosecution or for the defence): *per* Vaughan J., *Fuller,* 7 C. & P. 269, 1836.

Wilde C.J. was of opinion that where in felony a person of weak intellect was examined, the clerk should take down the questions put by the magistrate, and the answers given by the witness, about the latter's capacity to take an oath: *Painter,* 2 C. & K. 319, 1846; cf. *Peacock,* 1870.

Although in felony the committing magistrate need not *bind over* all the witnesses who have been examined before him, but only those whose evidence is material to the charge, it was very desirable that all which had been given in evidence should be transmitted to the judge: *Smith,* 2 C. & K. 207, 1845: *per* L. Denman C.J.

Witnesses for defence] Depositions of defendant's witnesses are now regulated by 30-1 V. 35, 3. If he or his representative cross-examine before the magistrate, the answers of the witnesses ought to be taken down and returned. *Potter,* 7 C. & P. 650 *n.*, 1836.

Signature of each or one for all] The depositions are to be signed by the witnesses and the magistrates. It seems that the signature of one magistrate is sufficient: see the latter words of s. 17. No proof is necessary of the signature of either. 'It is the magistrate's duty to sign every deposition (the witness having first signed it) as the proceedings go on'; *per* L. Denman C.J., *Lord Mayor of London,* 5 Q. B. 564; 13 L. J. M. C. 67, 1844; and if each deposition is signed on the last sheet, each separate sheet need not be signed: *Carrol,* 11 Cox C. C. 322, 1869. Whether one signature by the magistrate at the foot of the whole body of the depositions is sufficient, has been much discussed. On a charge of forging the acceptance of one Winter, who had died before the trial, the clerk proved Winter's examination to have been duly taken, and that he was cross-examined by an attorney; on the prosecutor tendering the examination in evidence, it was discovered that, although the examination itself was duly signed by two magistrates, the cross-examination taken on a later day was not so subscribed. The examinations, however, of two witnesses, called by defendant, and taken at the same time as the cross-examination, were pinned up along with it, and the last sheet of the whole was signed by the magistrates. Alderson B., after consulting Parke B., said that if the clerk could state that the sheets were all pinned together at the time the magistrates signed the last, he thought he could not reject the examination of Winter, but must receive the whole. The clerk not remembering the subject, one of the magistrates was called. He said that the depositions were all accurately taken, and when he signed the depositions they were lying on the table, but he could not state they were pinned together. Alderson B. thereupon rejected both the examination and cross-examination (which, however, were all subsequently read at the instance of defendant). *France,* 2 Moo. & R. 207, 1839. But where the depositions were on separate sheets, but under the one caption 'Examination of J. J. Hill and others in the presence of the prisoners, &c.,' and the whole were attached together, not at the time of signature, but subsequently by the clerk, Pollock C.B. admitted them. *Lee,* 4 F. & F. 65, 1864.

The schedule M. to the Act gives the following form of conclusion:—'The above depositions of *C. D. & E. F.* were taken and [*sworn*] before me, &c.,' and where the depositions had been pinned together

and the magistrate had signed the last sheet, Cockburn C.J., overruling himself in *Richards,* 4 F. & F. 860, 1866, said the depositions were sufficiently signed, and Byles J. said if all the depositions were on one sheet, one signature would be enough, and it could make no difference that the sheets were attached by tape or string or in any other way. *Parker,* L. R. 1 C. C. R. 225; 39 L. J. M. C. 60; 11 Cox C. C. 478, 1870.

Purposes] If the deposition be admissible at all, it is admissible for all the purposes for which ordinary evidence is admissible, and may be used either for or against defendant. It may be used before the grand, in the same way as before the petty jury. *Clements,* 2 Den. C. C. 251; 20 L. J. M. C. 193; 5 Cox C. C. 191, 1851; cf. *Philips,* 1858. In *Gerrans,* 13 Cox C. C. 158, 1876, Denman J. allowed a deposition to be sent before the grand jury without previous proof of the illness of the witness and the due taking of the deposition.

On trial of what offences] Most of the actual cases on this point are those in which the magistrate has inquired into an injury done to the deponent, which subsequently has founded a more serious charge than that first made. The question has then arisen, whether, if defendant be unable to attend the trial, the deposition is admissible, having been given on a different charge. All the cases before s. 17, above, were in favour of such admissibility; *e.g., Smith,* 1817, where, before the magistrate, there was another charge, viz., of robbing a manufactory. Four of the judges who approved the deposition being read at the trial relied on *Radbourne,* 1 Lea. 458, 1787, without which they would have doubted. It seems to have been thought that the statute made some difference in this respect, and the deposition was rejected once or twice in similar circumstances, but in *Beeston,* 1854, the subject was fully considered; there the original charge before the magistrate was feloniously wounding J. A., &c. J. A. subsequently died of the wound, and on the trial for murder, his deposition was received. The C. for C. C. R. unanimously held that the deposition would have been admissible at common law, and the statute 'was not intended to restrict the operation of' the common law. *Beeston* was approved in *J. Edmunds,* 1909. The important thing is a full opportunity of cross-examination on all points material to one charge as well as to the other. So on a charge of uttering a forged note, originally one of false pretences, arising out of the same transaction, and being in fact identical. *Williams,* 12 Cox C. C. 101, 1871.

(iii) *Before a coroner*] By s. 4 (2) of the Coroners A. 1887, 50-1 V. 71, 'It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material; and any such deposition shall be signed by the witness, and also by the coroner.'

By s. 5 (1), 'Where a coroner's inquisition charges a person with the offence of murder or of manslaughter, or of being accessory before the fact to a murder . . . the coroner . . . shall bind by recognizance all such persons examined before him as know or declare anything material touching the said offence, to appear at the next court . . . at which the trial is to be, then and there to prosecute or give evidence against the person so charged.'

(3) 'The coroner shall deliver the inquisition, deposition, and recognizances, with a certificate under his hand that the same have been

taken before him, to the proper officer of the court in which the trial is to be, before or at the opening of the court.' See under *Documentary Evidence.*

By s. 18 (5), 'A person charged by an inquisition with murder or manslaughter shall be entitled to have from the person having for the time being the custody of the inquisition or of the depositions of the witnesses at the inquest, copies thereof on payment of a reasonable sum for the same, not exceeding the rate of three halfpence for every folio of ninety words.'

Where a coroner had neglected to read over a deposition of a witness (since dead), made in defendant's presence, and to get his signature, the judge at the trial rebuked him, as if he, too, had died, the deposition could not have been proved: he declined to admit that a judge's notes were evidence, and so a coroner's were not. *Plummer,* 1 C. & K. 600, 1844.

Admissibility] What has already been said with respect to depositions before 11-12 V. 42, is for the most part applicable to those before coroners. In one respect, however, an important distinction has been taken between the two classes; the coroner's, it is alleged, being admissible, although defendant was not present when they were taken. This is stated in a book of reputation, B. N. P. 242 *a.* (1771), on the authority of two cases, *L. Morley and Bromwich,* 1 Lev. 180; 6 St. Tr. at 776; Kel. 55, 1666; cf. *Harrison,* 12 St. Tr. 852, 1692; and *Thatcher* v. *Waller,* Thos. Jones 53, 1677, and it was done in *Stockley,* 1772, who had absconded from 1753 to 1771; the depositions of three witnesses at the inquest, since dead, were read. It was also said by Buller J. in *Eriswell, Inhabs. of,* that depositions taken before the coroner, in the absence of defendant, are admissible. It has been observed (2 *Stark. Ev.* 278, 2nd ed.), however, that he did not, as it seems, intend to make a distinction between these depositions and those taken before a magistrate, but referred to *Radbourne* as an authority (*on the absence* of defendant), though in that case the depositions were in fact taken *in his presence.* L. Kenyon, also, in the same case, appears to have considered that depositions before a magistrate and before a coroner were on the same footing. The reasons given in support of the distinction are that the coroner's inquest is one 'of office,' and 'is a transaction of notoriety, to which every person has access,' 3 T. R. 722; and that 'the coroner is an officer appointed on behalf of the public to make enquiry about the matters within his jurisdiction; and therefore the law will presume the depositions before him to be fair and impartially taken,' B. N. P. 242. Hotham B. is stated to have received such depositions, though it was objected that defendant had not been present. *Purefoy, Peake, Ev.* 61, 5th ed. 1794. The authorities in favour of such evidence being admitted are not very satisfactory, and there are strong authorities against it; *e.g., T.* s. 494: "There is much doubt on the point.' *Phips.* 460; and see 2 Russ. Cri. 2245. In *Wall,* 1830—cited Russ.—a coroner's deposition was refused, partly because the witness may have been insane, and partly because there was no 'charge' before the coroner though defendant was there, and in *Rigg,* 4 F. & F. 1085, 1866, Smith J. refused to admit such a deposition of a sick witness. It has also been remarked (*Phill. Ev.* 570, 8th ed.) that it appears to be as regular for the coroner to take the depositions in the absence of the defendant as it is for a justice to take them in his presence. 'And it seems an unreasonable and anomalous proposition to hold that on a trial for murder upon the coroner's

inquest, a deposition taken before him, in the absence of the prisoner, is receivable in evidence; but that, if the trial takes place on a bill of indictment, a deposition so taken before a magistrate is not receivable. The same principle which excludes in the one case ought, if it is just and sound, to exclude also in the other.' 2 *Phil. & Arn. Ev.* 109, 110, 10th ed. The question about coroner's depositions (at any rate, on the point of sufficient proof of *illness*) seems to be settled by Darling J.'s remark: 'It seems to me that the old practice as to them has gone.' They, 'in my opinion, now stand on the same footing as depositions taken before magistrates, and all the provisions of 11-12 V. 42 apply.' *Butcher,* 64 J. P. 808, 1900, where, in the absence of medical evidence, pregnancy was not held to admit deposition. But in *Cowle,* 71 J. P. 152, 1907, defendant present, Grantham J. thought that 'admissibility . . . depended on the old common law and was in no way governed by either' the Act of 1848 or that of 1867; and, therefore, excluded such parts as were inadmissible by law; he adhered to this ruling in *Black,* 74 J. P. 71, 1909: defendant present.

Depositions, taken before a coroner, of a witness too ill to attend, may be sent before the grand jury. *Mooney,* 9 Cox C. C. 411, 1863.

The coroner is bound to be present at any trial on his inquisition, and if he is not, he may be fined: *Urwin,* Carr. Suppl. 17, 1827.

(iv) *India, the Colonies, abroad, &c.*] By s. 126 (6) of 5-6 Geo. 5, 61: "All such examinations ['depositions,' *ib.* (4)] and proceedings [*i.e.*, in certain offences in India, see *India*] or attested copies thereof under the seal of the High Court shall be sent to the Secretary of State as soon as may be, in order to their being produced in evidence on the trial of the person charged in the event of his being sent for trial to England.'

Ib. (8): 'The examinations and proceedings transmitted in pursuance of this section shall be received as evidence in all courts of law, subject to any just exceptions as to the competency of the witnesses.'

By 6-7 V. 98, 4: In slave-trade offences committed 'in any places out of the United Kingdom and within any British colony, settlement, plantation or territory,' the K. B. may *mandamus* a judge therein to examine witnesses and to transmit their depositions to that court, which, at a trial therein, may read them. See *Merchant Shipping A.*, above.

Extradition] And by 33-4 V. 52, 14, 'Depositions or statements on oath taken in a foreign state' and copies and certificates of conviction are made good evidence in proceedings under this A., if duly authenticated; and by s. 15, 'foreign warrants' of arrest and documents mentioned in s. 14 'shall be deemed to be duly authenticated for the purposes of this A. [Extradition] if authenticated in manner . . . as follows: (1) if the warrant purports to be signed by a judge, magistrate, or officer of the foreign state, where the same was issued; (2) if the depositions, &c., or the copies . . . purport to be certified under the hand of a judge, magistrate, or officer to be the original[s] or . . . true copies' . . . ; (3) if the certificate or document of conviction 'purports' to be certified by a judge, magistrate, or officer . . . where the conviction took place; and if in every case' they 'are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice or some other minister of state. And all courts of justice . . . shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.'

Public servants abroad] Depositions with regard to offences committed abroad by such persons are regulated by 42 G. 3, 85. *T.* ss. 500, 501.

British possessions] Though England is not a 'British possession' within s. 6 of 53-4 V. 37, it may be noted that there are similar provisions therein: (1) *b. c.*, in the case where a person has been sent for trial to one by 'a British court in a foreign country.' The term is defined for the Evidence (Colonial Statutes) A. 1907.

By consent] Depositions on interrogatories are sometimes taken with defendant's consent in misdemeanours when the witness is about to leave the country. *Morphew*, 2 M. & S. 602, 1814, K.B., where L. Ellenborough informed the A.-G. (Garrow) that there was a precedent on the impeachment of Warren Hastings: 'L. Thurlow was not likely to have consented to such a proceeding if any objection had existed against it.' *Anon.*, 2 Chitty, 199, 1816. But if the trial comes on before the departure of the witness, or after his return, the depositions cannot be read. *Anon.*, 2 Salk. 691; 12 Mod. 493, 1701; *Patterson* v. *Evans*, 1 Chit. 89, 1819.

Of a child] See *Children*.

Lost] If depositions are lost, after diligent search copies proved to be correct by the magistrate's clerk may be used: *Shellard*, 9 C. & P. 277, 1840. *T.* s. 1447.

Committal for trial—bankruptcy procedure] See 4-5 G. 5, 59, 163.

B. *Of the Defendant.*

I. Before the Criminal Evidence A. 1898. See *Presence, &c.*

Jervis's A. 11-12 V. 42, 18]—'After the examinations of all the witnesses on the part of the prosecution as aforesaid [s. 17] shall have been completed, the justice of the peace or one of the justices, by or before whom such examination shall have been so completed, as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words or words to the like effect, 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial'; and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any

Proviso 1.

promise of favour and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise
Proviso 2. or threat; Provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.' Cf. *Bate,* 1871. The form generally employed is made up of the words here suggested, followed by those taken from the first proviso ('*and I give you clearly to understand that you have nothing to hope,*' &c.). Atkinson's *Magistrate's Annual Practice,* 1914, p. 163. The second caution in the first proviso ought always to be given. *Sansome,* 1850, *per* Erle J.

S. 28—*the caution*] The 'forms in the schedule . . . or forms to the same or the like effect shall be deemed good, valid, and sufficient in law'; and the form (N.) in the schedule does not contain the second caution mentioned in the first proviso of s. 18, though it does the first: 'Having heard,' &c. It has, therefore, been held that, if the first caution has been given, defendant's statement is admissible. *Bond,* 1 Den. C. C. 517; 19 L. J. M. C. 138; 4 Cox C. C. 231, 1849; *Sansome,* 1 Den. C. C. 545; 25 L. J. M. C. 143; 4 Cox C. C. 203, 1850. The omission to give that caution is an irregularity, but not such as to deprive Q. S. of jurisdiction; L. Alverstone C.J. was influenced by the fact that now defendant can give evidence: (as he did in) *JJ. of Hertfordshire,* 1911, 1 K. B. 612; 22 Cox C. C. 378; 80 L. J. K. B. 437; 75 J. P. 91; 27 T. L. R. 156.

Charged after being a witness] The deposition of a witness was allowed by Cockburn C.J. to be read at his trial against him, although after his evidence was taken the magistrates committed him for trial with another defendant, his evidence criminating himself, but exculpating the other; he was convicted. *Chidley,* 8 Cox C. C. 365, 1860; but cf. *Lewis,* 1833, and *Wilson,* 1817.

So on a trial for arson, where there had been a previous inquiry at Quebec, legally held, on the origin of the fire, at which defendant had been a witness on oath, and had not been improperly compelled to answer questions tending to criminate him (but had not been cautioned that his evidence might be used against him), his depositions thus taken were admitted against him by the Judicial Committee. *Coote,* L. R. 4 P. C. 599; 42 L. J. P. C. 45; 12 Cox C. C. 557, 1873.

Coroner's court] It has, however, been held that if a witness on oath before a coroner is afterwards charged on the facts there alleged, his deposition could not be given against him. *Wheeley,* 8 C. & P. 250, 1838; but in several later cases they have been admitted. *Owen,* 9 C. & P. 83, 1839; *Colmer,* 9 Cox C. C. 506, 1864—caution by coroner; *Bateman,* 4 F. & F. 1068, 1866; *Wiggins,* 10 Cox C. C. 562, 1867—statement not on oath, after caution; *Marriott,* 22 Cox C. C. 211; 75 J. P. 288, 1911: Avory J.

In *Biggadike,* 1868, Byles J. admitted a sworn statement by defendant voluntarily, before she was in custody, not signed by her, but taken down in writing by the coroner at the time. The coroner was called (12th ed. of this work, authority not stated). In *William York,* a boy ten years old, who was 'charged' [*sic*] in 1748 before the coroner's

jury with murder, which he at first denied, but on being closely interrogated, confessed, such confession, together with others subsequently made to the magistrates and other persons (one, at least, after a caution), was admitted against him. Fost. C. C. 70. It does not appear whether the boy's confession before the coroner was on oath or not.

Other statements by defendant] Jervis's A. makes no provision for anything the accused says being taken down in writing *except* his statement after the statutory caution; to any other statement, therefore, the second proviso in s. 18 applies. 2 Russ. Cri. 2223. *T.* s. 890; *Gardner,* 1899. Thus an incidental observation made by defendant in the course of such examination, but which does not form a part thereof so as to make it the duty of the magistrate to take it down in writing, and which is not so taken down, may be given against him. *Moore,* 1831, Parke J., Littledale J. assenting. *Matthews,* Digest Crim. Law, 1833, 157; so Coleridge J., *Spilsbury,* 1835. See *Stripp,* 1856.

Examination not in writing] Nor does the statute make any provision if the examination is not reduced into writing; but Littledale J. is reported (*Matthews,* above) to have said in *Mulvey,* 1831, that if it ought to have been taken down in writing, and was not, it is inadmissible: cf. *Weller,* 1846, and *Coveney,* 1837. It seems, however, clear, that if no examination was taken in writing, then the evidence was always considered admissible. But this must be distinctly shown. See *Fearshire, per* L. Mansfield: of the information. Where the witness stated that nothing was so taken down, Parke J. said, 'As all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was taken in writing; and unless you can clearly show that the magistrate's clerk did not do his duty, I will not receive the evidence.' *Packer,* 1829; *Phillips,* clerk actually called, and nothing having been taken in writing, parol evidence of what defendant said received: 1831. 2 Russ. Cri. 2220 *n.* So clerk called to prove witness stated 'I said, Moore is there' before magistrate, repeated at the trial, but not in the deposition (because clerk thought the words said in Moore's absence were not evidence). *Moore,* 20 L. T. 987, 1869: *per* Lush J. (and Keating J.). Where the examination was not taken in writing, it was proved by *vivâ voce* testimony. *Huet,* 2 Lea. 821, 1798.

The rule is the same although the examination is afterwards taken in writing. Thus where one of two defendants was committed before the other was apprehended, and the depositions against the former were read over before the magistrate to the latter, and after they were read the latter went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination before himself, without the statement to the witness, Parke J. held that what defendant had said to the witness might be given. *Johnson,* 1829; 2 Russ. Cri. 2223. So where a man and a woman were charged with burglary, and, in the examination of a witness, a glove was produced which had been found on the man with part of the stolen property in it; on which he said, 'She gave me the glove, but she knew nothing of the robbery'; the depositions having been put in, and proved by the clerk to the magistrates,

and there being no such statements in the depositions or the defendant's examination, Erskine J. held, that what the man said might be proved by parol evidence. *Hooper,* 1842; 2 Russ. Cri. 2224. And it was Best C.J.'s opinion that on clear and satisfactory evidence, it was admissible to prove something said by defendant beyond what was taken down by the magistrate. *Rowland* v. *Ashby,* Ry. & Moo. 232, 1825. *Harris, Evans* and *Butler* were charged with stealing Bennett's, Pennell's, and Price's sheep; the magistrate duly cautioned them, himself took down in writing all they and the witnesses said, and defendants signed the papers: on indictment for (i) killing an ewe, the property of Bennett, with intent to steal the carcase, and (ii) for stealing the ewe, the magistrate gave evidence of the examinations, and produced the depositions of the three owners and the papers wherein *Butler* confessed each offence, *Harris* confessed 'voluntarily that he was concerned in stealing a sheep (Pennell's) . . . but that *Butler* was the foreleader,' and *Evans* 'voluntarily' confessed 'that he did not kill the sheep, but helped to carry it away.' One Robinson and Bennett swore that *Harris* and *Evans* admitted complicity in the theft indicted: there was, however, nothing written concerning them on *this* point: counsel for those two objected to the evidence of these two witnesses, as their clients having made a confession about Pennell's sheep, now in writing, 'any confession as to Bennett's' could not be supplied by parol, nor could there be parol evidence to supplement the magistrate's, as he had sworn that he had taken down everything that had been said, that he intended to do so, and believed he had done so: guilty: death. Eight judges were of opinion that the evidence was admissible, 'being precise and distinct': 1 Moody, C. C. 338, 1832. In *Lewis,* 6 C. & P. 162, 1833, where *Harris, &c.* was cited, Gurney B. said it was very dangerous to admit such evidence, and thought it ought not to be done in the case before him; he had previously rejected the written deposition of defendant, when a witness, and he did not think the examination was 'perfectly voluntary.' So in *Wilson,* 1817, where defendant had not been sworn. So where the magistrate's clerk, in taking down the examination of three defendants, had left a blank whenever one had mentioned the name of another, Patteson J. refused to allow the blanks to be supplied by the parol evidence of the clerk, observing that the rule ought not to be extended. *Morse,* 8 C. & P. 605, 1838. In *Weller,* 2 C. & K. 223, 1846, Platt B. refused to receive something that was said by defendant before the magistrate, in the course of the examination of the witnesses, but which did not appear in the depositions; if it was 'material,' it ought to appear therein. In *Watson,* 3 C. & K. 111, 1857, on the other hand, where defendant made a statement in similar circumstances, which was written down in the depositions, but not signed by him (he had not been cautioned), Patteson J. held that it was not evidence *per se,* but that any one who heard him make it might give evidence of it; but he should have been told by the magistrate that that was not the proper time to make a staement. The clerk was called and allowed to refresh his memory from the depositions. *Stripp,* 25 L. J. M. C. 109; Dears. C. C. 648; 2 Jur. N. S. 452; 7 Cox C. C. 97, 1856, was charged with stealing a cash-box: no evidence was given, the policeman asking for a remand, but defendant made a statement, which was repeated by the policeman at the second examination, and was embodied in his deposition. Evidence of this statement was also given by the policeman at the trial, and the question was reserved, whether or not it was properly received, defendant not

having been previously cautioned. The judges held that it was; Jervis C.J. saying, 'It is scarcely necessary to observe that the caution and warning prescribed by the statute is intended to apply to the final proceeding only, when, after all the witnesses have been examined, the prisoner is asked whether he has anything to say in answer to the charge. This provision of the statute, however, does not exclude any declaration or voluntary statement made by the party accused before, during, or after the inquiry.' Cf. *Bell,* 1831.

Upon the whole, it seems perfectly clear that what is said by a defendant at any time during the preliminary inquiry before a magistrate previous to the final hearing is evidence, which must be proved in the usual way by a person who heard it, or by a memorandum acknowledged by defendant. If the statement made at the final hearing, when he is called on, is returned in a form which is available under the statute, that return is the only evidence of it, exclusive of all parol testimony. If from some defect or informality this return is not available, then what is said by him on this occasion may be proved in the usual way. A confession made in circumstances which do not bring it within the statute stands as a confession at common law. See above on the concluding words of s. 18.

Signature of defendant—omissions] Defendant 'is not to be precluded from shewing, if he can, that omissions have been made to his prejudice; for the examination has been used against him as an admission. and admissions must be taken as they were made, the whole together. not in pieces, nor with partial omissions. Even' his 'signature ought not to estop him from proving, if he can, such omissions.' 3 Russ. Cri. 545 (6th edn. 1896), from 2 Phill. Ev. 85.

Informal examination—no signature] Cf. p. 64 and p. 66. The examination, when reduced into writing, ought to be read over to him, and tendered to him for his signature. But whether signed or not by him, it is still evidence against him, nothing being said in s. 18 about signature by him, and the statement being expressly made evidence *without further proof,* if read over to him and signed by the *magistrate.* In the schedule (N.) it is said, 'Get him (the prisoner) to sign it, *if he will.*' At common law, if a statement were made by a defendant and reduced into writing, the memorandum could only be evidence if signed by him, *or* its truth acknowledged by parol: see *Lambe,* 2 Lea. 552, 1791; *Bennet,* 2 Lea. 553 *n.*, 1793; *Thomas,* 2 Lea. 637, 1794; *Telicote,* 2 Stark. N. P. 483, 1819. When defendant 'retracted in time' a confession he had refused to sign, taken down by the magistrate, the judge refused to receive his simultaneous admission of guilt. *Bennet; Jones,* 1828, below.

Questions] Where an examination taken at several times, was reduced into writing by the magistrate (much of it in answer to his questions) and was read over to defendant each time, and he acknowledged the notes to be correct, although at the last examination he refused to sign them, saying that they were an incorrect account of the transaction, three judges held that they might be used to refresh the memory of the magistrate, who gave parol evidence of defendant's statement, and that a magistrate has a right to put questions to an accused. *Jones,* 7 C. & P. 239 *n.*; Carr. Sup. 1828. A 'magistrate being examined, stated that he held out no hopes, &c. . . . but he had examined' defendant, 'at a considerable extent, in the same

manner as he was accustomed to examine a witness. The prisoner, however, was not sworn.' The writing tendered was rejected: 'No matter whether a prisoner be sworn or not . . . ask him what he has to say. But it is irregular in a magistrate to examine a prisoner in the same manner as a witness': *per* Richards C.B., *Wilson,* Holt, N. P. R. 597, 1817. See 2 Russ. Cri. 2220. Cf. *Watkins,* 4 C. & P. 550 *n.*, 1831. Where, in felony, the examination of defendant was reduced into writing by the magistrates' clerk, but nothing appeared on the face of the paper to show that it was an examination taken on a charge of any felony, or that the magistrates who signed it were then acting as magistrates, Patteson J. permitted the clerk to be called, and to refresh his memory from this paper. *Tarrant,* 6 C. & P. 182, 1833; and see *Pressley, ib.* 183, 1833; and *Bell,* 5 C. & P. 162, 1831—voluntary confession, signed by defendant, attested by clerk before evidence against him completed; confession read by clerk in third person. Cf. *Stripp,* 1856.

Proof—alterations] If the examination has been taken in conformity with the statute, it proves itself. *Phips.* 457. But should there be alterations or erasures, the clerk to the magistrates, or some person who was present at the time, should be called to explain them. Where, in murder, it was proposed to prove defendant's examination before the coroner by evidence of the handwriting of the latter, and by calling a person who was present thereat, there being certain interlineations therein, L. Lyndhurst said that he thought the clerk who had taken it down ought to be called, and the evidence was withdrawn. *Brogan,* 1834. MS. (1st ed. of this work, p. 48). Cf. *Bell,* above, 163 & 164 *n.*; *T.* s. 892.

Defendant's statement—evidence against him only] In *Haines,* 1 F. & F. 86, 1858, Crowder J. refused to allow defendant's statement to the magistrate, which had not been put in by the prosecution, to be put in for defendant: it was 'not tendered' to show 'that the same account had been given by' him 'shortly after his arrest,' for it 'is evidence against him, but not for him,' and he could now repeat it through his counsel.

Defendant's copies] By 11-12 V. 42, 27, 'at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require, and shall be entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed on payment of a reasonable sum for the same, not exceeding at the rate of three half-pence for each folio of 90 words.' See also 30-1 V. 35, 3, 4. To the same effect of coroners' inquisitions, see under *Depositions.*

By s. 4 of 6-7 W. 4, 114, 'all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had.'

It was held that a defendant is not entitled to a copy of his own statement returned along with the depositions. *Aylett,* 8 C. & P. 669, 1838. As the note there says, this decision is in conformity with the strict letter of 6-7 W. 4, 114, 3 (rpd.), but it may be doubted whether it accorded with the intention of the legislature; where the case for

the prosecution, as in *Greenacre,* 1837, depends chiefly on contradictions of defendant's statement before the magistrate, it seems most reasonable that his counsel should be furnished with a copy of it; ' at all events, according to the principle laid down by Littledale and Coleridge JJ. in *Greenacre* ' (where a coroner's depositions were allowed a defendant, although the coroner was not bound to return them to the court), ' the judges being in possession of the depositions [and the statement] may direct their officer, if they think it will conduce to the ends of justice, to furnish a copy,' and equally so a statement under s. 18.

Rpd. s. 3 of 6-7 W. 4, 114, did not apply to cases of defendants committed for further examination. *The Lord Mayor of London,* 1844. When therefore defendant had been committed to gaol for default of sureties to keep the peace and for appearing at the sessions, which discharged him, it was held, on a rule for mandamus to justices to furnish copies of the depositions taken against him, that he was not entitled to them. *Ex parte Humphrys,* 19 L. J. M. C. 189, 1850.

II.

Much of this head has ceased to be of importance since the Criminal Evidence Act, 1898, was passed, and by s. 1 made the taking of

Defendant's Deposition,

which had only been permissible in certain statutory cases, permissible in all. That his sworn evidence is a deposition follows from *Bird,* 19 Cox C. C. 180; 79 L. T. 359; 62 J. P. 760; 15 T. L. R. 26, 1898: C. C. R., following *Erdheim,* where defendant, having given evidence below under 48-9 V. 69, 20—one of these statutory cases—was not a witness at the trial, but his deposition was put in against him: conviction affirmed: Hawkins J. saying, ' in my opinion the oath emphasises the statement.' Cf. *Bate,* 1871. *Chapman,* 29 T. L. R. 117, 1912, charged under s. 5 of that Act (misdemeanour), admitted on oath a felony under s. 4; on indictment for the latter, Channell J. admitted the deposition: defendant not called.

THE CRIMINAL EVIDENCE ACT, 1898.

61 & 62 Vict. c. 36.

AN ACT TO AMEND THE LAW OF EVIDENCE.

I. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

(*a.*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:

(*b.*) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:

(*c.*) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:

(*d.*) Nothing in this Act shall make a husband compellable to dis-

close any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(*e.*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(*f.*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

(*g*) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

(*h.*) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

II. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

III. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

IV.—(1.) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

VI.—(1.) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877.

(2.) But this Act shall not apply to proceedings in courts martial unless so applied—

(*a.*) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

VII.*—(1.) This Act shall not extend to Ireland.

(3.) This Act may be cited as the Criminal Evidence Act, 1898.

* Ss. 1-4 are extended to Ireland for motor-car offences by 3 E. 7, 36, 19.

SCHEDULE.

ENACTMENTS REFERRED TO. Section 4.

Session and Chapter.	Short Title.	Enactments referred to.	
5 Geo. 4, c. 83.....	The Vagrancy Act, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.	
8 & 9 Vict. c. 83.....	The Poor Law (Scotland) Act, 1845.	Section eighty.	
24 & 25 Vict. c. 100 ..	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five.*	
45 & 46 Vict. c. 75....	The Married Women's Property Act, 1882.	Section twelve and section sixteen.	
48 & 49 Vict. c. 69....	The Criminal Law Amendment Act, 1885.	The whole Act.	
57 & 58 Vict. c. 41 † ..	The Prevention of Cruelty to Children Act, 1894.	The whole Act.†	
8 Edw. 7, c. 45	The Punishment of Incest Act, 1898.	The whole Act.	Section 4 (4).
3 & 4 Geo. 5, c. 3	The Mental Deficiency and Lunacy Act (Scotland), 1913.	Section forty-six.	Section 4 (3).
3 & 4 Geo. 5, c. 28....	The Mental Deficiency Act, 1913.	Section fifty.	Section 4 (6).

* Ss. 50-1 were already rpd. by 58-9 V. 94, 2, when this A. passed.
† Rpd.: 8 E. 7, c. 67, the Children A. 1908. Part I. and Sched. 1. are, by s. 27, substituted.

THE ISSUE.

It is a general rule both in civil and criminal cases that the evidence shall be confined to the point in issue. 'In criminal proceedings it is even more necessary than in civil actions strictly to enforce the rule of confining the evidence to the points in issue and that no question not relevant to the issues should be put to a witness (except for the purpose of impeaching the credibility of a witness who has sworn to relevant facts), for it is of the utmost importance to a person accused of crime that the facts laid before the jury should relate only to the transaction which forms the subject of the indictment on which he is being tried': 1 Russ. Cri. 2097; cf. p. 1, above. 'The maxim that *evidence must be confined to the issue* expresses in a loose form the two-fold exclusion of facts (1) by pleading and substantive law; and (2) by the law of evidence as to relevancy' (*T.* ss. 298, 316). *Phips.* 18. These two heads are adopted below.

'Facts in issue are those facts which are necessary by law to establish the claim, liability, or defence forming the subject-matter of the proceedings; and which either by the pleadings or by implication are in dispute between the parties.' 'Facts relevant to the issue are facts which tend either directly or indirectly to prove or disprove a fact in issue or some relevant fact': *ib.* 40. 'Thus facts not relevant to the main issue may be relevant to one subsidiary, *e.g.*, corroboration of an accomplice': *ib.* 483, cited under *Accomplices.*

I. Indictment.

'An indictment is nothing else but a plain, brief and certain narrative of an offense committed by any person.' *Hale*, 2 P. C. 169: 'certain' = clear. The chief pleading in a criminal case is the indictment.

What is indictable?] 'There can be no doubt but that all capital crimes whatsoever, and also all kinds of inferior crimes of a *public nature* as misprisions, and all other contempts, all disturbances of the peace, all oppressions and all other misdemeanors whatsoever of a public evil example against the common law may be indicted; but no injuries of a private nature, unless they some way concern the King.

'Also, it seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of publick convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. . . .

'Also, if a statute extend only to private persons, or if it extend to all persons in general, but chiefly concern disputes of a private nature, as those relating to distresses made by lords on their tenants, it is said that offences against such statute will hardly bear an indictment.

'Also, where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, &c., without mentioning an indictment, it seems to be settled . . . that it will not maintain an indictment. . . .' 4 Hawk. P. C. c. 25, s. 4.

It seems that no more general rule can be laid down: cf. 4 Bl. Comm. 218; and see *Assault* and *Cheating at Common Law*.

For an instance of an offence not being indictable until found by verdict, see 46-7 V. 51, 52. Cf. *Codrington*, 1825, and *Oates*, 1855; and Index (*Non-indictable*).

The learning of Indictments has been very much affected by the Indictments A. 1915, 5-6 G. 5, 90.

'1. The rules contained in the First Schedule to this Act with respect to indictments shall have effect as if enacted in this Act, but those rules may be added to, varied, or annulled by further rules made by the rule committee under this Act.

2.—(1) There shall be established for the purposes of this Act a rule committee consisting of the Lord Chief Justice of England for the time being, and of a judge of the High Court, a chairman of quarter sessions, a recorder, a clerk of assize, a clerk of the peace, and another person having experience in criminal procedure, appointed in each case by the Lord Chief Justice.

(2) The rule committee shall have power from time to time, subject to the approval of the Lord Chancellor, to make rules varying or annulling the rules contained in the First Schedule to this Act and to make further rules with respect to the matters dealt with in those rules, and those rules shall have effect subject to any modifications or additions so made.

(3) Any rules made by the rule committee shall be laid, as soon as may be, before both Houses of Parliament, and, if within forty days on which either House has sat since the rules were so laid before the House a petition is presented to His Majesty by that House praying that the rules or any part of them may be annulled, His Majesty may thereupon by Order in Council annul the same, and the same shall thenceforth be void, but without prejudice to the validity of anything done thereunder.

(4) The term of office of any person who is a member of the committee by virtue of appointment shall be such as may be specified in the appointment.

3.—(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act.

4. Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanour, and charges for both felonies and misdemeanours, may be joined in the same indictment, but where a felony is tried together with any misdemeanour, the jury shall be sworn and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies.

5.—(1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.

(2) Where an indictment is so amended, a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and for the purposes of all proceedings in connection therewith as having been found by the grand jury in the amended form.

(3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

(4) Where, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the court under this Act to amend an indictment or to order a separate trial of a count, the court shall make such order as to the postponement of the trial as appears necessary.

(5) Where an order of the court is made under this section for a separate trial or for the postponement of a trial—

(*a*) if such an order is made during a trial the court may order that the jury are to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be; and

(*b*) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced; and

(*c*) the court may make such order as to costs and as to admitting the accused person to bail, and as to the enlargement of recognizances and otherwise as the court thinks fit.

(6) Any power of the court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes.

6. Where it appears to the court that an indictment contains unnecessary matter, or is of unnecessary length, or is materially defective in any respect, the court may make such order as to the payment of that part of the costs of the prosecution which has been incurred by reason of the indictment so containing unnecessary matter, or being of unnecessary length, or being materially defective as the court thinks fit.

7. Nothing in this Act shall prevent an indictment being open to objection if it contravenes or fails to comply with the Vexatious Indictments Act, 1859, as amended by section one of the Criminal Law Amendment Act, 1867, or any other enactment: Provided that an indictment shall not be open to objection under those Acts on the ground that a count is joined with the rest of the indictment which could not at the time of the passing of the Criminal Law Amendment

Act, 1867, be lawfully joined, if that count can be lawfully joined under the law for the time being in force.

8.—(1) Nothing in this Act or the rules thereunder shall affect the law or practice relating to the jurisdiction of a court or the place where an accused person can be tried, nor prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions, or intentions which are legally necessary to constitute the offence with which the person accused is charged, nor otherwise affect the laws of evidence in criminal cases.

(2) In this Act, unless the context otherwise requires, the expression 'the court' means the court before which any indictable offence is tried or prosecuted.

(3) The provisions of this Act relating to indictments shall apply to criminal informations in the High Court and inquisitions, and also to any plea, replication, or other criminal pleading, with such modifications as may be made by rules under this Act.

9.—(1) The enactments specified in the Second Schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

(2) This Act shall not extend to Scotland or Ireland.

(3) This Act may be cited as the Indictments Act, 1915.

(4) This Act shall come into operation on the first day of April nineteen hundred and sixteen, but shall not apply to indictments in the case of persons committed for trial before that date, or to the trial of any such person.

FIRST SCHEDULE. Sections 1, 2 (2).

Rules.

1.—(1) An indictment may be on parchment or durable paper, and may be either written or printed, or partly written and partly printed.

(2) Each sheet on which an indictment is set out shall be not more than 12 and not less than 6 inches in length, and not more than 14 and not less than 12 inches in width, and if more than one sheet is required, the sheets shall be fastened together in book form.

(3) A proper margin not less than 3 inches in width shall be kept on the left-hand side of each sheet.

(4) Figures and abbreviations may be used in an indictment for expressing anything which is commonly expressed thereby.

(5) There shall be endorsed on the back of an indictment the name of every witness examined or intended to be examined by the grand jury, and the foreman of the grand jury shall write his initials against the name of each witness so examined.

(6) An indictment shall not be open to objection by reason only of any failure to comply with this rule.

2. The commencement of the indictment shall be in the following form:—

The King v. A. B.

Court of Trial [e.g., *Central Criminal Court,* [or] *In the High Court of Justice, King's Bench Division,* [or] *Durham County Assizes held at Durham,* [or] *Hants Quarter Sessions held at Winchester*].

Presentment of the Grand Jury.

A. B. is charged with the following offence [offences]:—

3. Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.

4.—(1) A description of the offence charged in an indictment, or where more than one offence is charged in an indictment, of each offence so charged, shall be set out in the indictment in a separate paragraph called a count.

(2) A count of an indictment shall commence with a statement of the offence charged, called the statement of offence.

(3) The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.

(4) After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any statute limits the particulars of an offence which are required to be given in an indictment, nothing in this rule shall require any more particulars to be given than those so required.

(5) The forms set out in the appendix to these rules or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case.

(6) Where an indictment contains more than one count, the counts shall be numbered consecutively.

5.—(1) Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities, or intentions, or other matters stated in the alternative in the enactment may be stated in the alternative in the count charging the offence.

(2) It shall not be necessary, in any count charging a statutory offence, to negative any exception or exemption from or qualification to the operation of the statute creating the offence.

6.—(1) The description of property in a count in an indictment shall be in ordinary language and such as to indicate with reasonable clearness the property referred to, and if the property is so described it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.

(2) Where property is vested in more than one person, and the owners of the property are referred to in an indictment it shall be sufficient to describe the property as owned by one of those persons by name with others, and if the persons owning the property are a body of persons with a collective name, such as 'Inhabitants,' 'Trustees,' 'Commissioners,' or 'Club' or other such name, it shall be sufficient to use the collective name without naming any individual.

7. The description or designation in an indictment of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as "a person unknown."

8. Where it is necessary to refer to any document or instrument in an indictment, it shall be sufficient to describe it by any name or designation by which it is usually known, or by the purport thereof, without setting out any copy thereof.

9. Subject to any other provisions of these rules, it shall be sufficient to describe any place, time, thing, matter, act, or omission whatsoever to which it is necessary to refer in any indictment, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.

10. It shall not be necessary in stating any intent to defraud, deceive or injure to state an intent to defraud, deceive or injure any particular person where the statute creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence.

11. Any charge of a previous conviction of an offence or of being a habitual criminal or a habitual drunkard shall be charged at the end of the indictment by means of a statement—in the case of a previous conviction that the person accused has been previously convicted of that offence at a certain time and place without stating the particulars of the offence, and in the case of a habitual criminal or habitual drunkard, that the offender is a habitual criminal or a habitual drunkard, as the case may be.

12. Nothing in these rules or in any rules made under section two of this Act shall affect the provisions of subsection (4) of section thirty-two of the Children Act, 1908.

13.—(1) It shall be the duty of the clerk of assize, after a true bill has been found on any indictment, to supply to the accused person, on request, a copy of the indictment free of charge.

(2) The cost of any copy supplied to the accused person whether under this rule or otherwise shall be treated as part of the costs of the prosecution for the purpose of section one of the Costs in Criminal Cases Act, 1908.

(3) In the application of this rule to quarter sessions, the clerk of the peace shall be substituted for the clerk of assize.

14. The Interpretation Act, 1889, applies for the interpretation of these rules as it applies for the interpretation of an Act of Parliament.

15. These rules may be cited as the Indictment Rules, 1915, and these rules, together with any rules made under section two of this Act, may be cited together by such collective title as may be prescribed by the last-mentioned rules.

APPENDIX TO RULES.

Forms of Indictment.

1.

Statement of Offence.

Murder.

Particulars of Offence.

A. B., on the day of , in the county of , murdered J. S.

3.

Statement of Offence.

Manslaughter.

Particulars of Offence.

A. B., on the day of , in the county of , unlawfully killed J. S.

4.

Statement of Offence.

Rape.

Particulars of Offence.

A. B., on the day of , in the county of , had carnal knowledge of E. F. without her consent.

5.

Statement of Offence.

First Count.

Wounding with intent, contrary to section 18 of the Offences against the Person Act, 1861.

Particulars of Offence.

A. B., on the day of , in the county of , wounded C. D., with intent to do him grievous bodily harm, or to maim, disfigure, or disable him, or to resist the lawful apprehension of him the said A. B.

Statement of Offence.

Second Count.

Wounding, contrary to section 20 of the Offences against the Person Act, 1861.

Particulars of Offence.

A. B., on the day of , in the county of , maliciously wounded C. D.

6.

STATEMENT OF OFFENCE.

Cruelty to a child, contrary to section 12 of the Children Act, 1908.

PARTICULARS OF OFFENCE.

A. B., between the day of and the day of , in the county of , being a person over the age of sixteen years having the custody, charge, or care of C. D., a child, ill-treated or neglected the said child, or caused or procured the said child to be ill-treated or neglected in a manner likely to cause the said child unnecessary suffering or injury to its health.

7.

STATEMENT OF OFFENCE.

Larceny, contrary to section 67 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , being clerk or servant to M. N., stole from the said M. N. ten yards of cloth.

8.

STATEMENT OF OFFENCE.

Robbery with violence, contrary to section 42 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , robbed C. D. of a watch, and at the time of or immediately before or immediately after such robbery did use personal violence to the said C. D.

10.

STATEMENT OF OFFENCE.

Burglary and larceny, contrary to section 60 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., in the night of the day of , in the county of , did break and enter the dwelling-house of C. D. with intent to steal therein, and did steal therein one watch, the property of S. T., the said watch being of the value of ten pounds.

11.

STATEMENT OF OFFENCE.

Sending threatening letter, contrary to section 46 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , sent, delivered or uttered to or caused to be received by C. D., a letter accusing or threatening to accuse the said C. D. of an infamous crime with intent to extort money from the said C. D.

12.

STATEMENT OF OFFENCE.

Obtaining goods by false pretences, contrary to section 88 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , with intent to defraud, obtained from S. P. five yards of cloth by falsely pretending that he, the said A. B., was a servant to J. S., and that he, the said A. B., had then been sent by the said J. S., to S. P. for the said cloth, and that he, the said A. B., was then authorised by the said J. S. to receive the said cloth on behalf of the said J. S.

14.

STATEMENT OF OFFENCE.

First Count.

Arson, contrary to section 2 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , maliciously set fire to a dwelling-house, one F. G. being therein.

STATEMENT OF OFFENCE.

Second Count.

Arson, contrary to section 3 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , maliciously set fire to a house with intent to injure or defraud.

15.

STATEMENT OF OFFENCES.

A. B., arson, contrary to section 3 of the Malicious Damage Act, 1861;

C. D., accessory before the fact to same offence.

PARTICULARS OF OFFENCES.

A. B., on the day of , in the county of , set fire to a house with intent to injure or defraud.

C. D., on the same day, in the county of did counsel, procure, and command the said A. B. to commit the said offence.

16.

STATEMENT OF OFFENCE.

First Count.

Offence under section 35 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , displaced a sleeper belonging to the Great Western Railway with intent to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage or truck using the said railway.

STATEMENT OF OFFENCE.

Second Count.

Obstructing railway, contrary to section 36 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , by unlawfully displacing a sleeper belonging to the Great Western Railway did obstruct or cause to be obstructed an engine or carriage using the said railway.

17.

STATEMENT OF OFFENCE.

Damaging trees, contrary to section 22 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , maliciously damaged an oak tree there growing.

A. B. has been twice previously convicted of an offence under section 22 of the Malicious Damage Act, 1861, namely, at , on the day of , and at , on the day of .

18.

STATEMENT OF OFFENCE.

First Count.

Forgery, contrary to section 2 (1) (*a*) of the Forgery Act, 1913.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , with intent to defraud, forged a certain will purporting to be the will of C. D.

STATEMENT OF OFFENCE.

Second Count.

Uttering forged document, contrary to section 6 (1) (2) of the Forgery Act, 1913.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , uttered a certain forged will purporting to be the will of C. D., knowing the same to be forged and with intent to defraud.

19.

STATEMENT OF OFFENCE.

Uttering counterfeit coin, contrary to section 9 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , at the public-house called 'The Red Lion,' in the county of , uttered a counterfeit half-crown, knowing the same to be counterfeit.

20.

STATEMENT OF OFFENCE.

Uttering counterfeit coin, contrary to section 12 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the day of , at a public-house called 'The Red Lion,' in the county of , uttered a counterfeit sovereign, knowing the same to be counterfeit.

A. B. has been previously convicted of a misdemeanour under section 9 of the Coinage Offences Act, 1861, on the day of at .

21.

STATEMENT OF OFFENCE.

Perjury, contrary to section (1) (i) of the Perjury Act, 1911.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , being a witness upon the trial of an action in the Chancery Division of the High Court of Justice in England, in which one, , was plaintiff, and one, , was defendant, knowingly falsely swore that he saw one, M. N., in the street called the Strand, London, on the day of .

23.

STATEMENT OF OFFENCE.

First Count.

Publishing obscene libel.

PARTICULARS OF OFFENCE.

E. M., on the day of , in the county of , sold, uttered, and published and caused or procured to be sold, uttered, and

published an obsecene libel the particulars of which are deposited with this indictment.

[Particulars to specify pages and lines complained of where necessary, as in a book.]

STATEMENT OF OFFENCE.

Second Count.

Procuring obscene libel [or thing] with intent to sell or publish.

PARTICULARS OF OFFENCE.

E. M., on the day of , in the county of , procured an obscene libel [or thing], the particulars of which are deposited with this indictment, with intent to sell, utter or publish such obscene libel [or thing].

24.

STATEMENT OF OFFENCES.

A. B., undischarged bankrupt obtaining credit contrary to section 155 (*a*) of the Bankruptcy Act, 1914;

C. D., being accessory to same offence.

PARTICULARS OF OFFENCES.

A. B., on the day of , in the county of , being an undischarged bankrupt obtained credit to the extent of twelve pounds from H. S. without informing the said H. S. that he then was an undischarged bankrupt.

C. D. at the same time and place did aid, abet, counsel, and procure A. B. to commit the said offence.

25.

STATEMENT OF OFFENCE.

First Count.

Falsification of accounts, contrary to section 1 of Falsification of Accounts Act, 1875.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , being clerk or servant to C. D., with intent to defraud, made or concurred in making a false entry in a cash book belonging to the said C. D., his employer, purporting to show that on the said day 100*l.* had been paid to L. M.

STATEMENT OF OFFENCE.

Second Count.

Same as first count.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , being clerk or servant to C. D., with intent to defraud, omitted or concurred in omitting from or in a cash book belonging to the said C. D., his employer, a material particular, that is to say, the receipt on the said day of 50*l.* from H. S.

26.

STATEMENT OF OFFENCE.

First Count.

Fraudulent conversion of property, contrary to section 1 (1) (*a*) of Larceny Act, 1901.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , fraudulently converted to his own use and benefit certain property, that is to say, 100*l.* entrusted to him by H. S., in order that he, the said A. B., might retain the same in safe custody.

STATEMENT OF OFFENCE.

Second Count.

Fraudulent conversion of property, contrary to section 1 (1) (*b*) of Larceny Act, 1901.

PARTICULARS OF OFFENCE.

A. B., on the day of , in the county of , fraudulently converted to his own use and benefit certain property, that is to say, the sum of 200*l.* received by him for and on account of L. M.

'STATUTORY RULES AND ORDERS, 1916.

No. 282/L. 11.

CRIMINAL PROCEDURE, ENGLAND.

Indictments.

1.—(1) Forms 2, 9, 13 and 22 appended to the Indictment Rules, 1915, are hereby annulled, and the forms appended hereto and bearing the numbers 2, 9, 13 and 27 are respectively substituted therefor.

(2) Additional forms numbered 28, 29, 30, 31 and 32 respectively, and appended hereto, shall be used in cases to which they are applicable in accordance with Rule 4 (5).

2.—(1) These rules may be cited . . . as the Indictment Rules, 1915-16.

(2) These rules shall not apply to indictments in the case of persons committed for trial before the first day of April, 1916, or to the trial of any such person.

FORM 2.

STATEMENT OF OFFENCE.

ACCESSORY AFTER THE FACT TO MURDER.

Particulars of Offence.

A. B., well knowing that H. C. had murdered C. C., did on the day of and on other days thereafter, in the county of , receive, comfort, harbour, assist and maintain the said H. C.

FORM 9.

FIRST COUNT. STATEMENT OF OFFENCE.

LARCENY.

Particulars of Offence.

A. B., on the day of , in the county of , stole a bag, the property of C. D.

SECOND COUNT. STATEMENT OF OFFENCE.

RECEIVING STOLEN GOODS CONTRARY TO SECTION 91 OF THE LARCENY ACT, 1861.

Particulars of Offence.

A. B., on the day of , in the county of , did receive a bag, the property of C. D., knowing the same to have been stolen.

A. B. has been previously convicted of felony, to wit, burglary, on the day of at the Assizes held at Reading.

FORM 13.

STATEMENT OF OFFENCE.

CONSPIRACY TO DEFRAUD.

Particulars of Offence.

A. B. and C. D. on divers days between the day of and the day of , in the county of , conspired together and with other persons unknown to defraud such persons as should thereafter be induced to part with money to the said A. B. and C. D., by false representations that A. B. and C. D. were then carrying on a genuine business as jewellers at and that they were then willing and prepared to supply articles of jewellery to such persons.

FORM 27.

STATEMENT OF OFFENCE.

LIBEL.

Particulars of Offence.

A. B., on the day of , 1916, in the county of , published a defamatory libel concerning W. Y., in the form of a letter addressed to J. B., which said letter contained the following defamatory matters concerning the said W. Y.:—

1. Do you know that about the year 1886 your friend W. Y. was in the employ of L. and J., and that his accounts were found to be all wrong? (meaning thereby that W. Y. was guilty of acts of dishonesty and falsification of accounts whilst he was in the employ of L. and J.).

2. As soon as his defalcations were discovered and a warrant was applied for he fled to Rio (meaning thereby that the said W. Y. was a fugitive from justice).

3. Some time after this he appears to have returned to England, for he was found to be keeping a disorderly house in the East End of

London (meaning thereby that the said W. Y. had committed the criminal offence of keeping a disorderly house).

See Form 28 for plea of justification to Form 27.

FORM 28.

PLEA OF JUSTIFICATION OF A. B. IN ANSWER TO THE INDICTMENT AGAINST HIM FOR LIBEL. (*See* FORM 27.)

A. B. says he is not guilty, and for a further plea he says that all the defamatory matters alleged in the indictment are true.

Particulars.

1. On the day of , 1886, W. Y. received the sum of 2*l.* 8*s.* 6*d.* from T. S., and on the day of , 1886, W. Y. received the sum of 1,100*l.* from C. F. and the sum of 500*l.* from W. D. on behalf of his employers, L. and J., which he fraudulently omitted to enter in their books or to account for in any way.

2. On the day of , 1886, soon after W. Y.'s defalcations were discovered and a warrant was applied for against him upon charges of embezzling his employers' money and falsifying their books, W. Y. left England on a ship called the 'Eagle' bound for Rio de Janeiro.

3. On the 19th September and on other days in the year 1911 W. Y. kept a house at Street, Mile End, for the purpose of betting, contrary to the Betting Act, 1853.

And A. B. says it was for the public benefit that the defamatory matters charged in the said indictment should be published by reason of the fact that W. Y. was at the time of the publication thereof a candidate for the public office of Councillor of the Borough of .

(For Replication to Form 28, *see* Form 29.)

FORM 29.

REPLICATION TO THE PLEA OF JUSTIFICATION OF A. B. (*See* FORM 28.)

H. S., clerk of assize, joins issue on behalf of our Lord the King.

FORM 30.

FIRST COUNT. STATEMENT OF OFFENCE.

BANKRUPTCY OFFENCE CONTRARY TO SECTION 154 (1) OF BANKRUPTCY ACT, 1914.

Particulars of Offence.

A. B. has been adjudged bankrupt, and on the day of in the county of , did not fully and truly discover to the trustee all his property, and how and to whom and for what consideration and when he had disposed of a piano, part thereof

SECOND COUNT. STATEMENT OF OFFENCE.

BANKRUPTCY OFFENCE CONTRARY TO SECTION 154 (3) OF BANKRUPTCY ACT, 1914.

Particulars of Offence.

A. B. has been adjudged bankrupt, and on the day of , in the county of , did not deliver up to the trustee a book called a ledger, relating to his property or affairs.

THIRD COUNT. STATEMENT OF OFFENCE.

BANKRUPTCY OFFENCE CONTRARY TO SECTION 154 (5) OF BANKRUPTCY ACT, 1914.

Particulars of Offence.

A. B., on the day of , and within six months next before the presentation of a bankruptcy petition against him upon which he was adjudged bankrupt, in the county of , fraudulently removed a piano, value 20*l.*, part of his property.

FORM 31.

STATEMENT OF OFFENCE.

OBSTRUCTING CORONER IN THE EXECUTION OF HIS DUTY.

(Common Law Misdemeanour.)

Particulars of Offence.

A. B. and G. C., on the day of , in the county of , intending to prevent the coroner of from holding an inquest in the execution of his duty upon view of the dead body of S. C., who died a violent or an unnatural death or a sudden death of which the cause was unknown, or intending to obstruct the said coroner in the holding of such inquest, did bury the said dead body in a certain place called Hampstead Heath.

FORM 32.

STATEMENT OF OFFENCE.

CONSPIRACY TO INCITE WOMEN TO PROCURE THEIR OWN MISCARRIAGE.

Particulars of Offence.

A. B. and C. D. on divers days between the day of and the day of , in the county of , conspired together and with other persons unknown to incite women being with child to administer to themselves noxious things with intent to procure their own miscarriage.

Dated the 3rd day of May, 1916.

No. 323/L. 12.

1. Rule 1 (5) in the First Schedule to the Act shall not apply to Criminal Informations in the High Court.

Rule 2 in the First Schedule to the Act shall apply to such Criminal Informations, substituting for the words 'Presentment of the Grand Jury' the words 'Criminal Information filed by the King's Attorney-General' or 'The King's Coroner and Attorney.'

2. The King's Attorney-General or any person procuring any Criminal Information to be exhibited, received, or filed at the Crown Office shall deliver to the Master of the Crown Office a true copy thereof for each accused person who shall on request be supplied therewith free of charge.

3.—(1) Rule 1 (5) and Rule 2 in the First Schedule to the Act shall not apply to Coroners' Inquisitions.

(2) In Coroners' Inquisitions the form of Inquisition provided by the Coroners' Act, 1887, may be used with such alterations as may be made under that Act, but any offence charged therein shall be stated in accordance with the form of indictment relating thereto prescribed by the Indictment Rules, 1915-16.

4. It shall be the duty of the Clerk of Assize to supply on request free of charge to a person committed for trial on a Coroner's Inquisition a copy of so much of the Inquisition as charges him with an offence, and the cost of such copy shall be treated as part of the costs of the prosecution for the purpose of section one of the Costs in Criminal Cases Act, 1908.

5. Except as in these Rules otherwise provided the Indictment Rules, 1915-16, relating to Indictments shall apply to Criminal Informations in the High Court and to Inquisitions and also to any plea replication or other pleading relating thereto.

6.—(1) These Rules may be cited . . . as the Indictment Rules, 1915-16.

23rd May, 1916.'

The effect of this enactment, &c., and notably of s. 4, is obviously to destroy or diminish the importance of many previous enactments and decisions thereon. There is, therefore, no longer any advantage in setting many of them—sections and cases—out, though references to many of them will be found under particular crimes in Part II.

Interpretation] The A. also goes far to supersede the ancient indulgence to technical objections in favour of life or liberty. In such a case—*Lyons*, 1858—where the indictment followed an A., Pollock C.B., commenting on the history of the construction of criminal statutes, said, 'They are construed now with reference to the true meaning and real intention of the legislature.' So *Craies* on *Statute Law*, p. 459, 2nd edn.: 'The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules.' This must be borne in mind in common law offences also. Thus, in *Outlines of Criminal Law*, 1916, p. 458, Prof. Kenny says: 'at the present day, courts hold, as the late L. Russell grimly said, that even in considering the question of the validity of an indictment one must have some regard to the ordinary intention of

language': *Jameson,* 1896. Accordingly, the rule or supposed rule of favouring accused persons by construing penal statutes strictly is not applied to indictments. An indictment, like any ordinary document, must be construed *ut res magis valeat quam pereat.* Thus, if its words be capable of different meanings, it must be construed 'in that sense in which the party framing the indictment must have used it if he intended his charge to be consistent with itself,' that is to say, in the sense most favourable to the prosecutor. And, as in ordinary instruments, surplus words may be rejected: *utile per inutile non vitiatur.* Should two entire clauses be contradictory, so that one of them must be rejected as surplusage, it is, as in deeds, the later one that must be rejected (not, as in wills, the earlier).' See *Interpretation,* in Index.

Joinder] It is obvious that it will often be convenient to join allegations of more than one offence in one indictment, so that juries will thereby be entitled to make a choice of which they will convict. But still at common law, in the case of

Felony charged] misdemeanour cannot be found: *Woodhall,* 1872; *Thomas,* 1875: but only by statute. And *generally,* in the case of

One offence charged, another found] there must be statutory authority: see specific titles of crimes, *e.g., Attempts, Defectives;* for when averments are divisible, the offence found is charged.

Misdemeanour charged—felony proved] By s. 12 of 14-15 V. 100, 'If upon the trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts, unless the court, before which such trial may be had, shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony; in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour.' Though if the misdemeanour is merged in a felony, this s. does not entitle to acquittal; there cannot be a conviction unless the misdemeanour is proved. *Bulmer:* c. q.

Averments] See p. 1126.

Divisible averments] What is generally known as the rule of divisibility of averments—which may be stated thus (cf. *Taylor,* 1869): that if in the indictment an offence is stated which includes within it an offence of less gravity *of the same class,* then defendant may be convicted on that indictment of the minor offence, though the jury find that the evidence fails of the major—has, perhaps, become superfluous by reason of its inclusion in the general policy of the Indictments A. Thus, before the statute, on an indictment for *murder,* there might be a conviction of manslaughter. *Turner* v. *Musgrave,* 3 Dyer, 261 *a,* 1567: 'appeal of death': acquittal of murder, 'but guilty of the death s. of the felonious slaying,' 'not of malice aforethought'; *Mackalley,* 9 Co. Rep. 65 *b,* 1613; Co. Litt 282 (*a*): and there were many more instances, in some of which 'this has the effect of permitting alternative pleading, although in strictness it is not permissible':

Encyc. Laws Eng. (1907): 'divisible averments.' But the A. also adopts 'alternative pleading' expressly by R. 5 (1), exemplified by Form 5, where, obviously, three distinct (alternative) verdicts might be found; nor does the A. insist that the 'included' offence must be 'of less gravity.' The chief safeguard now against uncertainty of accusation is to be found in R. 3. Joined charges must all arise out of the same facts or of related groups of facts popularly called 'a system.' The ease with which indictments can be drawn and the absence of technical words permitted, which the A. avowedly promotes, will no doubt succeed in destroying all interest in the long line of cases on this topic.

Offence both at common law and by statute] One was indicted under rpd. 1 J. 1, 8, for stabbing *contra formam statuti;* it was held that the jury might acquit on the statute, and find him guilty of manslaughter at common law. *Harwood,* Style, 86, 1648; 2 Hale, P. C. 302. So of common law libel, and libel 'knowing the same to be false.'

Enumeration of property] With regard to the extent or amount of the property the object of the offence, the averments are divisible. Whatever number of articles may be alleged, there may be a conviction if *any one* of them be proved to have been stolen. Where defendant was indicted, for that he, being employed in the business of the post office, feloniously stole and took from a letter a bank post bill, a bill of exchange for 100*l.*, a bill of exchange for 40*l.*, and a promissory note for 20*l.*, and it was not proved that the letter contained a bill of exchange for 100*l.*, on a conviction, it was held that the statement in the indictment not being descriptive of the letter but of the offence, the conviction was right. *Ellins,* R. & Ry. 188, 1810. So, on an allegation that the defendant took 'extorsively' twenty shillings, it is sufficient to prove that he took one: *per* Holt C.J., *Burdett,* 1 L. Raym. 149, 1696. Where it was averred that defendant had embezzled bank notes for 1*l.* each, and some for other sums, and the evidence was, that he had embezzled five notes for 1*l.* only, this was held sufficient. *Carson,* Russ. & Ry. 303, 1815.

So on a

Joint Indictment] Any one of the accused may be convicted. But they cannot be found guilty separately of separate parts of the charge. Where A. and B. were indicted for stealing in a dwelling-house to the value of 6*l.* 10*s.*, and the jury found A. guilty of stealing part of the things, to the value of 6*l.* (a capital offence), and B. guilty of the residue (simple larceny), the judges held, that judgment could not be given against both; but that on a pardon to or *nolle prosequi* B., it might be given against A. *Hempstead,* Russ. & Ry. 344, 1818.

The same is the case when, as sometimes occurs,

More than one 'intent'] is laid in the indictment; it is sufficient to prove any one that is an ingredient in or constitutes the offence. Thus on a charge that defendant published a libel of certain magistrates, with intent to defame them, and also with intent to bring the administration of justice into contempt, Bayley J. informed the jury that if they were of opinion that defendant had published the libel with *either* of those intentions, they ought to find him guilty. *Evans,* 3 Stark. N. P. 35, 1821. So where the indictment charged assault on a female child, with intent to abuse and carnally know her, and the jury found that defendant assaulted the child with intent to abuse her, but negatived

the intention carnally to know her, Holroyd J. held, that the averment of intention was divisible. *Dawson,* 3 Stark. N. P. 62, 1821.

Averments which need not be proved] Where an averment of intent is unnecessarily introduced, it may be rejected. *Jones,* 2 B. & Ad. 611, 1831; 'intent to deceive' averred but not required by statute. It is unnecessary to aver that the right to trial by a jury has been claimed under 42-3 V. 49, 17: *Chambers,* 65 L. J. M. C. 214; 75 L. T. 76; 18 Cox C. C. 401; 60 J. P. 586, 1896: C. C. R. A convenient list of 'the principal cases' in which this claim may be made will be found in *Atkinson's Magistrate's Practice,* c. 3.

Description of the charge] See Rules 4 and 5 of the Indictments A. 1915.

'*Essential elements of the offence*'] If place or time be of the essence of the offence, as in burglary, or the non-surrender of a bankrupt at the time appointed, then it must, subject to the power of amendment, be strictly proved as laid. *Brown,* M. & M. 163, 1828.

In some cases it is necessary to prove the parish or place named. Thus, in an indictment against a parish for not repairing a highway, the situation of the highway within the parish is a material averment; it must be proved as laid. *Inhabs. of Hartford,* 1 Cowp. 111, 1779. So if the statute on which the indictment is framed gives the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish alleged. *Glossop,* 4 B. & A. 616, 1821.

Description generally] is regulated by Rules 6-9: 'reasonable clearness' is the chief and indispensable feature.

Averments of place, time, &c.] R. 9, where the words 'subject . . . rules' seem to be inserted *ex abundanti cautela,* but perhaps they are illustrated by 8 E. 7, 67, 32 (4), whereby in certain 'continuous' offences 'the date of the act constituting the offence' need not be specified. Cf. R. 4 (3).

Coin] 14-5 V. 100, s. 18 is: 'In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved.'

By s. 30 of that A.: 'In the construction of this Act the word 'indictment' shall be understood to include 'information,' 'inquisition,' and 'presentment,' as well as indictment, and also any 'plea,' 'replication,' or other pleading, and any Nisi Prius record; and the terms 'finding of the indictment' shall be understood to include 'the taking of an inquisition,' 'the exhibiting of an information,' and 'the making a presentment'; and wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be

understood to include and shall be applied to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing; and the word 'property' shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.'

Property—value] R. 6 (1).

Owners of property] R. 6 (2).

Defendant and other persons] R. 7. 'The only exception' to the rule that in all criminal proceedings definite legal persons must be named as defendants 'seems to be the case where the 'inhabitants' of a parish or other district are indicted for failure to repair a highway. There is no need to mention names in such an indictment and any two or more of the inhabitants may appear.' *H. Smith, The Law of Associations*, 105 (1914), citing *Owners and Occupiers of . . . Burn*, 1778, in *Birmingham, &c. Rly.*, 1842 (which see), where an indictment was quashed for want of definite defendants.

If the charge is alleged in respect of two capacities, proof of employment in either is sufficient: *Shaw*, 2 W. Bl. 789; 1 Lea. 79; East P. C. 580, 1771.

'*Special value*'] There are many cases in which the allegation of value is material, either because the value is of the essence of the offence, as in an indictment against a bankrupt for concealing, &c. part of his property to the value of 10*l.* (p. 411), or as enhancing the punishment, as for stealing in a dwelling-house to the amount of 5*l.* Rule 6 (1) of I. A.

Counts] R. 4 (1) and (2). There cannot be a finding on part of a count: *O'Connell, &c.* v. *R.*, 11 Cl. & F. 155; 9 Jur. 25; 1 Cox C. C. 413, 1844: H. L.

Amendment] See p. 82 and p. 272.

Effect of the rules] It is, perhaps, less than it was (in the last edition) true to say: 'In considering, therefore, what evidence is proper to the issue in criminal cases, we must always bear in mind that we may have to look for the issue beyond the mere words of the indictment.'

Description of documents] is now regulated by R. 8.

Foreign languages] In *Goldstein*, R. & R. 473; 3 Br. & B. 201; 7 Moore 1, 1822, judgment—for forgery of a Prussian note—was arrested because there was no English translation of the German in the indictment, but as no copy need now be set out therein, it seems that such a point is no longer good. Any foreign document in evidence must be translated by a sworn interpreter.

'*A person unknown*'] R. 7. If the real name comes to light after indictment found and before judgment, the power of amendment under s. 5 (1) would now meet the difficulties which were formerly felt

in such a case: see 2 East, P. C. 651. It is doubtful, from a comparison of *Keilwey* and other old authorities with *East,* whether if a new indictment with the correct name were presented, defendant could plead *autrefois acquit;* but the point is of little importance.

In *Caspar,* 2 Moo. C. C. 101, 1839, an indictment charging that 'a certain evil-disposed person' feloniously stole, &c., that A. B. feloniously incited him to do so, and that C. D. and E. F. feloniously received, &c., was held bad against A. B. because the statement concerning the stealer was 'too uncertain to support the charge against' A. B. as accessory before the fact, but good against C. D. and E. F. for a substantive felony. But, perhaps, now the allegation against A. B. would be held good under s. 3 (1) of the I. A.

Idem sonans] The so-called rule is obsolete. Cf. *Watson,* 32 St. Tr. 25, 1817.

Signature] Where the only evidence of the christian name of the prosecutor was that of a witness who had seen him sign his name, once to the complaint and once to his deposition, it was held to be 'admissible as evidence of that name, although no doubt it is evidence open to observation to the jury': *per* Cockburn C.J., *Toole,* D. & B. C. C. 194; 7 Cox C. C. 266, 1857.

Caption] See R. 2. It never was a part of the indictment: 2 Hale, P. C. 165; *Weldon,* 26 St. Tr. 237, 1795.

II. Relevancy.

a. *Other similar offences or conduct*] The view that it is in itself an objection to the admission of evidence that it discloses other *similar* offences, especially where they are the subject of indictment, *Smith,* 2 C. & P. 633, 1827, has long been exploded (and is by no means encouraged by the Indictments A.). *Salisbury,* 5 C. & P. 155, 1831; *Clewes; Richardson,* 2 F. & F. 343, 1860; *Rearden,* 4 F. & F. 76, 1864; *Cobden,* 3 F. & F. 833, 1862; *Proud,* 1 L. & C. 97, 1861; *Ollis,* 1900, 2 Q. B. 758; 69 L. J. Q. B. 918; 64 J. P. 518; 19 Cox C. C. 554 (evidence on a previous *acquittal* admissible); C. C. R. by a majority; *Bond,* 1906, 2 K. B. 389; 95 L. T. 296; 70 J. P. 424; 22 T. L. R. 633; 54 W. R. 586; 75 L. J. K. B. 693; 21 Cox C. C. 252; C. C. R. by a majority (evidence showing a system which negatives the defence of ignorance or accident), and numerous other cases, including *Makin* and *Wyatt,* 1904, many of which are mentioned in *Bond.* If the evidence is admissible on general grounds, it cannot be resisted on this ground. But, on the other hand, when on the trial of one indictment, evidence relevant to another and prejudicial to defendant was unnecessarily (and perhaps unintentionally) given, the C. C. A. quashed the conviction: *Posnett,* 9 Cr. A. R. 64, 1913. So of another accusation (without indictment), though the judge strongly cautioned the jury, *Barron,* 1913; cf. *Probets: à fortiori* when the chairman and prosecuting counsel knew from the depositions that a witness would give this kind of evidence, but made no effort to suppress it: *Coulter,* 5 Cr. A. R. 149, 1910. Evidence was given that defendant, charged with false pretences ('in effect forgery'), admitted the forgery of two irrelevant documents (similar to that in issue): *J. Gray,* 1911: c. q.

Perhaps the question could only arise now where there has been a failure to indict for all the offences suggested by the evidence, for R. 3 of the Indictments A. disposes of the difficulty formerly felt, and only leaves open the question what are 'offences of the same or a similar character.' And this point was discussed before 1915.

Perhaps the leading case on this subject is *Makin* v. *Att.-Gen. for N. S. W.*, 1894, A. C. 57; 63 L. J. P. C. 41; 58 J. P. 148; 69 L. T. 778; 17 Cox C. C. 704; 6 R. 373, the famous judgment of L. Herschell C. in which substantially supplies the general rule now accepted, the question as to the admissibility of such evidence was fully discussed. See p. 105. In that case the prisoners were charged with the murder of a child whom they had received from the mother on representation of their desire to adopt it, and whose body was subsequently found buried in their garden. It was held that evidence that several other children had been received by the prisoners on similar representations, and that other bodies of infants had been found buried in gardens of houses occupied by the prisoners, was relevant to the issue.

Thus evidence may be given, not only of the act charged itself, but of other acts so closely connected therewith, as to form part of one chain of facts which could not be excluded without rendering the evidence unintelligible—part in fact of the *res gestæ*. Thus L. Ellenborough, in citing *Whiley*, 2 Lea. 985; 1 New. Rep. B. & P. 92, 1804, a case where a man committed three burglaries in one night, and stole a shirt at one place and left it at another, and they were all so connected that the court heard the history of all three burglaries, remarked, 'If several and distinct offences blend themselves with one another, the detail of the party's whole conduct must be pursued.' Defendant, who had been in the employ of the prosecutrix, was indicted for stealing six shillings; her son, suspecting him, had marked a quantity of money, and put it into the till, and watched him; at first the till contained 11*s.* 6*d.* The son having received another shilling from a customer put it into the till; and another person having paid a shilling to defendant, he was observed to go to the till, to put in his hand and to withdraw it clenched. He then left the counter, and was seen to raise his clenched hand to his waistcoat pocket. She was proceeding to prove other acts of his, in going to the till and taking money, when it was objected that this would be to prove several felonies. The objection being overruled, the son proved that, on each of the several inspections of the till, after defendant had opened it, he found a smaller sum than ought to have been there. On a conviction, the K. B., on an application for staying judgment, were of opinion that it was in the discretion of the judge to confine prosecutor to the proof of one felony, or to allow him to give evidence of other acts which were all part of one entire transaction. *Ellis*, 6 B. & C. 145, 1826. The same responsibility rests on the judge under R. 3.

Where several ricks in the same neighbourhood were on fire on the same night, on an indictment in respect of one, defendant's presence and demeanour at the other two (both charged) was given in evidence as 'important to explain his movements and general conduct before and after' the fire then in issue: 'but threats, statements and particular acts' relating to those two and not to his conduct at that under trial were excluded: *per* Patteson J., *Taylor*, 5 Cox C. C. 138, 1851.

That the question is not yet solved in a wholly satisfactory way appears from a collation of criminal appeals. Perhaps the most con-

venient of these is *Rodley,* 1913, 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 465; 58 S. J. 51; 29 T. L. R. 700; 9 Cr. A. R. 69, in which Bankes J. (with A. T. Lawrence and Atkin JJ.), delivering judgment, followed *Fisher,* 1910, 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. A. R. 176, and *Bond,* above, citing with approval the words of Channell J. in the former and Bray J. in the latter, viz.: 'A careful examination of the cases where evidence of this kind has been admitted shews that they may be grouped under three heads: 1. Where the prosecution seeks to prove a system or course of conduct. 2. Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake. 3. Where the prosecution seeks to prove knowledge by the prisoner of some fact.' Bankes J. added that several of the (majority) judges in *Bond* pointed out that 'a single prior act of a like criminal nature would in general not be admissible as evidence of a system.' He referred also to the judgment of Loreburn C. (in which the E. of Halsbury, LL. Ashbourne, Alverstone C.J., Atkinson, Gorell, Shaw, Mersey and Robson concurred) in *Ball,* 1911, A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 27 T. L. R. 162; 6 Cr. A. R. 31, where the C. C. A. had quashed a conviction for incest on the ground that evidence of offences similar to those alleged in the indictment and not on the dates therein alleged [July, September, 1910] had been wrongly admitted: 5 Cr. A. R. 238: the H. L. reversed this decision, Loreburn C. saying: 'Certain evidence which was obviously admissible was given to establish that at all events there was ample opportunity for this offence, and there were circumstances which, to say the least, were very suggestive of incest; also that these two persons lived together and occupied the same bed. Further evidence was' at the trial 'tendered to shew that these persons had previously carnally known each other and had had a child in 1908. The object of that evidence was to make good that they had a guilty passion towards each other, and that, therefore, the proper inference from their occupying the same bedroom, and the same bed, was an inference of guilt. . . . ' Bankes J. added: 'In *Ball,* the first ground given by the Lord Chancellor for the admissibility of the evidence [the birth of a child] suggests an extension of the rules . . . above referred to' (perhaps doubting the 'extension'), 'but the second ground comes within the rule . . . that evidence is admissible to rebut a defence really in issue.'

At what stage such evidence may be given] In *Perkins* v. *Jeffery,* 1915, 2 K. B. 702; 84 L. J. K. B. 1554; 113 L. T. 456; 79 J. P. 425; 31 T. L. R. 444; 25 Cox C. C. 59, respondent was charged under s. 4 of the Vagrancy A. 1824, with an act, in July, 1914, with intent to insult a female. The questions submitted to the K. B. D., said Avory J., in giving judgment, are: 'i. whether respondent giving evidence . . . could be asked in cross-examination if he had exposed himself to the same young woman in the same place in May, 1914; ii. whether evidence was admissible on the part of the complainant that he had so exposed himself in May; iii. whether evidence was admissible on the part of the complainant that respondent had on other occasions' done the same act at the same place and about the same hour with the same intent. 'The justices refused to admit the question in cross-examination, or the other evidence, on the ground that it was not relevant to the issue and was contrary to the provisions of s. 1 of the Criminal Evidence A. . . . i. and ii. In our opinion, the question in

cross-examination, and the evidence of the complainant, directed to show that he had done the same thing at the same place and to the same woman were admissible and relevant to each of these issues [1. the identification; 2. its being wilful and not accidental; 3. the intent] . . .' It had been argued that the only issue raised by the defence was identity, but 'in our opinion the statement of respondent when arrested, 'They have made a mistake; they have got the wrong man,' would not preclude him from raising the other defences' to 2 and 3 above, 'and it must be borne in mind that in criminal cases, and especially in . . . summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of the particular defence that is going to be set up. In the present case we think the cross-examination did suggest a possible defence on grounds 2 and 3, above. iii. Other witnesses to show a systematic course of conduct, &c.: The question is more difficult. The dates of the other occasions are not before the court, and unless it appeared clearly that the defence that the act was not done wilfully or with intent to insult a female was going to be relied on, and that the other occasions were sufficiently approximate to the alleged offence to show a systematic course of conduct, we think the evidence should not be admitted. *Bond* is an authority which would justify the admission of such evidence . . . But it is, we think, open to doubt whether evidence is admissible to prove a 'system or course of conduct,' unless it is relevant to negative accident or mistake, or to prove a particular intention.' The judgment then cited Reading L.C.J. in *Boyle and Merchant,* 1914, 3 K. B. 339; 24 Cox C. C. 406; 111 L. T. R. 638; 10 Cr. A. R. 193, as saying: 'It has been laid down that to make such evidence admissible there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence,' and then after a reference to a passage in *Christie* (H. L.), added: 'We think that such evidence as to other occasions should not be admitted unless and until the defence of accident or mistake, or absence of intention to insult, is definitely put forward.' Cf. *Anticipating Defence,* below. See also *Rebutting Evidence.*

Mitigation of the strict rule] In *Shellaker,* 1914, 1 K. B. 414; 83 L. J. K. B. 413; 78 J. P. 159; 24 Cox C. C. 86; 30 T. L. R. 194; 110 L. T. 351; 9 Cr. A. R. 240 (for the facts of which see *Rape*), five judges on the authority of *Ball* (above, which, it said, followed a line of authorities of which *Ollis* (above) was one) went on to observe that in cases where 'the application of the general principle might work hardships' they 'may come within that class of case where, although the evidence is strictly admissible, it is of little value to the prosecution, but would indirectly so prejudice the fair and dispassionate trial of the prisoner that the judge would say that it ought not to be given.'

It is clear that the law on this point has developed since 1856, for Stephen J. writing of *Palmer's* trial for murder says (*Gen. View of Crim. Law,* p. 270, 2nd ed. (1890)) that though he was also indicted for the murders of his wife and his brother—'he most unquestionably had murdered the former and was guilty of forgery—yet the evidence on all these matters was confined to what was absolutely necessary for the purpose of showing motive.' The suggestion of murder 'was never made or hinted at.' The trial 'exhibited in its very best and

strongest light the good side of English criminal procedure.' Compare with *Palmer, G. J. Smith,* 11 Cr. A. R. 229; 84 L. J. K. B. 2153; 114 L. T. 239; 80 J. P. 31; 59 S. J. 704; 31 T. L. R. 617, 1915, also indicted for three murders and tried for one. According to one headnote (S. J.): 'Appellant was charged with the murder of B. M., a woman with whom he lived and with whom he had gone through a form of marriage. She was found drowned in her bath. Evidence was admitted that subsequently two other women with whom he had gone through a form of marriage had been found drowned in their baths in very similar circumstances. Held, that as there was in law a *primâ facie* case to go to the jury on the evidence about the death of B. M. alone, the evidence in question was admissible to prove that her death was designed by appellant. Whether the evidence would have been admissible if there had been no *primâ facie* case apart from it, *quære.*' According to another (L.J.): 'At the trial on indictment of a prisoner the prosecution may, in order to prove the quality of the act charged in the indictment, give evidence of subsequent criminal acts by the prisoner and the facts and circumstances surrounding the same, other than that covered by the indictment, when a *primâ facie* case in law has been established against the prisoner of the act charged in the indictment.' Cr. A. R. is to the same effect, and adds: 'But the judge must carefully direct the jury on the limits of the use which they may make of' that 'evidence . . . the criterion of extent' of evidence of surrounding circumstances of the similar acts 'is (*semble*) the necessity of assisting the jury.' Evidence was admitted in each case that appellant benefited pecuniarily by the death (J. P.).

Convictions quashed on the ground of such evidence having been wrongly admitted: *A. T. Ellis,* 1910, 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 22 Cox C. C. 330; 26 T. L. R. 535; 5 Cr. A. R. 41; *Rodley,* above; *Barron,* 9 Cr. A. R. 236; 24 Cox C. C. 83; 110 L. T. 350; 30 T. L. R. 187; 78 J. P. 184, 1913; *Baird,* 11 Cr. A. R. 186; 113 L. T. 608; 25 Cox C. C. 86; 84 L. J. K. B. 1785, 1915: credit by fraud; where the headnote (Cr. A. R.) is: 'On a charge of obtaining by false pretences or fraud, evidence of similar conduct by the defendant to that charged is only admissible in so far as it tends to prove the specific intent to defraud alleged (by showing systematic dishonesty), and when such evidence has been given there ought to be an express direction to that effect. If the similar transactions did not amount to criminal offences (*semble*) they cannot be given in evidence. On the trial of such indictments, the foundation for the admission of evidence of similar transactions should be laid by proof of the facts in issue.' It is added that the similar conduct, to be relevant, must amount to criminal acts; for the correct direction, see under *Summing Up.* It would seem, then, that the relevancy of similar acts—*i.e.* the degree of similarity—must depend on the circumstances of each case.

Similar acts subsequent to that charged] See above; *Adamson,* 6 Cr. A. R. 205, 1911, larceny; *Rodley,* above; *Mason,* 10 Cr. A. R. 169; 24 Cox C. C. 305; 111 L. T. 336; 78 J. P. 389, 1914, relying on *Rhodes,* 1899. *Burlison,* 11 Cr. A. R. 39, 1914, hardly affects the point. See under *Incest.*

General rule] So far as there can be a general rule, it is admirably stated 9 *Laws of England,* 380: 'Evidence cannot be given for the prosecution to prove that the defendant is of bad character or has a

propensity to commit criminal acts of the same nature as the offence charged. But in cases where a guilty knowledge or intention or design is of the essence of the offence, proof may be given that the defendant did other acts similar to those which form the basis of the charge. Such acts may be proved whether they were done before or after the acts which form the basis of the charge, and even if they form or have formed the basis of other charges. Such evidence is admissible to show not that the defendant did the acts which form the basis of the charge, but that, if he did such acts, he did them intentionally and not accidentally, or inadvertently, or innocently, or that they formed part of a system.' Cf. *Chitson,* 1909.

Time limit] The C. C. A. ' has held again and again that where guilty intent is of the gist of an offence, evidence to prove such intent is admissible although it relates to the commission by the accused person of other similar acts at or about the same time as those charged against him ': *D. F. West,* 12 Cr. A. R. 146, 1916. But see *Kennaway,* where the interval was eighteen years, and, generally, on the rule about similar acts.

It is not easy to understand why, on a charge of picking a pocket at a horse sale, evidence that defendants were seen together there ' hustling ' unidentified persons and attempting to pick their pockets, was held admissible, but, apparently, it was considered proof of 'system': *T. Evans, &c.,* 12 Cr. A. R. 257, 1917. Other or older cases at most require mention (many may be found under particular offences): *Egerton,* Russ. & Ry. 375, 1819 (robbing prosecutor of a coat by threatening to accuse him of a crime: evidence was admitted that the defendant had made another, but ineffectual, attempt to claim a 1*l.* note from prosecutor on the day after that on which he obtained the coat), and this ruling was confirmed by the judges; *Voke,* R. & R. 531, 1823 (maliciously shooting at the prosecutor: evidence admitted that defendant fired at prosecutor twice during the day, partly on the ground that the two shots were ' one continued transaction,' but also that counsel for defendant, by his cross-examination of prosecutor, had endeavoured to show that the gun might have gone off the first time by accident); *Clewes,* 1830 (for the murder of one Hemmings; opened that great enmity existed between Parker, the rector, and his parishioners, and that defendant had used expressions of enmity against him—' he would give 50*l.* to have him shot '; that the rector *was* shot by Hemmings, and that defendant and others who had employed him, fearing that they should be discovered, had themselves murdered Hemmings: evidence of the defendant's malice against the rector was given without objection, but objection taken to showing that Hemmings was the murderer; Littledale J. decided that it was admissible as it [whether defendant had any motive to murder H.] was relevant to the issue before him); *Mogg,* 4 C. & P. 364, 1830 (administering sulphuric acid to eight horses, with intent to kill them: evidence that defendant had frequently mixed sulphuric acid with the horses' corn objected to; Parke J. held it was admissible, as showing whether the act was done with the intent charged in the indictment); *Geering,* 18 L. J. M. C. 215, 1849, an indictment for the murder of a husband, in September, 1848, by administering arsenic; defendant was also charged, in three other indictments, with the murder of her son George, in December, 1848; of another son, James, in March, 1849; and of an attempt to murder another son, Benjamin, in April, 1849—all by similar means: evidence was tendered consisting

of a medical *post-mortem* analysis of the intestines, heart, &c. of the husband and two sons who were dead, and also of the vomit of Benjamin, showing the presence of arsenic in each case; also that they all lived together, and that defendant cooked the victuals: on objection Pollock C.B. said that the domestic history of the family during the period that the four deaths occurred was receivable in evidence, to show that during that time arsenic had been taken by four members of it, so that the jury might determine whether such taking was accidental or not: contrast with *Geering, Palmer ex relatione* Stephen J., above; *Garner,* 4 F. & F. 346, 1864; *Cotton,* 12 Cox C. C. 400, 1873; *Roden, ib.* 630, 1874. early death of several children; *Heeson,* 14 Cox C. C. 40, 1878; *Dale,* 16 Cox C. C. 703, 1889; *Rhodes,* 1899, 1 Q. B. 77; 19 Cox C. C. 182; 79 L. T. R. 360, obtaining by false pretences, *subsequent* acts admissible to show a sham business being carried on, C. C. R.; *Wyatt,* 1904, 1 K. B. 188; 20 Cox C. C. 462, obtaining credit by fraud; antecedent acts, 'negativing accident, inadvertence, or negligence': C. C. R.

Guilty knowledge] When the indictment alleges *knowledge* defendant 'must know that without the reception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether' there was *guilty* knowledge or not: *per* L. Ellenborough, *Whiley,* above: see head 3 in *Bond.*

Offence constituted by series of acts] In *Firth,* 38 L. J. M. C. 54; L. R. 1 C. C. R. 172; 11 Cox C. C. 234, 1869, the abstraction of gas from a pipe for several years was considered to be one transaction; and even if there were separate takings yet in such a case they would afford evidence of one continuous felony. Cf. *Roberts,* 1808: conspiracy; and *Long,* 6 C. & P. 179, 1833.

In some cases the offence itself consists of a series of transactions, as on indictments for barratry, uttering, conspiracy, keeping a common bawdy-house, and other cases. In all these cases, of course, evidence of any act is admissible which goes to make up the offence. The principle is explained by L. Hardwicke C., 'This is the practice in all cases where the general behaviour or quality or circumstance of the mind is the thing in issue. . . . Wherever the general life or conversation is put in issue, it is notice to the person who is charged that she should be prepared to take off the weight of that evidence; but where it comes in collaterally, you shall be confined to general evidence.' This, he had explained, happens in criminal prosecutions *generally,* where 'character' is not the particular thing to be tried; 'and when that is the case, they are not supposed to be prepared with evidence'—a case contrasted with those (gaming-house cases, &c.) 'where the character is the particular issue to be tried.' See *Clarke* v. *Periam,* under *Nuisance.* In *Welman,* D. & P. C. C. 188; 22 L. J. M. C. 118; 6 Cox C. C. 153; 17 Jur. 421; 1 W. R. 361, 1853: false pretences; defendant, in July, 1850, called on prosecutrix and made false representations about a benefit club, but failed on this occasion to obtain any money. In August of the same year he again called about the club, and referred to the previous conversation. It was held that it was for the jury to say whether these conversations were so connected as to form one continuing representation; and that if so, they might connect them: conviction affirmed.

Identifying] evidence is sometimes an instance of this principle. Thus, property which had been stolen from a house on fire was afterwards discovered in defendant's possession: this evidence admitted in *arson* 'as it seemed to be all one act.' *Rickman,* 2 East, P. C. 1035, 1789. So where *Rooney* and others were indicted for robbing A. of money, there being another indictment against them for robbing B. of a watch, when A. and B. were travelling in a gig and were stopped and robbed, Littledale J. held, on the trial of the first, that evidence might be given that B. lost his watch at the same time and place, and that it was found on one of them (but that evidence was not admissible, being irrelevant, of the violence that was offered to B.). 'One question in the case is, whether these persons were at the place in questions when' A. 'was robbed, and as proof that they were so, we must hear evidence that one of them had got something which was lost there at the time.' *Rooney,* 7 C. & P. 517, 1856. So, to identify an instrument, evidence may be adduced of the shape of a wound given to another by defendant at the same time, although such wound be the subject of another indictment: *per* Gaselee and Parke JJ., *Fursey,* 6 C. & P. 81, 1833. For identification in so far as it consists of an incriminating statement made in defendant's hearing, see *Christie,* 1914.

Particular Offences] Cf. *Offence constituted,* &c., above. The general rule is conveniently illustrated in three classes of case, in which, from the nature of the offence itself, this kind of evidence is frequently necessary; viz. conspiracy, uttering forged instruments and counterfeit coin, and receiving stolen goods. In these the act charged itself is almost always of an equivocal kind, from which *malus animus* cannot, as in crimes of violence, be presumed; and almost the only evidence which could be adduced to show the guilt of defendant would be his conduct on other occasions. 'Though it must be acknowledged that in the two first of these the Crown being often directly interested, has succeeded in pushing the rules of evidence to their extremest severity against the prisoner': 7th ed. of this work, p. 89, by Stephen K.C. (afterwards J.).

Anticipating Defence] On a trial for murder, the crown tendered the prison doctor, at the end of its case, to show defendant's state of mind at the date of the act, but an objection to that course was sustained. After defendant gave evidence, the crown was permitted to call the doctor: the C. C. A. upheld this decision: 'the circumstances showed that by cross-examination the defence was going to set up that appellant was not responsible for his actions. Thereupon the prosecution appreciated that they had to give evidence on the point to answer the cross-examination. If there was any evidence before the jury that the prisoner was insane at the time, it was clearly the duty of the prosecution to call rebutting evidence. If there was no evidence of insanity before the jury, then calling medical evidence would not have affected the case': *per* Alverstone L.C.J. *Scholey,* 3 Cr. A. R. 183, 1909. Cf. *Perkins* v. *Jeffery.* In *A. Thompson,* 1917, L. Sumner said: 'The prosecution cannot credit the accused with fancy defences, in order to rebut them at the outset with some damning piece of prejudice.' 'Before an issue can be said to be raised which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance, if not in so many words—the issue so raised must be one to which

the prejudicial evidence is relevant,' *e.g.* in 'coining, uttering, procuring abortion, demanding by menaces, false pretences and sundry species of fraud.'

Rebutting evidence] 'After the close of the case for the defendant, the general rule is that the evidence in reply must bear directly or indirectly upon the subject-matter of the defence, and ought not to consist of new matter unconnected with the defence and not tending to controvert or disprove it . . . but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted.' 2 Phill. Ev. 474. So in effect, *Crippen,* 1911, 1 K. B. 149; 22 Cox C. C. 289; 75 J. P. 141; 5 Cr. A. R. 255; 27 T. L. R. 69: murder: if something unfair, *e.g.* 'a trap' had been set by the prosecution, the C. C. A. would review the discretion. This was repeated in *I. Foster,* 6 Cr. A. R. 196, 1911, where defendant was indicted for receiving with two others (for larceny): one of whom, L., pleaded guilty; neither defendant called him, but when the cases for both were closed, the prosecution was allowed to call him, on the ground of 'surprise,' as he had been called for Foster's co-defendant (but not for F.) before the justices. The C. C. A. thought that the judge's discretion had been fairly exercised, and that 'Foster could have been recalled to contradict' L. if he had applied to do so. That discretion is, in practice, the only rule (provided, always, that such evidence is not merely confirmatory of the original case, for then it should have been tendered at first: *Stimpson,* 2 C. & P. 415, 1826). Evidence in reply is usually allowed where defendant gives evidence of matter which could not be foreseen by the prosecution, *e.g.* a lawful explanation that the goods were bought; or an *alibi: Hilditch,* 5 C. & P. 299, 1832; *Froggatt,* 4 Cr. A. R. 115, 1910, about an immaterial date which perhaps could not have been given in chief; good character of crown witnesses: *Layer,* 287; of defendant: *Rowton,* 1865; or some collateral fact impeaching the credit of a witness on the other side: *Whelan,* 1886; *T.* s. 1473. In *Frost,* 1839 (St. Tr. at 386), Tindal C.J. said: 'If any matter arises *ex improviso,* which no human ingenuity can foresee on the part of . . . a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown.' Theoretically, no doubt, a defendant might reply on the rebutting evidence, but the procedure is controlled by the judge. Cf. the remarks by Cockburn C.J. in *Rowton,* and *per* Cave J. in *Shimmin.* For instances, see *Contradicting Witness.* After the jury had retired a witness was recalled whose evidence gave defendant the right to cross-examine and to give rebutting evidence: but he was not asked to do so: *Howarth,* 13 Cr. A. R. 99, 1918: c. q. 'solely on that ground.'

General disposition] 'It would not be allowable to shew . . . that the prisoner has a general disposition to commit the same kind of offence as that charged against him. Thus, in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be received in evidence': *Cole,* 1810, 'by all the judges'; 1 Phill. on Ev. 499 (8th edn.). But see the judgments in *A. Thompson,* 1917, especially L. Sumner's.

Caution] Nor may evidence of caution to defendant against an offence generally be given on the charge of a particular crime: *J. T. Mullins,* 5 Cr. A. R. 13, 1910.

b. *Evidence of defendant's* (i) *good character*] The theory on which general evidence of *good* character is admitted, and the limits within which it must be confined, are settled at common law by the case of *Rowton*, L. & C. 520; 34 L. J. M. C. 57; 10 Cox C. C. 25; 11 L. T. 745; 11 Jur. N. S. 325; 13 W. R. 436, 1865, where evidence of good character having been given, the prosecution called a witness who, being asked, 'What is the defendant's general character for decency and morality of conduct?' replied, 'I know nothing of the neighbourhood's opinion, because I was only a boy at [his] school when I knew him; but my own opinion and the opinion of my brothers, who were also pupils of his, is that his character is that of a man capable of the grossest indecency and the most flagrant immorality.'—In his judgment, Cockburn C.J. said: 'It is necessary to consider what is the meaning of evidence of character. Does it mean evidence of general reputation, or evidence of disposition? I am of opinion that it means evidence of general reputation. What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged; but no one has ever heard the question, What is the tendency and disposition of the prisoner's mind? put directly. The only way of getting at it is by giving evidence of his general character, founded on his general reputation in the neighbourhood in which he lives. That, in my opinion, is the sense in which the word 'character' is to be taken when evidence of character is spoken of. . . . The allowing evidence of good character has arisen from the fairness of our laws, and is an anomalous exception to the general rule. It is quite true that evidence of character is most cogent when it is preceded by a statement showing that the witness has had opportunities of acquiring information upon the subject beyond what the man's neighbours in general would have; and in practice the admission of such statements is often carried beyond the letter of the law in favour of the prisoner. It is, moreover, most essential that a witness who comes forward to give a man a good character should himself have a good opinion of him, for otherwise he would only be deceiving the jury; and so the strict rule is often exceeded. But when we consider what, in the strict interpretation of the law, is the limit of such evidence, in my judgment it must be restricted to the man's general reputation, and must not extend to the individual opinion of the witness. . . . Suppose a witness is called who says that he knows nothing of the general character of the accused, but that he has abundant opportunities of forming an individual opinion on his honesty, or the particular moral quality that may be in question in the particular case. Surely if such evidence were objected to it would be inadmissible. . . . Within what limits must the rebutting evidence be confined? I think that that evidence must be of the same character and confined within the same limits.' The conviction was quashed, by eleven to two. This view is criticised by Erle C.J. and very strongly by Willes J. (neither of whom noticed that Holt in *Hains*, 1695, had said: 'No witnesses should be asked how the defendant stands affected [= what his disposition is]; but if the defendant gives evidence of a general reputation, it may be answered by particular instances on the other side for the King.' *Rowton's* counsel wrongly cited Holt in *Rookwood*, 13 St. Tr. at 211, 1696, as referring to defendant's character: he was speaking of a *witness's*); by *T.* ss. 350-1 (see also *Best*, ss. 260-2), and by Stephen (Dig. Ev., note 25), who says, 'One consequence of the view taken in' *Rowton* 'is that a witness may with perfect truth swear that a man,

who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and, according to *Rowton*, the reputation is the important matter. The case is seldom, if ever, acted on in practice.

Form of question] The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction.' Elsewhere he says, *Rowton* 'settled the law, but in practice it is impossible to act upon it.'

(ii) *Evidence of bad character*] Beside the method of proving similar acts, defendant's character may be attacked *directly* under the careful regulation of statutes. But see p. 109.

Previous conviction charge—Felony] 61-2 V. 36, 1 (*f*) (ii.), regulates the suggestion before *verdict* of a previous conviction of defendant, but does not directly provide for any proof thereof (if, for instance, he denies it in answer to a question); indirectly, s. 1 does, making him a competent witness and so lets in 28-9 V. 18, 6. S. 1 (*f*) (i.) deals with the circumstances in which proof is now admissible. But in cases of felony where there is an *indictment* for a previous conviction for felony, when defendant gives evidence of good character, a previous conviction may be given in evidence in reply by 6-7 W. 4, 111; where defendant's counsel elicited, *on cross-examination*, from a witness for the prosecution, that defendant had borne a good character, Parke B. thought that a previous conviction might be put in evidence against him, in like manner as if witnesses to his character had been called. *Gadbury*, 8 C. & P. 676, 1838: witness to character may be asked whether he has heard that defendant was suspected of a named crime; *Shrimpton*, 2 Den. C. C. R. 319; 21 L. J. M. C. 37; 5 Cox C. C. 387, 1851: under the proviso in s. 9 rpd. of 14-15 V. 19, which is practically identical with that in 6-7 W. 4, 111: under neither A. could defendant 'give evidence' on oath; and in both cases the good character was elicited by his cross-examination, and defendant was held to be 'giving evidence.' Hence, though the *Criminal Evidence A.* does not allow *independent* proof of a previous conviction, yet 28-9 V. 18, 6, and other enactments (above) do: *e.g.* p. 980.

Suspicion of Felony] For evidence of defendant's character under 24-5 V. 96, 104, see *Tuberfield*. By s. 15 of 34-5 V. 112: Prevention of Crimes A. 1871, which is extended by 54-5 V. 69, 7, in proving the intent of a rogue and vagabond, under 5 G. 4, 83, which is amended by 36-7 V. 38, to commit a felony, it is 'not necessary to show any particular acts': the intent may be gathered 'from the circumstances . . . and his known character.'

Whether, when a prisoner gives evidence that he is or has been in regular employment (or the like) this is giving evidence of 'his own good character' under s. 1 (*f*) (ii.), p. 114, and so lets in a previous conviction, may be doubted, but this view has been sometimes taken in practice. See further, for prisoner-witness, below. For prisoner suborning witnesses, see *Watt*, 1905.

Things found in defendant's possession] A very difficult question arose in *A. Thompson,* 1917, 2 K. B. 630; 86 L. J. K. B. 1321; 12 Cr. A. R. 261; in H. L. (1918, A. C. 221; 34 T. L. R. 214; 13 Cr. A. R. 61: commented on *Twiss,* 1918. On a trial for gross indecency with males, evidence was admitted of powder-puffs being found on defendant when arrested, and of indecent photographs in a locked drawer in his room. The C. C. A. and the H. L. unanimously thought that this evidence was good, but the majority of the noble and learned lords distinctly held this in view of the special circumstances of this case, so that the *ratio decidendi* is difficult to seize. The speciality here was that the defence was an *alibi,* and it was held that the possession of photographs known to minister to the depraved propensity here charged was corroboration of the accomplices' identification of the accused, identity being the sole issue at the trial. No difficulty was felt about the powder-puffs. It certainly was agreed that a *primâ facie* case being made against any defendant, *any thing* found in his possession having a nexus with the charge may be matter of evidence, *e.g.* burglar's tools, *provided that* the burglary charged could have been effected by them.

To some extent this decision was anticipated in *Mackenzie* and *Higginson:* conspiracy to debauch, &c., where evidence of indecent instruments found in appellants' premises was admitted by the C. C. A. on the ground that they were proof of the alleged debauching; but, in fact, at the trial, they were admitted in view of 'imputations' on 'the girl in cross-examination.'

Previous conviction, if ingredient of the charge] When defendant elects to be tried on indictment under 34-5 V. 112, 7, offence becomes 'crime' under s. 9, and the previous conviction must be proved by the prosecution as a necessary ingredient and therefore disclosed to the jury: *Penfold and Edwards,* 1902, 1 K. B. 547; 20 Cox C. C. 161; 71 L. J. K. B. 306; 66 J. P. 248: C. C. R., overruling *Brown,* 65 J. P. 136, 1901. So *J. Osborne,* 1 Cr. A. R. 134, 1908. This is the solitary exception to the general rule, p. 307, where see the judgments in *Faulkner* v. *R.*

The conviction can only be proved in the statutory method (see *Documentary Evidence*), and not by one present thereat: *Mash* v. *Darley,* 1914, 3 K. B. 1226; 83 L. J. K. B. 1740; 24 Cox C. C. 414; 79 J. P. 33; 111 L. T. 744; 30 T. L. R. 585: C. A. overruling K. B. D.

Since the Criminal Evidence Act, 1898.

General principle] Even before this A. when defendant was compelled to admit a previous conviction, conviction was quashed: *Charnock* v. *Merchant,* 1900, 1 Q. B. 474; 69 L. J. Q. B. 221; 64 J. P. 183: Q. B. D.

Since the passing of that A. the following noteworthy cases have occurred:—

Cross-examination tending to show consent in rape lets in cross-examination under s. 1 (*f*); *Fisher,* 1899 (see *Sheean,* below); *Holmes,* 1899, the same when defendant deposes that prosecutrix is 'a drunken wastrel'—both *per* Day J., 43 Sol. J. 219; co-defendant incriminated by other's evidence may cross-examine latter. *Hadwen,* 1902, 1 K. B. 882; 71 L. J. K. B. 581; 66 J. P. 456; 20 Cox C. C. 206: C. C. R.;

defendant's answer in cross-examination on prosecutor's evidence, 'it is a lie,' and 'he is a liar,' does not let in such cross-examination—it is only 'an emphatic denial,' *Rouse*, 1904, 1 K. B. 882; 73 L. J. K. B. 60; 20 Cox C. C. 592; 68 J. P. 14: C. C. R.; defendant's evidence that he was acting in the matter under the instructions of the detective, called for the crown, *i.e.* as an informer, does not let in such cross-examination, but if his counsel allows a question to be put about a previous conviction and answered, without objection, a conviction will not be set aside on that account, *Bridgwater*, 1905, 1 K. B. 131; 74 L. J. K. B. 35; 20 Cox C. C. 737; 69 J. P. 26: C. C. R.; but evidence that one of the witnesses for the crown had committed the crime charged on defendant, although it was only a necessary part of the defence, clearly lets in such questions: *per* Darling J., *Marshall*, 63 J. P. 36, 1899. Jelf J. dissented '*in toto*' from *Fisher*, above, when consent was a defence, and ruled to the contrary: *Sheean*, 21 Cox C. C. 561; 72 J. P. 32; 24 T. L. R. 459: rape: acquittal.

Since 1908.

The following cases have been decided by the C. C. A. ('proviso' = that in s. 4 of Cr. Ap. A.: appeal dismissed if not otherwise stated):—

Solomon swore that on arrest (for burglary) he said: 'I am a respectable man; I am earning my living; I never robbed anyone of a penny': cross-examination on convictions for assault and keeping a gaming-house; point not decided by the court; proviso applied: 2 Cr. A. R. 80, 1909. *Ferguson*, 2 Cr. A. R. 250, 1909: suggestion by defendant that he was a religious man. *Evison* had said nothing to justify the question whether he had been previously convicted, and he denied it: c. q.—though he might have been convicted on the facts; the jury ought to have been distinctly cautioned to pay no attention to the suggestion: 3 Cr. A. R. 75, 1909. So *Morgan*, 5 Cr. A. R. 157, 1910: similar offence suggested irrelevantly: c. q. (see below). *Biddulph:* evidence of a police photograph, clearly suggesting a previous conviction, wrongly admitted: proviso applied: 4 Cr. A. R. 22, 1910. *Ellis*, 1910: c. q.: Bray J., delivering the considered judgment of five judges, said: 'If' defendant's counsel had 'in his opening speech endeavoured to establish appellant's good character . . . that is not within the statute. . . . It was said that in the examination-in-chief of appellant' counsel 'had asked questions relating to his purchase of this business, to his general relations with' the man whom he was charged for defrauding, '&c. . . . In our opinion it would not be correct to say that appellant had given evidence of his own good character. . . . In our opinion, if we were to give the slightest colour to the idea that a general examination of the surrounding circumstances was such evidence of good character as to entitle the prosecution to prove or to cross-examine on other offences or convictions, we should deprive the prisoner of the protection which the statute has given him'; s. 1 (*f*) (ii) 'was intended to apply to cases where witnesses to character were called or where evidence of the good character of the prisoner was sought to be elicited from the witnesses for the prosecution . . . not to mere assertions of innocence or repudiation of guilt on the part of the prisoner, nor to reasons given by him for such assertion or repudiation. The evidence given by appellant here in chief could not

possibly have been objected to in a civil action as being 'evidence of good character.' . . . The statute provides that the question shall not be asked. The reason of this is plain because in most cases the mischief is done by the asking of the question. The jury naturally assume that no such question would be put unless there was foundation for it, and the more objection is made to it by counsel the stronger to their minds becomes that assumption. It is most damaging to prisoner's case for his counsel to get up and argue that a question is inadmissible because it tends to shew that prisoner has committed another crime. In this case' counsel 'was obliged to tell the' judge 'that there was another charge pending against appellant, which was contained in another indictment. In our opinion it is the duty of the judge not to wait for any objection from counsel, but to stop such questions himself, and if by mischance the question be put, it is equally the clear duty of the judge to direct the jury to disregard it and not let it influence their minds.' . . . Hence the words 'tending to show' do not only mean 'with a view to show,' but 'mean such questions as would naturally lead the jury to think defendant was charged with some other crime, and no such question can be isolated from others in cross-examination.' But the statute does not say that if the question is asked, the conviction is bad: *Barker v. Arnold,* 1911, 2 K. B. 120; 80 L. J. K. B. 820; 75 J. P. 364; 22 Cox C. C. 533: K. B. D. *W. Baker,* 7 Cr. A. R. 252, 1912. swore that for four years he had been earning an honest living: this is 'evidence of his good character.' *Hemingway,* 8 Cr. A. R. 47; 77 J. P. 15; 29 T. L. R. 13, 1912: the judge, intending to elicit defendant's good character, asked a question, the answer to which showed that he had been previously convicted several times; the evidence against him was slight and the jury were carefully warned about the inadmissible evidence: c. q. *Curtis,* 9 Cr. A. R. 9; 29 T. L. R. 512, 1913: 'when arrested appellant blurted out a statement referring to a previous 'trouble' which was not defined. The deputy-recorder, instead of taking special care to protect him from any prejudice which might be aroused in the minds of the jury from this unguarded statement, took it as though it were a deliberate answer in cross-examination and an admission of having committed some criminal act, probably a felony,' and told the jury to take this fact into consideration: c. q. *Kurash:* a question to defendant in cross-examination suggesting bigamy was disallowed and the jury directed to disregard it: proviso applied. So in *A. Stratton,* 3 Cr. A. R. 255, 1909, where the judge checked the influence of an improper cross-examination: proviso applied. The court will judge each such case on its merits: *Sullivan,* 3 Cr. A. R. 26, 1909; *W. F. Wilson,* 11 Cr. A. R. 251, 1915: to suggest in cross-examination that defendant had been connected in business with a 'rogue' and that he 'gets money out of' people and does not repay it is within the sub-s.: c. q. *Haslam,* 12 Cr. A. R. 10, 1916, was, without bringing himself within the s., 'subjected to a long cross-examination which put him in the dilemma that he must either commit perjury or admit that he was in prison': c. q. But when the question is distinctly relevant to the *defence* it is admissible though incriminating: *O'Donnell,* 12 Cr. A. R. 219, 1917.

The judge] must not suggest by an interrogation that he has information to the discredit of defendant (except when such evidence is let in): *H. Ratcliffe,* 14 Cr. A. R. 95, 1919: c. q.: defendant's statement that he has a discharge book from his ship is not putting his character in issue.

Inadvertent or unnecessary disclosure of previous conviction] by defendant: *J. Lee,* 1 Cr. A. R. 5; 72 J. P. 425; 24 T. L. R. 798, 1908; *W. Warner,* 1 Cr. A. R. 227, 1908; *Franks,* 11 Cr. A. R. 104, 1915: c. q. By the court: *Hargreaves,* 6 Cr. A. R. 97, 1910: proviso applied; *G. Brown,* 1 Cr. A. R. 82, 1908; *H. Joyce, ib.* 142, 1908; *A. George, ib.* 169, 1908; *Hemingway,* above; *Curtis,* above. When defence gives evidence of a previous prosecution the judge, *semble,* may ask whether there was a conviction: *sed qu.: Key,* 1 Cr. A. R. 135, 1908.

Previous conviction quashed] ought not to be given in evidence: *Sullivan,* 9 Cr. A. R. 201, 1913: c. as habitual criminal q.

Evidence of regular employment] It was suggested in the last edition (p. 87) that evidence of this sort for defendant ought not to let in (though it in fact had let in) a previous conviction; this view is confirmed by the judgment *per* Pickford J. in *Solomon,* above: 'it is evident that evidence of recent employment and its duration is not evidence of good character.' Cf. *W. Baker,* above, *per* the same judge.

In the following cases defendants were cross-examined on a previous conviction (except one, on a similar offence):—

In *Preston,* 1909, 1 K. B. 568; 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 53 S. J. 322; 25 T. L. R. 280; 2 Cr. A. R. 24, defendant suggested that a police officer had deliberately assisted a witness to identify him—'a serious charge,' but a matter 'not irrelevant to appellant's defence. It was natural that appellant should refer to it. We do not think that, because a prisoner perhaps inconsiderately but naturally and with reference to his defence makes a statement of this sort, the statute means that his career is to be exposed. The case is very close to the line': c. q. If the nature of the defence involves the suggestion that the case for 'the prosecution ought not to be believed because of the misconduct of one or more of their witnesses, apart from their evidence, then it is permissible to inquire into the previous history,' &c.: *ib., Bridgwater,* 1905, approved. *Ferguson,* above: "If a prisoner merely called the prosecutor or one of his witnesses a liar his character cannot be forthwith attacked': *per* L. Alverstone C.J. *Grout,* 3 Cr. A. R. 64; 26 T. L. R. 60, 1909, in cross-examination said: 'the constable [a witness] is telling lies'; 'when a man in appellant's station of life uses such terms as 'he is lying' and 'it is a lie,' or even stronger expressions, all that is generally meant is a denial of the truth of the case for the prosecution and not a real reflection upon the character of the witness . . . . it seems . . . that appellant's words were only an emphatic denial of guilt, and as such do not come within the words of the s. Then, too, the answers were elicited in cross-examination and not given as part of the defence. If any court finds that a defendant is being unwittingly led on to make such statements the judge ought at once to disallow cross-examination which is in the nature of a trap': *per* L. Alverstone C.J.: c. q. In *Seigley* (receiving) defendant, in cross-examination only, suggested, in effect, that prosecutor was a party to the crime; the court thought that there was no trap in the questions, but did not decide the case under this sub-s. But an attack on the general veracity of prosecutor is within the sub-s.: *Rappolt,* 6 Cr. A. R. 156, 1911. *R. Jones,* 3 Cr. A. R. 67; 26 T. L. R. 59, 1909, cross-examined about

a similar offence, which he denied, attacking his wife (a witness): conviction affirmed; Alverstone L.C.J. saying, '*Primâ facie* answers in cross-examination are part of the case of the prosecution and do not show the nature or conduct of the defence, but it cannot be laid down as an absolute rule that no answer in cross-examination can let in such evidence.' *H. Benson,* 3 Cr. A. R. 70, 1909, undefended, cross-examined so as to bring himself within the s., but was not warned ; on giving evidence he was warned about giving evidence of his good character, and he desisted therefrom, but was cross-examined about a previous conviction abroad: conviction affirmed, Alverstone L.C.J. observing that appellant had been warned 'most properly, as was usually done by counsel for the crown, of the risk he ran if he set up his own good character, but that was quite a different matter from a warning not to attack someone else's character.' *F. Wright,* 5 Cr. A. R. 131, 1910, suggested that admissions made by him when in custody were obtained by bribes or threats of a police officer: conviction affirmed. Cf. *Morgan,* above: 'You cannot turn a defence involving a *bonâ fide* dispute which might justify a man in declining to pay, into an attack on the witnesses for the prosecution': *per* Alverstone L.C.J. *Westfall,* 7 Cr. A. R. 176; 23 Cox C. C. 185; 76 J. P. 235; 107 L. T. 463; 28 T. L. R. 297, 1912: a charge against police of improper violence on arrest, a suggestion that prosecutor is a habitual drunkard, a statement to the magistrate (put in at the trial, but not made the basis of the defence) that the whole of the prosecution's evidence was concocted, are not within the s.: c. q. In *B. Hudson,* 1912, 2 K. B. 464; 81 L. J. K. B. 861; 107 L. T. 31; 76 J. P. 421; 23 Cox C. C. 61; 56 S. J. 574; 28 T. L. R. 459; 7 Cr. A. R. 256, previous cases were considered by five judges, who held that a suggestion in cross-examination by counsel that witness for the crown has committed the offence indicted is within the s., Alverstone L.C.J. saying, in a considered judgment, that *Bridgwater, Preston* and *Westfall* (above) 'cannot be treated as laying down a general rule applicable to all cases, and in the opinion of the court they are not a complete enunciation of the law under the s.'; possibly an undefended person should have a warning: cf. *Benson,* above. *Marshall,* 1899, was approved. Where, in manslaughter, the imputation was on the deceased, cross-examination on defendant's character was not let in: *Biggin,* 14 Cr. A. R. 87, 1919: c. q.

Objection] to questions tending to show defendant's bad character should be taken at the trial: *Farrington,* 1 Cr. A. R. 119, 1908; *B. Hudson,* which was followed in *David Watson,* 8 Cr. A. R. 249; 23 Cox C. C. 543; 109 L. T. 335, 1913, where appellant's cross-examination of a witness put forward by the crown as an accomplice and of bad character was held to let in cross-examination of his own. The same point in *Lewis Cohen,* 10 Cr. A. R. 91; 24 Cox C. C. 216; 111 L. T. 77, 1914: suggestion of another crime committed by witness: see *Summing-Up.* But—

Discretion of the judge] The trial judge has a discretion whether there should be cross-examination to defendant's character: *Watson,* 1913. This is especially so if a trap has been laid for defendant consciously or unconsciously, or if he would be unfairly prejudiced by answering: *R. Jones,* 1909.

In *Chitson,* 1909, 2 K. B. 945; 79 L. J. K. B. 10; 73 J. P. 491; 53 S. J. 746; 25 T. L. R. 818; 2 Cr. A. R. 325, on a charge of

carnal knowledge with a girl under sixteen, A. swore that (at the time of, or) the day after the act defendant mentioned similar conduct with B., also under sixteen; defendant denied on oath that he had made the statement or committed the offence therein alleged, whereupon compromising letters from him to B. were put to him and admitted by him: conviction confirmed, not (according to *Phips.* 487) because the evidence showed his bad character or system or habit, 'but as corroborating' A.'s 'testimony by showing that she had not invented the incident' of B., 'and thus as evidence that' defendant was 'guilty of the offence charged' under this sub-s. Thus this was not a case where a similar offence could be substantively proved, but incidentally became 'evidence of the credibility of his story': *per* A. T. Lawrence J. (Cr. A. R.), which 'is not the same thing as credit.' It is, perhaps, rather an instance of the doctrine of *res gestae* than an application of this sub-s. On the same ground, apparently, *Banks,* 12 Cr. A. R. 74, 1916, was supported: on a charge of carnal knowledge of a girl under sixteen, though defendant had denied misconduct on the relevant dates, he was cross-examined to show that he was the father of her expected child; the questions 'tested the veracity of the appellant in some very important particulars and were admissible on that ground': *per* Avory J. See further on this case p. 3.

Seigley, 6 Cr. A. R. 106, 1911, in a sworn statement at the police court, put in, said 'K.'s (his co-defendant's) evidence is a lie from beginning to end,' and that K. had asked him to sell the stolen goods, the subject of the charge; this 'necessarily involved the guilt of K': *per* Hamilton J.; K. was acquitted.

Misdirection] on the law: see *Summing-Up.* The principle acted on by the C. C. A. in *Hilliard,* 83 L. J. K. B. 439; 109 L. T. 750; 23 Cox C. C. 617; 9 Cr. A. R. 171, 1913—larceny by a trick—involving a technical point of law, may be conveniently cited here: 'Though the court may agree with the verdict it will quash a conviction unless it is satisfied that, with a proper direction on the law, the jury must *necessarily* have arrived at it.'

iii. *Character of witness (not defendant)*] Evidence is also, in all cases, admissible to show that an *opponent* witness bears such a character and reputation that he is unworthy of belief. But it is not allowed (with the exception of facts which go to prove that the witness is not an impartial one) to prove particular collateral facts in order to discredit him: *Watson,* 1817 (Stark. 149); *Layer,* at 252.

In chief] Garrow's proposed questions being, 'Have you the means of knowing what the general character of this witness was?' and 'From such knowledge of his general character would you believe him on his oath?': *Mawson* v. *Hartsink,* 4 Esp. 1102, 1802, followed in *Brown,* L. R. 1 C. C. R. 70; 36 L. J. M. C. 59; 10 Cox C. C. 453, 1867, L. Ellenborough said: 'The question might be put in that way, as it would then be open for the opposite side to ask about the means of knowing the witness's character, so that it could be judged of what degree of credit was due to the assertion, from the means that the witness then called had of informing himself and forming his judgment.' 'In practice the question may be shortened thus: 'From your knowledge of the witness, would you believe him on his oath?': *Phips.* 478. In *Brown,* above, c. q. because the defence was not allowed to put this question. There is, however,

another exception to the above rule—28-9 V. 18, 6. The old common law rule was that the person who calls a witness is always supposed to put him forward as a person worthy of belief; he cannot, therefore, if his testimony should turn out unfavourably, give *general* evidence to discredit him; cf. Bull. N. P. 297, and *T.* ss. 1404, 1426; but see next par.

c. *Party's witness*] And if the general character of any witness for credibility be impeached, either by direct evidence or on cross-examination, his testimony may be supported by general evidence that his character is such that he is worthy of credit.

These are the only cases in which evidence of character can be given *in chief;* for the cross-examination of witnesses upon their character, see that title.

Evidence to contradict or reinstate a witness] Any fact material to the issue which has been proved by one side may be contradicted by the other. The only fact material to the issue, with reference to which there is any peculiarity in this respect, is the general credibility of a witness: see above. But whether it be to contradict the direct evidence which impeaches the witness's credit, or to contradict the suggestions thrown out by the line of cross-examination, it is clear that, in order to reinstate the witness, no evidence can be used but *general* evidence that he is worthy of credit, in the same way as he may be impeached by *general* evidence that he is not so. *T.* ss. 1470A-6; 'but no further recrimination than this seems allowable': *Phips.* 479.

In a precisely similar manner if a witness, on cross-examination (which see), refuses to admit collateral facts which damage his case or his credit, he cannot be contradicted on these points, if they are not otherwise material to the issue. *Spenceley* v. *De Willott,* 7 East, 108, 1806; *Yewin,* 2 Campb. 639, 1811; except under 28-9 V. 18, 6, which see: the general rule was clearly expounded by Channell J. in *Cargill.* In *Yewin,* when defendant's apprentice denied that he had been charged with robbing defendant, and that he had said he would be revenged and 'fix' him in gaol, the judge declined to allow the fact of the charge to be proved, but allowed the words imputed to be proved, for they were material to defendant's guilt or innocence. *T.* ss. 1435-6.

Female witnesses—sexual offences] After much discussion, the same rule now holds with respect to the evidence of the woman in sexual charges; and it has been held, on the one hand, that prosecutrix cannot be contradicted that she has not previously had connection with a man other than defendant: *Holmes,* L. R. 1 C. C. R. 334; 41 L. J. M. C. 12; 12 Cox C. C. 137, 1871; not even when counsel has (wrongly) mentioned her chastity in opening and examined her on it: *Cargill,* 1913, 2 K. B. 271; 82 L. J. K. B. 655; 23 Cox C. C. 382; 108 L. T. 816; 77 J. P. 347; 8 Cr. A. R. 224, which may now be regarded as the leading case on the point; and, on the other, that she may be contradicted that she has not previously had connection with defendant himself, because that is material to the issue: *Riley,* 18 Q. B. D. 481; 56 L. J. M. C. 52; 16 Cox C. C. 191, 1887: C. C. R.

The two last-mentioned rules are founded on the necessity of putting some limit on the extent to which an inquiry may be carried, without which proceedings might be spun out to an interminable length. See, however, *Whelan,* below, and *Rebutting Evidence.*

Contradicting one's own—'hostile'—witness] See *T.* s. 1404; *Phips.* 469; and under *Examination of Witnesses.* Though a party calling a witness cannot bring *general* evidence to discredit him, yet if he state material facts which make against that party, other witnesses may be called to prove that the facts were otherwise. A doubt used to exist whether one could prove that a witness called by him, who has given evidence *against* him, has made at other times a statement contrary to that made by him at the trial; see the common law rule, p. 118; but now by 28-9 V. 18, 3, 'A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked, whether or not he has made such statement.'

Inconsistent testimonies] So in rape, where in cross-examination a witness for the prosecution gave particulars of the girl's 'complaint' to her of a trivial matter, counsel for the prosecution proposed to ask her in re-examination whether she had not given to the girl's mother a different and inconsistent account of the girl's complaint, viz that defendant was in fact guilty of rape, and to ask the mother whether that witness did not give her such an account of the complaint, Day J. (and Cave J.) came to the conclusion that the case was within the s. and allowed the questions. *Little*, 15 Cox C. C. 319, 1883. In *Dibble*, 1 Cr. A. R. 155; 72 J. P. 498, 1908: burglary, W., confessing himself an accomplice, implicated defendant in writing; this was opened to the jury, but W., called, told a different story and exonerated defendant; he was cross-examined as 'hostile' under this s., and swore that the written statement was untrue. The C. C. A. thought 'that a statement so put in was mere evidence to discredit prosecution's own witness, and could not do more than cancel the witness's asseveration of Dibble's innocence. It could not amount to positive or admissible evidence against the latter': c. q.

Evidence that a witness is not impartial] But immunity, perhaps, does not attach where the fact sought to be proved is that the witness does not stand indifferent between the parties. See *T.* s. 1442; and *Yewin*, above. So also it may be proved that a witness has been bribed to give his evidence, *Langhorn*, 7 St. Tr. 446, 1679; *Watt*, below; or has endeavoured to suborn others, *L. Stafford, ib.* 1401, 1458, 1680, which case and *Yewin* were recognised in *Att.-Gen.* v. *Hitchcock*, 1 Ex. R. 91; 11 Jur. 478, 1847. And the same law was assumed by the judges (provided that the alleged corrupter has had an opportunity of denying the allegation) in the *Queen's case*, at 311. But the question must be one which goes directly to prove improper conduct or partiality that might be directly proved, and not merely that such conduct has been suggested to the witness. Thus, in *Att.-Gen.* v. *Hitchcock*, a revenue case, the question put to the witness was, whether he had not said that the officers of the Crown had *offered* [not given] him a bribe to give his testimony, which he denied; and on this the Exch. C. held that he could not be contradicted. X. identified defendant as a murderer and was cross-examined whether he had not stated that he was not the murderer. This he denied. Defendant called A. and B. to

prove X. had so said. After the close of the defence the Crown was allowed to call C. and D., who were present at the conversation with A. and B., to contradict A. and B. and support X. For the defence E., a constable, stated that X. had told him soon after the crime that he could not recognise him, as he was masked; but this conversation with E., when put to him, X. denied; on cross-examination E. said he had reported this conversation to his superior officers, but the Crown was not allowed at the close of defendant's case to call as rebutting evidence the superior officers to say whether this was true. May C.J. regarded the question of admissibility as one for the discretion of the judge, cf. *T.* ss. 1399, 1445; but the proper test is whether the evidence is material or irrelevant. *Whelan,* 14 Cox C. C. 595; 8 L. R. Ir. 314, 1881; *Shaw,* 16 Cox C. C. 503, 1888.

The important proviso laid down in the *Queen's case,* above, applies to acts as well as to statements; if the discovery of the corruption is after the cross-examination, the witness must be recalled.

Subornation of witnesses] Evidence of this in respect of the trial may be given thereat: *Watt,* 20 Cox C. C. 852, 1905: see above.

Former statements confirming one's own witness] At one time it seems to have been thought (and occasionally acted on) that a witness might be corroborated by proof of former statements made by that witness. See *Luttrell* v. *Reynell,* 1 Mod. 282, 1671; *Freind,* 13 St. Tr. 32, 1696; *Harrison,* 12 St. Tr. 860-1, 1692. See also Hawk. P. C. 2, 46, 48. Buller J. originally took this view, B. N. P. 294, but in *Parker,* 3 Dougl. 242, 1783, he said that the case of *Luttrell* v. *Reynell* and the passage in *Hawkins* were not now law. Cf. *T.* s. 1476 n. In *Parker* (perjury) the depositions of a deceased person were given in evidence for the prosecution, and on the cross-examination of one of the prosecutor's witnesses it was proposed to inquire into certain declarations of a person, not on oath, for the purpose of corroborating some facts in the deposition material to defendant. Eyre B. rejected the evidence of these declarations, and the K. B. held the rejection proper. A case (according to 2 *Phill. Ev.* 523 n., 10th ed.)—perhaps *Parker*—was referred to by L. Redesdale in the *Berkeley Peerage case* —who always understood that for the purpose of impugning testimony a previous declaration might be inquired into, but not for that of confirming it. L. Eldon also concurred in that opinion. In conformity with these later decisions, the rule is laid down by Phillipps, with this exception, that where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship, in that case, perhaps, in order to repel such an imputation, it might be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. *Ib.* According to *Phips.* 483, 'Afterwards the rule was changed, and such evidence is now generally inadmissible either on direct examination to confirm his testimony or on re-examination to re-establish his credit when impeached by proof of a previous contradictory statement,' citing *Parker; Coyle,* 7 Cox C. C. 74, 1855; *Coll,* 24 L. R. Ir. 522, 1889: C. C. R. [five judges to four]: 'Exceptions . . . (1) where the witness is charged with having *recently fabricated* the story . . . *Coll, Coyle;* (2) on charges of *rape* and similar offences against females' [prosecutrix's *early* complaint]. *Coll* was followed by the C. C. A. in *A. Benjamin,* 8 Cr. A. R. 146, 1913, where a detective cross-examined

about an entry in his note-book, which he had not put in, was allowed to put it in (only) to show that certain testimony of his had not been an afterthought.

111. *Inadmissible evidence*] The general rule is that if the legal evidence is 'substantial' the C. C. A. will not apply the proviso (below): *J. W. P. Campbell,* 1912, correcting the headnote to *Brann,* 1 Cr. A. R. 256, 1908; *Currier,* 13 Cr. A. R. 154, 1918. See p. 1 and p. 113 and *Summing-Up.* In *Forster,* 1855, the jury, in convicting, 'voluntarily added that they found their verdict without considering the evidence' on which the case was reserved. Pollock C.B. remarked on this: 'If evidence is given upon a trial which is not properly admissible, the jury cannot make the reception of that evidence proper by saying that they have not been influenced by it.' The C. C. A. has constantly been confronted with this difficulty, *e.g.* when previous convictions of defendant have been improperly disclosed, and in other cases when, as it has often been said (*e.g. Ellis,* 1910), 'the mischief is done' and is not cured by the emphatic warnings of the judge to the jury to disregard the foreign matter. Thus in *Dibble,* where the judge had advised the jury that they could not safely convict, Alverstone L.C.J. said: 'The unfortunate admission of W.'s and' a co-defendant's 'statements [*both* withdrawn], unavoidable as it was, may have prejudiced the jury; it was impossible to believe that they had no effect on their minds; it was impossible to discover whether in their absence the jury would have considered Dibble's guilt to be proved.' Cf. *Barron,* 1913.

That court, however, is not free to quash a conviction on purely technical legal grounds, for s. 4 (1) of the Criminal Appeal A. reads: 'Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred'—a proviso which is very frequently applied. It has even been applied in effect by the K. B. which, of course, is not affected by this A.: see *Barker* v. *Arnold,* previous conviction wrongly disclosed, where the court accepted from *justices* the disclaimer (of being influenced) which Pollock C.B. declined to accept from a jury (above).

Application of proviso to s. 4 (1)—*rule*] 'The principle on which' the C. C. A. 'acts in such cases [misdirection] is laid down in *Stoddart* [below], *i.e.* in order to support the conviction we must come to the conclusion that if the jury had obeyed the direction and disregarded the girl's statement they might not have come to the same conclusion . . . the evidence without the girl's statement was entirely circumstantial . . . and we do not think we can say that the jury would necessarily have come to the same conclusion': *per* Pickford J., *Norton,* 1910, 5 Cr. A. R. at 76, where it will be noticed that the conviction was quashed for *misdirection;* the court must obviously apply the same criterion of 'miscarriage of justice' to the reception of inadmissible evidence, *e.g.* the cases of misreception of evidence of defendant's past conduct, above; *Posnett* and *Barron; J. Davis,* 9 Cr. A. R. 56, 1913, incriminating statement by defendant; *Christie,* 1914, and many others will be found in the indexes of Cr. A. R. In *Cutting,* 2 Cr. A. R. 150, 1909, the judge withdrew the evidence he had wrongly admitted.

The reference to *Stoddart,* 2 Cr. A. R. at 245; 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612, 1909, is, *per* Alverstone L.C.J. (and four judges): 'in *Dyson,*' 1908, 2 K. B. 454; 1 Cr. A. R. 15; 72 J. P. 303; 77 L. J. K. B. 813; 99 L. T. 201; 21 Cox C. C. 669; 24 T. L. R. 653, 'dealing with this proviso I said that we could not in that case say that if they had been properly directed the jury must have come to the conclusion which would have supported the conviction. We think it is open to consideration whether the word 'must' is not too strong and whether the proper question is not whether, if properly directed, the jury would have returned the same verdict. We are unable to come to the conclusion that in this case if the jury had been properly directed they would have thought that the facts proved were inconsistent with the defendant's innocence and might not have had a doubt whether the prosecution had failed to satisfy them that the defence set up . . . was not made out': c. q. In *Dyson* (manslaughter) Alverstone L.C.J. said (J. P.): 'We ought not to substitute this court for the jury . . . here there has been in fact a miscarriage of justice and we are unable to interfere [*i.e.* to order a new trial]. The reason why we cannot act is that we ought not to exercise the functions of a jury where there is doubt on the question at issue . . . we cannot say that if they had been properly directed the jury must have come to the conclusion that the child's death was accelerated by the injuries inflicted' within the year, 'though we think there is little doubt they would have done so.' 'It was too serious in such a case to say that the jury must have come to a verdict of guilty': c. q.: see, further, under *Manslaughter.* So in *Coleman,* 1 Cr. A. R. 50, 1908, where a clear mistake in the facts had been made in the evidence, Alverstone L.C.J. said that the court could not 'possibly say that the jury were not impressed by the [erroneous] suggestion . . . and cannot say that this verdict would have stood if this mistake had not been made. They were asked to say, in the words of s. 4 (1) . . . that 'no substantial miscarriage of justice has actually occurred,' and if the facts were only consistent with guilt they would not interfere though a mistake had been made': c. q.: cf. *Brownlow,* 1910, and *Bradshaw,* 1910. But in *Loates,* 5 Cr. A. R. 193, 1910, where, on the charge of stealing a purse, evidence was inadvertently given of the stealing of another at the same time and place, but on the mistake being corrected the judge carefully explained the confusion, the proviso was applied. So *Atherton, ib.* 233, incriminating statement by person not called given in evidence; and *Barker,* 11 Cr. A. R. 191, 1915, where an invoice from a consignor abroad to his agent here was wrongly admitted to prove that the goods were those stolen. The general rule of the court, then, is that if in its judgment an irregularity at the trial may have contributed to the finding of 'guilty,' it will quash the conviction. Cf. *J. Russell,* 1910.

Judge's duty] In *F. C. Davis, &c.* the C. C. A. denied that certain evidence had been wrongly admitted; 'but if it were so, if counsel on the other side do not object it is not obligatory on the judge to do so. When a prisoner is defended by counsel and he chooses for reasons of his own to allow such evidence to be let in without objection, he cannot come here and ask to have the verdict revised on that ground': *per* Darling J.; *sed quære* whether this is correctly reported. If a statement is objected to, the judge should give no indication of its contents till it is admitted: *D. Lee, &c.,* 1917.

Improper cross-examination] For proviso applied, see *Banks*, 1916, and *Seham Yousry*, 11 Cr. A. R. 13; 84 L. J. K. B. 1272; 112 L. T. 311; 31 T. L. R. 27, 1914, where counsel, cross-examining appellant, 'held in his hand a piece of paper and instead of saying, 'Look at this paper; do you adhere to your answer?' he described it as a report from the Cairo police about her origin, and then invited counsel for the defence to look at it, who was sufficiently on his guard not to do so. The effect which it was calculated to produce was, no doubt, that this was a report from the Cairo police so damaging to appellant that her counsel dare not touch it. Now that was inadmissible in evidence and in our judgment that was a wholly wrong method to adopt. Counsel for the prosecution, holding documents in his hands which he cannot put in, has no right to suggest to the jury in any way what they are': *per* L. Coleridge J.; see, further, *Cross-examination of Witnesses*.

Introduction of evidence] In *Layer*, at 180, the A.-G. led evidence of a conversation not in defendant's presence; on his counsel's objecting, Pratt L.C.J. said: 'Many times in discourse it is necessary to mention introductions to let in what is material; whatever passed between him [witness] and' another 'does not affect your client . . . what is introductory goes for nothing, but it is in order to explain the evidence'; but at the present day the preface would be much less substantial. Cf. *Examination of Witnesses*.

Evidence of being 'known to the police'] 'It is almost impossible that the jury will not be influenced by the fact—which they may infer—that the prisoner is known to the police': C. C. A. in *Varley*, 10 Cr. A. R. 127, 1914, identification by photograph: c. q.

WITNESSES.

I. Attendance.

i. *In Courts of Justice.*

Compellability of witnesses] *i.e.* their liability to punishment if they do not attend: see under *Competency*, below, and *Privilege*, with which the subject is necessarily involved.

Compelling attendance] For the power of the trial judge, see *Baines*, 1909. There are two modes of compelling the attendance of witnesses: (a) by recognisance; (b) by subpœna.

(*a*) *Recognisance.*

By justice] By 11-12 V. 42, 20, power is given in *all* cases to bind by recognisance the prosecutor and witnesses to appear and give evidence at the next court of oyer and terminer and general gaol delivery, *or* the next court of quarter sessions, as the case may be. The same power is exercised by coroners under 50-1 V. 71, 5 (2), in cases of murder and manslaughter. So also witnesses for the defence may be bound over: 30-1 V. 35, 3, 4.

By judge] When a trial is postponed, the presiding judge, exercising the ordinary functions of a justice of the peace, usually binds over the prosecutor and witnesses to appear and give evidence at the next court.

If a witness before a magistrate refuse to be bound over, he may, by 11-12 V. 42, 20, be committed. It seems doubtful whether, *in any case*, a witness can be compelled to find sureties for his or her appearance: certainly not, until he has refused to appear at the trial: *per* L. Denman, *Evans* v. *Rees*, 12 A. & E. 55, 1840; cf. *per* Graham B. 1827, 1 *Stark. Ev.* 82, 2nd ed. It was once thought that an infant was bound to find sureties in such a case and could be committed in default, on the ground that his own recognisances would be invalid; but the contrary has been since implied as it was held that infancy is no ground for discharging a forfeited recognisance to appear and prosecute for felony. *Ex parte Williams*, 13 Price, 673; M'Clel. 493; 2 Exch., 1824. In *Smith*, 17 Cox C. C. 601, 1892, however, Day J. held that the recognisance of an infant witness could not be estreated, 'that being a matter of contract . . . between him and the crown,' and that the proper course, therefore, was to subpœna him; if he disobeys, he may be attached for contempt, and he allowed the prosecutor the costs of the subpœna under which the infant had given evidence. It is still the practice generally not to take the recognisance of a married woman, but that of her husband, or some person willing to be bound for her, if any such there be; but if no such person be at hand, she herself is frequently bound; and there seems no reason why her recognisance should not be binding where she has

separate property, especially since the Married Women's Property A. 1882.

Estreats] *i.e. extracts* 'taken out from among the other records and sent up to the Exchequer': 1 Chitty, Cr. L. 92. Formerly it was the practice to estreat 'indiscriminately' all recognisances for the appearance of prosecutor or witnesses who did not appear; but by 7 G. 4, 64, 31, it was enacted, that, 'in every case where any person bound by recognisance for his or her appearance, or for whose appearance any other person shall be so bound to prosecute or give evidence in any case of felony or misdemeanour, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy, shall therein make default, the officer of the court by whom the estreats are made out shall, and is hereby required to prepare a list in writing specifying the name of every person so making default, and the nature of the offence in respect of which every such person, or his or her surety was so bound, together with the residence, trade, profession, or calling of every such person and surety, and shall in such list distinguish the principal from the sureties, and shall state the cause, if known, why each such person has not appeared; and whether by reason of the nonappearance of such person the ends of justice have been defeated or delayed; and every such officer shall, and is hereby required, before any such recognisance shall be estreated, to lay such list, if at a court of oyer and terminer or gaol delivery in any county besides Middlesex and London, or at a court of great sessions, or at any one of the superior courts of the counties palatine, before one of the justices of those courts respectively; if at a court wherein a recorder or other corporate officer is the judge or one of the judges, before such recorder or other corporate officer; and if at a session of the peace, before the chairman or two other justices of the peace who shall have attended such court, who are respectively authorised and required to examine such list, and to make such order touching the estreating or putting in process of any such recognisance as shall appear to them respectively to be just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognisance without the written order of the justice, recorder, corporate officer, chairman, or justices of the peace before whom respectively such list shall have been laid.'

(*b*) *Subpœna.*

For persons not compellable to give evidence (and therefore not amenable to subpœna), see *Witnesses* II.

For prosecution] This process is issued by the clerk of the peace at sessions, or by the clerk of the assize at the assizes, or it may be issued from the crown office. And the last is the most effectual mode, for not only, as will be seen, are the proceedings on it for contempt more speedy and effective, but it is itself more effectual, as it may be served anywhere in the United Kingdom.

In order to render the process to compel attendance more effectual, it was provided by 45 G. 3, 92, 3, that the service of a subpœna [the crown office not being mentioned] on a witness in any part of the United Kingdom, for his appearance on a criminal prosecution in any other part, shall be as effectual as if it had been in that part where he is required to appear. It has been held on this statute, that by the word 'part' in this section is signified England (with Wales)

or Scotland or Ireland. *Brownell,* 1 A. & E. 598; 3 L. J. M. C. 118, 1834. It does not seem, therefore, that any increased validity, *except as between the three kingdoms,* is given by that statute to writs of subpœna issued from courts of limited jurisdiction, which at common law are only available within such jurisdiction.

It is said that one subpœna ought not to include more than four persons. *Doe* v. *Andrews,* Cowp. 845, 1778, cited *Tidd's Pr.* 805 (1828); nor a crown office one more than three: *Short and Mellor, Cr. Pr.* 405, 2nd ed.

A subpœna requiring attendance at a trial on the commission day extends to the whole assizes, which, by fiction of law, are supposed to last but one day. *Scholes* v. *Hinton,* 10 M. & W. 15, 1842.

If the person whose attendance is required be a married woman, the service (perhaps) should be upon her personally. *Goodwin* v. *West,* Cro. Car. 522; 1 Jones, 430, 1638; 2 *Phill. Ev.* 428, 10th ed.

The witness must be personally served, by leaving with him a copy of the *subpœna,* or a *ticket* which contains the substance of the writ. *Maddison* v. *Shore,* 5 Mod. 355, 1697; 2 *Phill. Ev.* 427, 10th ed.; 2 *Russ. Cri.* 2256 (*p*); 1 *Stark. Ev.* 77, 2nd ed. Where a copy only is served, the original must be shown to the witness whether he require it or not, otherwise he cannot be attached. *Wadsworth* v. *Marshall,* 3 Tyrw. 218; 1 C. & M. 87, 1832; cf. *Mullett* v. *Hunt.* It must be served a reasonable time before the day of trial. Service upon a witness at two in the afternoon, in the City, requiring him to attend the sittings at Westminster in the course of the same day, has been held to be too short. *Hammond* v. *Stewart,* 1 Str. 510, 1722; see *Notice to Produce.*

Presence without subpœna] In a criminal case, *e.g.* for stopping up a way, a person who is present in court, when called as a witness, is bound to be sworn and to give his evidence, although he has not been subpœnaed: *per* Littledale J., *Sadler,* 4 C. & P. 218, 1830. So a witness being sworn, and having in court a document in his possession. *Dwyer* v. *Collins.* So, if a client subpœnaed, but not *duces tecum,* declines to waive his privilege in a document which his attorney, who has been subpœnaed *duces tecum,* has in court, secondary evidence is let in: *Newton* v. *Chaplin.*

Duces tecum] Where there are writings or documents or other chattels in the possession of a witness, which it is desired that he should produce on the trial, a clause of *duces tecum,* directing the witness to bring them with him into court, is added to the writ of subpœna. If they are in the possession of defendant or his attorney, a notice to produce and not a subpœna must be given. Where they are in the possession of the prosecutor, and defendant is desirous of having them produced on the trial, the safest mode of proceeding appears to be to serve the prosecutor with a *subpœna duces tecum,* and not to rely on a notice to produce, since it may be a question whether a prosecutor is so far a party as to be affected by such a notice.

The *subpœna duces tecum* is compulsory on the witness, and though it is a question for the judge whether the witness in court should produce the documents, &c. required, yet he ought to be prepared to produce them if the judge be of that opinion. *Amey* v. *Long,* 9 East, 473, 1808; *Greenway,* 7 Q. B. 126, 1845. When produced they are *in custodia legis.*

A solicitor served with a *subpœna duces tecum* is bound to produce a document in respect of which defendant is charged, although such document has been deposited with him by the latter on another occasion. *Brown,* 9 Cox C. C. 281, 1862; see *Cox* and *Railton.* Cf. *Privilege of Solicitors.*

A person subpœnaed merely to produce a document need not be sworn, the other side cannot insist on it; *Perry* v. *Gibson,* 1 A. & E. 48, 1834; and if sworn by mistake, is not liable to be cross-examined; *Rush* v. *Smyth,* 4 Tyrw. 675; 1 Cr. M. & R. 94, 1834. See further, *Cross-examination.*

Judges] A judge may be subpœnaed: *per* Martin B., *Morgan,* 1852; see rules under *Competency.*

For defendant] In cases of misdemeanour the defendant was always entitled to a writ of subpœna, and when by 1 Anne, st. 2, c. 9, s. 3, all witnesses on behalf of a defendant, for treason or felony, were sworn in the same manner as witnesses for the crown, and became liable to all the penalties of perjury, the process of subpœna was allowed to defendants 'in any case whatsoever': 4 Hawk. P. C. 2, 46, 172. Cf. 4 Black. Comm. 359-60.

Misprision of treason] 7 W. 3, 3, 7, allowed defendants subpœna.

Habeas corpus ad testificandum—common law] Where a person required as a witness is in custody, or under the control of some third person, as a sailor on a ship of war, so as to prevent his attendance, one mode of compelling is to issue a *habeas corpus ad testificandum* to the person in authority. For this purpose application must be made to the court of trial, or to a judge on an affidavit stating that the person is a material witness and willing to attend. *Roddam,* Cowp. 672, 1777, where the writ was directed to the commanding officer; L. Mansfield said there must first be an affidavit that the men (who were sailors) were willing to attend on subpœna, they were not 'to be brought up as prisoners against their consent'; 2 *Phill. Ev.* 429, 10th ed.; 1 *Stark. Ev.* 81, 3rd ed. The court will then, if it think fit, make a rule, or the judge will grant his *fiat* for a writ of *habeas corpus; Burbage,* 3 Burr. 1440, 1763, where it was refused for a man in prison; 2 *Phill. Ev. ib.;* which is then sued out, signed, and sealed. *Tidd's Prac.* 9th ed. 809. In *Freind,* 13 St. Tr. 3, 1696, Holt L.C.J. on the application of defendant, ordered his clerk to prepare 'a warrant for *habeas corpus*' to the keeper of the Gatehouse to bring up a prisoner at once to give evidence. The authority with whom the writ is left will be bound to bring up the body, on being paid his reasonable expenses. 2 *Phill. Ev.;* 1 *Stark. Ev.,* as above.

If the witness be a prisoner of war, he cannot be brought up without an order from the Secretary of State, but he may be examined on interrogatories, *Furly* v. *Newnham,* 2 Doug. 419, 1780, where the order had been refused.

A witness may be brought up on *habeas corpus* from a lunatic asylum, on an affidavit that he is fit for examination, and not dangerous. *Fennel* v. *Tait,* 5 Tyrw. 218; 1 Cr. M. & R. 584, 1834.

By statute] Formerly, it was doubted whether persons in custody could be brought up as witnesses by writ of *habeas corpus,* to give evidence before any other courts than those at Westminster; but by

43 G. 3, 140, a judge may, at his discretion, award a *habeas corpus ad testificandum*, for bringing any prisoner in any gaol in England before a court martial, or commissioners of bankruptcy, commissioners for auditing the public accounts, or other commissioners, acting by virtue of any royal commission or warrant.

By 44 G. 3, 102, the judges have power to award *habeas corpus* for bringing prisoners, in gaol, before any sitting at *nisi prius*, or before any court of record in the United Kingdom, to be there examined as witnesses, or before any grand, petit, or other jury, in any cause or matter, civil or criminal. The application under this statute ought to be to a judge out of court. *Gordon*, 2 M. & S. 582, 1814.

By warrant from a Secretary of State] By 61-2 V. 41, 11 (1): 'A Secretary of State, on proof to his satisfaction that the presence of any prisoner at any place is required in the interest of justice or for the purpose of any public inquiry, may by writing under his hand order that the prisoner be taken to that place'; (2) regulates the custody of such a person, and one under s. 9, below; (3) defines such a 'prisoner.'

Or a judge] It is enacted by 16-17 V. 30, 9, as amended and replaced by 61-2 V. 41, 11 (above) and 15 (1) and Sched., that in effect any judge of the High Court may, if he think fit, on 'application by affidavit, issue a warrant or order under his hand, for bringing up any prisoner or person, confined in any gaol, prison, or place, under any sentence or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal . . . and the person required by any such warrant or order to be so brought before such court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner, in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of her Majesty's superior courts of law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with.'

Setting aside subpœna] It was held (*per* Bigham and Walton JJ.) that the K. B. D. has jurisdiction to set aside a subpœna issued in a criminal proceeding and, though the person served 'cannot get it set aside' merely by swearing that he can give no material evidence, yet the court, being satisfied by affidavits that writs had not been issued *bonâ fide* for the purpose of getting relevant testimony and that the persons served were in fact unable to give such evidence, set the writs aside: *Baines*, 1909, 1 K. B. 258; 78 L. J. K. B. 119; 100 L. T. 78; 25 T. L. R. 79; 72 J. P. 524; 21 Cox C. C. 756.

Power of trial judge] If a subpœna is set aside 'the power of the judge at the trial to order the witnesses to attend, if he thinks their presence necessary, is in no way interfered with': *ib.*; that is, presumably, a fresh subpœna might issue. Judges often send for witnesses, but it does not seem that their refusal to come without a *subpœna* would be contempt of court.

Attachment] Where a person who has been duly served with a subpœna, and who is able to do so, neglects to appear in obedience

to it, he is guilty of contempt of court (*T.* s. 1265) and punishable by attachment, and if taken under the attachment, he may be detained until he has given evidence on the trial, and may then be set at liberty. *Shilcox,* 1793, cited in *Ring,* 8 T. R. 585, 1800: attached witness kept in custody more than eight months after giving evidence. The person disobeying is subject to an attachment, although the cause was not called on. *Barrow* v. *Humphreys,* 3 B. & Ald. 598, 1820. And he is also liable to an action on the case if the party summoning him has to withdraw his case, or, *semble,* loses it, through his non-attendance. *Pearson* v. *Iles,* 2 Doug. 556, 1781; and *Mullett* v. *Hunt,* below. It is not necessary, in order to make a witness liable for disobeying a subpœna, that the jury should have been sworn. *Mullett* v. *Hunt,* 3 Tyrw. 875; 1 Cr. & M. 752, 1833. Neither does it seem requisite that he should have been called on his subpœna, particularly if he did not attend the court at all. *Dixon* v. *Lee,* 5 Tyrw. 180; 1 Cr. M. & R. 645, 1834; *Stretch,* 3 A. & E. 503, 1835. But in order to ground a motion for an attachment, the affidavit must state that he was a material witness. *Tinley* v. *Porter,* 2 M. & W. 822, 1837; and if it appear, by the notes of the judge at the trial or on affidavit, that the testimony of the witness could not have been material, the rule for an attachment will not be granted. *Dicas* v. *Lawson,* 5 Tyrw. 235; 1 Cr. M. & R. 934, 1835.

If the subpœna issued out of the crown office, the K. B. D. will, on application, grant the attachment. *Ring,* above. When the process is not issued out of the crown office, but under 45 G. 3, 92, 3, 4, punishment is regulated thereby, and application must be made to the court out of which the process issued; disobedience to a subpœna issued by Q. S. is not a contempt of the K. B. D. *Brownell.* Q. S. have no power of proceeding against a person by attachment. Hawk. P. C. 2, 8, 33, citing *Bartlett,* 2 Sess. Ca. 291, 1735, where the K. B. said 'they would not determine how it would have been if they had committed . . . but the ordinary and proper method is by indictment' (for disobedience to an order). Cf. Bac. Abridg. Courts, E.; this seems to apply to default on a subpœna. But Q. S. and inferior courts generally may fine for a contempt; presumably, therefore, for not obeying a subpœna, in like manner as it is their constant practice to fine jurors defaulting. See *Clement,* 4 B. & Ald. at 233; cf. 227, 1821. It has been held, that if a witness refuses to give evidence before a grand jury at Q. S., he may be fined, and committed until the fine be paid for 'a great contempt': *per* Holt C.J. *L. Preston,* 1 Salk. 278, 1691, where a peer of Scotland was committed. A witness who refuses to attend on *subpœna* to give evidence for a defendant is liable to an attachment in the same manner as on one for the prosecution.

Remuneration of witnesses] See under *Costs,* p. 347.

Expenses] Under 45 G. 3, 92, 4, as limited by *Brownell,* the witness is not punishable for default, unless 'a reasonable and sufficient sum of money' has been tendered to him, on the service of the subpœna, for defraying the expenses of coming, attending, and returning. It has, indeed, been doubted whether in other criminal cases a witness may not, unless a tender of his expenses has been made, lawfully refuse to obey a subpœna, and the doubt is founded upon the above provision. 1 *Chitty,* Cr. Law, 613. But it seems to be established that except in

cases within the Act of 1805, 'witnesses making default on criminal prosecutions are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpœna; . . . although the court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey.' 2 Russ. Cri. 2258; 'the attendance of a witness is then in the nature of a public duty': *Short* and *Mellor, Crown Office Practice* (1908), p. 408 [in criminal cases]. But the court might refuse to grant an attachment in the case of a poor witness, if his expenses were not paid: *Dixon* v. *Lee*, where, in the circumstances, the court thought the conduct-money too little, though on receiving it, the witness made no complaint.

'It is the common practice in criminal cases, for the court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid.' 1 *Stark. Ev.* 83 (*a*), 2nd ed. Accordingly, in 1820, Bayley J. ruled that an unwilling witness, who required to be paid before he gave evidence, had no right to demand such payment; Scarlett said, 'It is not done in criminal cases.' Russ. Cri. *ib.* So on an indictment which had been removed into the K. B. by *certiorari*, a witness for the defendant stated, before he was examined, that at the time he was served no money was paid him, and asked the judge to order the defendant to pay his expenses before he was examined. Park J. (and Garrow B.) said, 'we are of opinion that I have no authority in a criminal case to order a defendant to pay a witness his expenses, though he has been subpœnaed by such defendant'; nor is the case 'altered by the indictment having been removed by *certiorari*, and coming here as a civil cause.' *Cooke*, 1 C. & P. 321, 1824. In *Cousens*, 1843, Russ. Cri. *ib.*, Wightman J. directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpœna duces tecum*, to go before the grand jury, although he objected on the ground that his expenses had not been paid.

Protection from arrest] A witness attending to give evidence, whether subpœnaed or only having consented to attend, *Smith* v. *Stuart*, 3 East, 89, 1802, is protected from civil arrest, *eundo morando et redeundo;* and so are all persons having 'relation to a suit which called for their attendance' (including bail and barristers on circuit), 'provided they came *bonâ fide*.' *Meekins* v. *Smith*, 1 H. Bl. 636, 1791. 'A reasonable time is allowed to the witness for going and returning, and in making this allowance the courts are disposed to be liberal.' 2 *Phil. Ev.* 428, 10th ed., citing *Lightfoot* v. *Cameron*, 2 W. Bl. 1113, 1777, and *Strong* v. *Dickenson*, 1 M. & W. 488, 1836. A witness residing in London is not protected from arrest between the time of the service of the subpœna and the day appointed for the examination in London; but a witness coming to London to be examined, is protected during the whole time he remains in town, *bonâ fide*, for the purpose of giving his testimony. *Gibbs* v. *Phillipson*, 1 Russ. & M. 19, 1829. A witness subpœnaed in a criminal case, tried in the K. B., who was committed for a contempt of court in striking the defendant, has the same privilege from arrest in returning home after his imprisonment has expired, as he would have had in returning home from the court if he had not been so committed. *Wigley*, 7 C. & P. 4, 1835. If a witness is improperly arrested, the court out of which the subpœna issued, or a judge of the court in which the case has been or is to be tried, or a judge at chambers on

habeas corpus, will order him to be discharged; cf. *ex parte Lyne*, 3 Stark. N. P. 132, 1822, witness not privileged from arrest by his bail. *T.* s. 1337.

The protection does not extend to arrest on *criminal* process. *T.* s. 1333: *In re Douglas*, 3 Q. B. 825; 12 L. J. Q. B. 49, 1842.

Intimidation, &c. of witnesses in a court of justice] Any interference or tampering with a witness or an intending witness is a contempt of the court. Hawk. P. C. 1, 21, 15; 4 Bl. Comm. 126. See *Perversion of Justice*.

ii. *Other witnesses*] By 55-6 V. 64, 2, 'Every person . . . who threatens or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure any person for having given evidence upon any inquiry [which includes a royal commission, a committee of either House of Parliament or any statutory authority, but not a court of justice, s. 1], or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanour, and be liable upon conviction thereof to a maximum penalty of 100*l.* or to a maximum imprisonment of three months,' and the court may *in addition* award costs and compensation to the person aggrieved, s. 4. The accused and complainant both have a right to a trial by jury (s. 3), at Q. S. or assizes, except 'within the metropolitan area,' *ib.*, where only the Central Criminal Court has jurisdiction.

WITNESSES.

II. Competency and Incompetency.

Competency and compellability] 'All witnesses competent to give evidence are in general compellable to do so'; *i.e.* punishable for refusing: see this point under *Privilege*. 'To this rule the Sovereign forms an exception, and also, it seems, ambassadors of foreign states (Dana's Wheaton [1866], notes 125, 129)': *Phips*. 436.

It is for the court to decide on the competency of witnesses, see *Hill*, 1851, at 263; B. N. P. 297; *T*. ss. 2, 23A.

The question may be tried by examining on the *voir dire* [literally = to speak truly] or evidence *aliunde*: *Wakefield*, 2 Lew. 279, 1827: was a witness tendered by the crown defendant's wife?: following *L. Lovat*, 18 St. Tr. 579, 596, 607, 1746: treason, impeachment. So in 1308-9 where a demandant in a *cui in vita* admitted that she could not 'contradict' her husband in his lifetime, but asserted against the tenant that he was dead, a trial by witnesses was at once awarded to try this question, and it was held that he was alive: *Anon.*, Y. B. 2 E. 2, 24; 17 Selden Soc. Series, 111, case 54. See under V., below.

i. Status.

The Sovereign] His competency is doubtful 'seeing that the evidence would be without temporal sanction'; 'on the whole the better opinion seems to be that' he, 'if so pleased, may be examined as a witness in any case, civil or criminal, but not without being sworn.' *T*. s. 1381. In *Mylius, Times* newspaper, Feb. 2, 1911, criminal libel on his Majesty, the A.-G. had the King's authority in writing for saying that he would have been a witness had not his law officers advised him that it would be 'unconstitutional.' See above. 'It is doubtful whether the King, foreign sovereigns and

Foreign ambassadors] are competent as witnesses; they are not subject to the coercive powers which the courts exercise over witnesses and are not punishable for perjury': 13 Halsbury, 570 *c*. But cf. *ib*. vol. 9, 401 *a*.: 'it seems that the King, foreign sovereigns and foreign ambassadors, who are not compellable to give evidence, are competent witnesses,' citing *T*. s. 1381, above, who, however, deals only with 'the Sovereign.'

ii. *Physical and Mental Disability.*

Infants] As far back as Hale (1 P. C. 634-5), who died in 1676, it was asserted that, in cases of rape, children of 'such tender years that in point of discretion the court sees it unfit to swear' them, ought to be heard unsworn, 'for *in many cases* there may be reason to admit such witnesses to be heard, in cases especially of this nature, which yet the jury is not bound to believe.' When this passage was cited in *Omichund* v. *Barker*, 1 Atk. 29, 1744, two judges said that it had been ruled that a child's evidence not on oath could not be received.

Of late years [so in 1846] no particular age is required in practice

to render the evidence of a child admissible. 'The competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess.' 1 *Phill. Ev.* 10th ed. 8. Hale, *ib.*, agrees that if she understands 'the obligation of an oath, tho she be under twelve years, she may be sworn,' citing Dalton, c. 164, p. 378, for an instance of a girl of nine being sworn in the *Witches' case*, 1612. In *Brasier*, 1 East, P. C. 443; 1 Leach, 199, 1779, though the two reports do not quite agree, it seems that Blackstone, Nares, Eyre, and Buller JJ. were of opinion that the evidence of a child under seven would have been admissible, if she had appeared on strict examination to be capable of understanding the nature and consequences of an oath or of distinguishing between good and evil. But others of the judges, particularly Gould and Willes JJ., held that the presumption of law, of want of discretion under seven, was conclusive. Subsequently all the judges agreed that a child of any age, if capable of distinguishing between good and evil, might be examined on oath. It was held, therefore, that as the child was not produced, and her complaint to her mother had been admitted, the conviction was wrong, and so *Tucker*, 1808, cited *Phill. Ev. ib.* 10. According to the rule now universally established, 'the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also in part upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath or of the consequences of a falsehood.' 1 *Phill. Ev.* 9, 10th ed. (1852). In murder, where a girl of eight, up to the time of the death, was totally ignorant of religion, but subsequently she had received some instruction on the nature and obligation of an oath with a view to her being examined, but at the trial showed she had no real understanding of religion, or a future state, Patteson J. would not allow her to be examined, observing, 'I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that previous to the happening of the circumstances, to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony.' *Williams*, 7 C. & P. 320, 1836. In an early edition of *T. Ev.* these remarks were severely criticised (and *Milton*, Irish Circ. R. 16, 1841, cited where religious instruction had been imparted since the commission of the offence, and the child was sworn), but in the last it is observed that (while the better opinion is that a trial ought not to be postponed in order that a child-witness may be instructed in the religious nature of an oath) 'the matter is probably one entirely in the discretion of the presiding judge'; s. 1377 *n.* Accordingly, in Ireland it has been held that even on an indictment for murder, an infant might be examined, though her religious knowledge had been communicated to her after the perpetration of the offence, and with the sole object of rendering her a competent witness: *Milton*, above. In *Nicholas*, 1846, Pollock C.B. refused to put off the trial in order that a child of six might receive instruction, but said that he thought there were cases (*e.g.* of older children whose education had been *neglected*) in which it might be done, but not 'where the infirmity arises from no neglect, but from the child being too young to have been taught.'

Possibly a distinction was drawn between the case where the child was a material witness and that where he or she was not, for 'in criminal cases where a person of tender years is a material witness, it is usual for the court to examine the witness on his competency to take an oath before he goes before the grand jury. And if such a witness be found incompetent, for want of proper instruction, the court will, in its discretion, put off the trial, in order that the party may, in the mean time, receive such instruction as will qualify him to take an oath.' 1 *Stark. Ev.* 93, 2nd ed. (1833); and this was done by Rooke J. in the case of a rape, and approved of by all the judges. *Murphy,* 1795, cited under *White,* 1 Lea. 430 n., 1786. 'An application to postpone the trial on this ground ought properly to be made before the child is examined by the grand jury; at all events, before the trial has commenced,' for where a judge stopped the case, when it appeared that the prosecutrix, 'though an adult and of sufficient intellect, had no idea of a future state of rewards and punishments,' and discharged the jury, it was held that an acquittal should have been directed, and a pardon was recommended. 1 *Phill. Ev.* 9, 10th ed., and *Wade,* 1 Moo. C. C. 86, 1825.

But now the matter is regulated by 8 E. 7, 67, 30, which provides safeguards, where evidence is unsworn, very much like that suggested by Hale, above. That s. 'shall apply to proceedings against persons for offences not mentioned in that section [30] in like manner as they apply in respect of proceedings against persons for offences mentioned in that section': by 4-5 G. 5, 58, 28 (2).

It seems that an infant may affirm under the Oaths A. 1888.

Corroboration of infants] 'Yet,' says Blackstone (following Hale), 'where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion.' 4 Com. 214; nevertheless 'it is clear that a person may be legally convicted upon such evidence alone and unsupported; and whether the account of a child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given.' 1 *Phill. Ev.* 11, 10th ed., who also observes, 'Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive.'

Deaf and dumb] It was formerly held that a person deaf and dumb from birth was presumably in contemplation of law an idiot, and, therefore, incapable of guilt; but such presumption may be repelled by evidence of understanding, as in *Steel,* 1 Lea. C. C. 452, 1787—deafness. And now no such presumption exists, *per* Wood V.-C. in *Harrod* v. *Harrod,* 1 Kay & J. at p. 9, 1854. If it appear that such person has the use of his understanding, he is criminally answerable for his acts, 1 Hale, P. C. 34. He is also competent as a witness; thus, where a man deaf and dumb from birth, was produced as a witness, he was allowed to be examined through the medium of his sister, who was

sworn 'well and truly to interpret to' the witness 'the questions and demands made by the court' to him, 'and his answers made to them.' The sister stated, that for a series of years she and her brother had been enabled to understand one another by means of certain arbitrary signs and motions, which time and necessity had invented between them. She believed that her brother had a perfect knowledge of the tenets of Christianity, and was certain that she could communicate to him notions of the moral and religious nature of an oath, and of the temporal dangers of perjury. *Bartlet,* 1 Lea. 408, 1786. So in Scotland, in rape, the woman, who was deaf and dumb, but had been instructed by teachers, by means of signs, in the nature of an oath, of a trial, and of the obligation of speaking the truth, was admitted to be examined, after her instructors had spoken to her capacity. *Martin,* 1823, 2 Alison's Crim. Law of Scotl. 437; and see *Whitehead,* 1866. The cross-examination, in rape, of the prosecutrix, deaf and almost dumb, was rendered abortive by an unsatisfactory interpreter: *Imrie,* 12 Cr. A. R. 282, 1917: c. q. Cf. *Whitehead,* and *Arraignment of Defendant.*

Idiots and lunatics] See *Mental Unsoundness.* A lunatic may be a witness, *in lucidis intervallis.* Comyns, Dig. Testmoigne (A 1). He must, of course, have been in possession of his intellect at the time of the event to which he testifies, as well as at the time of examination; and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of imagination for the events he has witnessed. 2 Alison, as above. With regard to those persons who are afflicted with *monomania,* or an aberration of mind on one particular subject, not touching the matter in question, and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony, it being impossible to calculate with accuracy the extent and influence of such a state of mind. But see *T.* s. 1375.

Where a monomaniac, confined in an asylum, was accepted as a witness by the judge who satisfied himself that he knew the nature, &c. of an oath, and gave a perfectly rational account of what he had seen, the conviction was unanimously upheld; the judge, assisted by medical testimony, determined on his examination on the *voir dire,* to hear him. It is for the jury to determine whether his testimony is affected by his insanity and what weight is to be attached to it. *Hill,* 2 Den. C. C. R. 254; 20 L. J. M. C. 222, 1851; so *A.-G.* v. *Hitchcock,* at 1 Ex. 95.

iii. *Religious Belief or Want of It.*

Oath or affirmation] The Sovereign: 2 Roll. Abr., 686, ed. 1668; *Omichund* v. *Barker,* 1744, Willes at 550, and below; see above and *T.* s. 1381; a peer: *Shaftesbury* v. *Digby,* 3 Keb. 631, 1676; a judge; a juror: *Bennet* v. *Inhabs. of Hartford,* Style, 233, 1650; *Fitzjames* v. *Moys,* 1 Sid. 133, 1664; *Kitchen* v. *Manwaring,* Andrews, 321, 1726; *Rosser,* 7 C. & P. 648, 1836, must be sworn, or affirm, if they give evidence or use their knowledge.

Its sanction] 'The law requires that the witness should acknowledge the force of an oath in imposing a religious obligation upon him to speak the truth. It is therefore essential to the admissibility of a witness, that he should believe in the existence of a God, by whom truth is enjoined and falsehood punished. . . . It is not sufficient that a witness believes himself bound to speak the truth from a regard

to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury.' 1 *Phill. Ev.* 15-16, 10th ed. 1852; *T.* s. 1382. Although it was formerly held that infidels (that is to say, persons professing some other than the Christian faith) could not be witnesses, on the ground that they were under none of the obligations of our religion, and therefore could not be under the influence of the oaths which our courts administer: *Gilb. Ev.* 142; yet a different rule has since prevailed; and it is now well settled, since the case of *Omichund* v. *Barker*, above, and 1 *Wils.* 84, that those infidels who believe in a God, and that He will punish them in this world, or (as it seems) in the next, if they swear falsely, may be admitted as witnesses in this country.

'It is clear,' says *Best*, s. 161, 'that disbelief in the existence and moral government of God are not to be presumed.' The succeeding paragraphs of this learned writer should be consulted by those who are interested in the history and philosophy of a very delicate question, which, however, is almost academic, since the A. of 1888.

For reasons given, *Best*, s. 166, it is still possible that dispute should arise about the mode in which the witness's belief is to be ascertained. The preponderance of authority is in favour of the witness being himself examined on his religious opinions. *The Queen's case:* witness, after taking the oath, may be asked whether he thinks it binding; *White*, 1786; *Taylor*, 1 Peake, N. P. 14, 1790; *Serva*, below. It is, however, the opinion of some writers that the witness ought not to be questioned at all, but that the fact should be proved by the oath of persons acquainted with him. Best strongly contends that evidence both of the person himself and others is admissible on the point. See the statute, below.

The inquiry can never be carried further if the witness himself asserts his belief. Thus in *Rookwood*, 13 St. Tr. 213, 1696, Holt asked 'Blackwill.' a Moor, whether he was a Christian; and in *Serva*, 1 Den. C. C. 104; 2 C. & K. 53; 1 Cox C. C. 292, 1845, a negro, who was called as a witness, stated, before he was sworn, that he was a Christian, and had been baptised; Platt B. held that he might be sworn, and that no further question could be asked before he was sworn.

Witnesses unsworn] In *James*, 6 Cox C. C. 5, 1852, after a verdict of guilty, it was discovered that one of the witnesses had not been sworn; the jury were then directed to reconsider their verdict, and to leave out of their consideration the evidence given by the unsworn witness, which they did with the same result, but, perhaps, at that date the conviction should have been quashed; now the C. C. A. would exercise a discretion. In *Marsham, ex parte P. Lawrence*, 23 Cox C. C. 77, 1912, after conviction by a magistrate it was found that a witness had not been sworn; he reheard the case in due form and convicted again. The K. B. D. approved of this, but was clear that but for the second hearing the conviction must have been quashed.

Its form] 'There is no prescribed form of oath, but the usual form for Christians is as follows: 'The evidence which you shall give between the parties [*or* between our Sovereign Lord the King and the prisoner at the bar (felonies), *or* between our Sovereign Lord the King and the defendant (misdemeanours)] shall be the truth, the whole truth, and nothing but the truth, so help you God,' the witness holding the Gospels or the whole of the New Testament in his naked hand':

13 Halsbury, 591 *m*. The particular form or ceremony of administering an oath is quite distinct from its substance. *Best*, s. 58. 'The form of oaths under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious belief which the swearer entertains of God; it being vain to compel a man to swear by a god in whom he does not believe and whom he therefore does not fear.' Puffend. *De Jur. Nat. et Gent.* Bk. 4, ch. 2 (*de Jurejurando*), s. 4. Our law therefore is, that witnesses may be sworn according to the peculiar ceremonies of their own religion, or in such a manner as they may consider binding on their consciences: *per* Alderson B. in *Miller* v. *Salomons*, 7 Ex. R. 534, 535, 1852; and *per* Pollock B. *ib.* 558. A Jew consequently is sworn upon the Pentateuch or the Old Testament, with his head covered. 2 Hale, P. C. 279; *Omichund* v. *Barker*, above, and 1 Atk. 21. But a Jew who stated that he professed Christianity, though he had not been formally admitted into the Church, nor had been baptised, nor even formally renounced the Jewish faith, was allowed to be sworn on the New Testament. *Gilham*, 1 Esp. 285, 1795. A witness who stated that he believed both the Old and New Testament to be the word of God, yet as the latter prohibited, and the former countenanced swearing, he wished to be sworn on the former, was permitted to be so sworn. *Edmonds* v. *Rowe*, Ry. & Moo. N. P. C. 77, 1824. And where in high treason a relevant witness, apparently an English subject, refused to be sworn in the usual manner, 'but only put his hands to his buttons,' and in reply to a question, whether he was sworn, finally stated that he was sworn and was under oath, it was held sufficient. *Chris. Love*, 5 St. Tr. at 113, 1651. In Ireland it is the practice to swear Roman Catholic witnesses on a Testament with a crucifix or cross upon it. The following is given as the form of a Scotch Covenanter's oath: 'I, A. B., do swear by God Himself, as I shall answer to Him at the great day of judgment, that the evidence I shall give to the court and jury, touching the matter in question, is the truth, the whole truth, and nothing but the truth, So help me God.' *Mildrone*, 1 Lea. 412 n., 1786; *Walker, ib.* 1788. See *Phips*. 438. A Mahommedan is sworn on the Koran. The form in *Morgan*, 1 Lea. 54, 1764, was as follows:—The witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked on it for some time, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. 'It is, however, very doubtful if Mohammedans should be sworn.' *Phips*. 438, whom see *ib.* on current misconceptions of such non-Christian forms. The deposition of a Gentoo has been received, who touched with his hand the foot of a Brahmin. *Omichund v. Barker*, above. The following is given as the form of swearing a Chinese. On entering the box the witness immediately knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The crier of the court then, by direction of the interpreter, administered the oath in these words, which were translated by the interpreter into the Chinese language: 'You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer.' *Entrehman*, C. & M. 248, 1842.

Where a professing Jew was sworn on the Gospels as a Christian, and gave a false name, the Exch. Ch. refused a new trial on *this* ground, being of opinion that the oath as taken was binding on the witness, both as a religious and moral obligation; Richardson J. added,

that if the witness had sworn falsely, he would be subject to the penalties of perjury. *Sells* v. *Hoare,* 3 B. & B. 232; 7 J. B. Moore, 36, 1822; moreover, the objection was too late after verdict.

Refusing to swear] One person called was fined 500*l.* and another the same sum and was ordered to be imprisoned during the pleasure of the court for refusing: *Love,* 1651, at 134, where, though the trial was anomalous in many respects, the court correctly applied the common law *on these points.*

Affirmation] By 3-4 W. 4, 49, Quakers and Moravians are permitted to make a 'solemn affirmation or declaration, instead of taking an oath, in all places, and for all purposes whatsoever where an oath is or shall be required either by the common law or by any Act of Parliament.' Where a prosecutor, who had been a Quaker, but had seceded from the sect, though he agreed with them about making oath or affirmation and refused to take an oath, and called himself an Evangelical Friend, stated that he could not affirm according to either of the forms there given [below], saying that 'persuasion' there meant *sect,* and further declined to make the 'Separatists'' declaration (under repealed 3-4 W. 4, 82), but stated, 'I cannot say that I am a Quaker at all; I am but a Moravian'; but had no objection to and did affirm, 'I . . . do solemnly, sincerely, and truly declare and affirm'—which is the form provided by 9 G. 4, 32, 1, for Quakers and Moravians—and was allowed to give evidence, the judges were unanimous that his evidence was improperly received, and the conviction wrong. *Doran,* 2 Lew. C. C. 27; 2 Moo. C. C. 37, 1838.

This case led to the passing of 1-2 V. 77, which puts 'any person who shall have been a Quaker or a Moravian' in exactly the same position in this regard as those sects; see last paragraph. The affirmation or declaration is:—'I, A. B., having been one of the people called Quakers [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm.'

Oaths A. 1888] 'For practical purposes' (*Stringer* on *Oaths,* 2nd ed. (1893) p. 116) these provisions are superseded by the Oaths A. 1888, 51-2 V. 46; s. 1 is: 'Every person upon objecting to being sworn, and stating as the ground of such objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath.'

S. 2: 'Every such affirmation shall be as follows: *I, A. B., do solemnly, sincerely, and truly declare and affirm,* and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness,' *e.g.* in the commonest case, '—affirm that the evidence I shall give, &c., shall be the truth, &c., . . . nothing but the truth.'

S. 3: 'Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking such oath no religious belief, shall not for any purpose affect the validity of such oath.'

S. 5: 'If any person to whom an oath is administered desires to

swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question.'

Where a witness desires to affirm, the judge himself must ascertain either that he has no religious belief or that the taking of an oath is contrary to his religious belief; if he has a religious belief he cannot be allowed to affirm; the objection to a witness on this latter ground was not too late after verdict. *Moore,* 17 Cox C. C. 458; 61 L. J. M. C. 80; 66 L. T. 125; 56 J. P. 345, 1892: C. C. R.; c. q.; followed in *Nash* v. *Ali Khan,* 8 T. L. R. 444, 1892: C. A.: Indian witness who had a religious belief, but would not say what form was binding on him.

Oaths A. 1909, 9 *E.* 7, 39] By s. 2 (1): 'Any oath may be administered and taken in the form and manner following:—The person taking the oath shall hold the New Testament or, in the case of a Jew, the Old Testament, in his uplifted hand and shall say or repeat after the officer administering the oath, the words 'I swear by Almighty God that . . .' followed by the words of the oath prescribed by law. (2) The officer shall (unless the person about to take the oath voluntarily objects thereto or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question: Provided that in the case of a person who is neither a Christian nor a Jew the oath shall be administered in any manner which is now lawful.' By s. 3, 'officer' here='every person duly authorised to administer oaths.' The statute is permissive and not compulsory, and the older way of swearing is still legal: *Palm,* 4 Cr. A. R. 41, 1910.

iv. *On other Grounds.*

Jurors, judges, counsel engaged in the case] A grand juror has *sometimes* been rejected on account of the oath of secrecy (or, rather, perhaps, on grounds of public policy) which he takes before the inquiry. 1 *Phill. Ev.* 140, 10th ed., citing *Watson,* St. Tr. 107, 1817, where the defence proposing to ask a witness *only* whether he produced certain notes to the grand jury and, if so, the date, Gifford S.-G. objected, and L. Ellenborough said that he had 'considerable doubt,' though he remembered 'a case of life and death' where a witness was permitted to say what passed before the grand jury; but 'many very eminent men at the bar' as well as himself had doubted. *T.* ss. 942-3, who extends the *privilege* to the clerk and prosecuting officer of the grand jury (perhaps meaning that they may refuse to answer if they like). Indeed, L. Kenyon allowed, in malicious prosecution, a grand juryman to be called to prove who was the prosecutor of an indictment, being of opinion that it was a fact the disclosure of which did not infringe on his oath. *Sykes* v. *Dunbar,* 1800, 2 Selw. N. P., 13th ed., 1015. This was followed in *Freeman* v. *Arkell,* 1 C. & P. 137, 1823. And where the issue is a fraud on the grand jury, they must necessarily be called: *Scarlet,* 1613; or *autrefois acquit, per* Parke B.: *Bird,* 1851. But the K. B. refused to receive an affidavit from a grand juryman about the number of grand jurors who concurred in finding the bill. *Marsh,* 6 A. & E. 236, 1837. So, where a grand jury returned an indictment containing ten counts, indorsed 'a true bill on both counts,' and defendant pleaded to the whole ten counts, Patteson J. (the grand jury having been discharged) would not allow one of them to be called to explain their finding. *Cooke,* 8 C. & P. 582, 1838. The objection

is obviously less if the grand juror is called in a trial where he has not been a party to finding the bill, or in the case of a justice who has not committed defendant. So, Martin B. said of an 'advocate or attorney' in a county court, called on a subsequent indictment for perjury: *Morgan*, 1852. It is no exception against a person's giving evidence, either for or against, that he is one of the judges or jurors who are to try him. 4 Hawk. P. C. 2, 46, 83; Bac. Ab. Evid. (A. 2). In *Earl of Essex*, 1 St. Tr. 1333, 1340, 1342: 1600, 'the Lord Keeper [Sir T. Egerton, who, however, took no part in the trial], the Earl of Worcester [one of the peers of the court of trial; viz. the Lord High Steward's], and Popham L.C.J. [one of the judges advising the peers] proved in court upon their honours' that they heard certain words, and a declaration signed by the three was put in and 'attested *vivâ voce*' by the latter. But at the present day such a doubling of parts is impossible: in 1882 two judges, one robed, gave evidence on *subpœna* of what had passed before them judicially (*Times*, Feb. 24); in May, 1905, Deane J. gave evidence of what took place when he was acting as counsel. *Gazard*, therefore, has no authority. In *Hacker*, 1660, two of the commissioners for the trial of the regicides 'came off the bench, and were sworn, and gave evidence, and did not go up to the bench again during the trial.' Kel. 12; Sid. 153; 5 St. Tr. 1181. See *T.* s. 1379; and p. 135, generally: for counsel's privilege (if any), see *T.* s. 938 and s. 1378 n., and *Confidential Adviser*.

A juror may give evidence of any fact material to be communicated in the course of a trial, but of course he must be sworn (see *Rosser*, 1836, 3 Bl. Com. 375), and should cease to act as a juror. But, generally, it is most undesirable that any one appearing in one capacity at a trial should appear in any other, *e.g.* barristers, as in *Guinea*, 1841; a solicitor, however, who has moved in the proceedings, legal and other, before trial, is often necessarily a witness: cf. *Willmont*, 1914, where the C. C. A. refused to hear jurors on a communication made to them. A barrister, plaintiff appearing by counsel, was not allowed to argue: *Newton* v. *Chaplin*, though it appeared that he had been so allowed.

The bare possibility of a doubling of parts in a trial induced the Committee for Privileges of the H. L. to report that a barrister who is a peer 'may not appear as counsel to argue before Committees of the House or before the House when sitting under the presidency of the Lord High Steward in a criminal case,' but 'may argue as counsel in an appeal at the bar of the H. L.' because, *teste* Earl Spencer, like a lay peer, he could not now sit judicially: *In re L. Kinross*, 1905, A. C. 468; 74 L. J. P. C. 137.

It must be remembered that persons may sometimes waive their privilege.

Excommunicated; under sentence of death] By 53 G. 3, 127, 3, persons excommunicated incur no civil liabilities. It seems that a person under sentence of death is incompetent to be a witness, and his capacity is not restored by 6-7 V. 85, 1: *per* Lush J., *Webb*, 11 Cox C. C. 133, 1867. But this is very doubtful. *T.* s. 1347 (*n.*); *Phips.* 430, citing (*Steph. Dig. Ev.* 107 n., and) *Fitzgerald*, 1884, in Ireland, unreported, the witness had been reprieved; *Webb* was not followed.

Co-defendant witness for prosecution] Four defendants jointly indicted pleaded not guilty; during trial one withdrew this plea; a verdict on him was not taken, but he was sentenced and called for

prosecution; the C. C. A. held that he was competent, though not *found* guilty: *Tomey*, 2 Cr. A. R. 329, 1909.

'*Infamy*'] as applied to a witness; see *Jury Challenges*.

v. *Incompetency from interest*] The Criminal Evidence A. 1898, has almost entirely swept away the last relic of this disability—the removal of that of defendant to give evidence has almost revolutionised procedure. The only survival is in the case of—

Husband and wife] The statute regulates the competency of 'spouse-witnesses,' as they have been called.* Its effect—conclusions which may be conveniently stated before the reasoning by which they have been obtained—on this point has been thus summarised: 'In England a spouse-witness is only competent for the prosecution when the offence charged is within the Schedule, as amended, of the Criminal Evidence Act and in those cases in which he or she is compellable. A spouse-witness is competent for the defence of the spouse in all criminal trials without exception. A spouse-witness is compellable for the prosecution or for the defence of the spouse when the offence charged is personal injury (including threats and attempts) or forcible abduction and marriage, and only in those cases'; where 'competent for the defence' implies, of course, *if not called for the prosecution*.

Bigamy] Since the passing of the statute there have been two further encroachments on the common law: (i) In s. 7 (6) of 2-3 G. 5, 20, the Criminal Law Amendment A. 1912: 'The wife or husband of a person charged with an offence under' the Vagrancy A. 1898, 'may be called as a witness either for the prosecution or defence and without the consent of the person charged, but nothing in this provision shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person'; this gets rid of the (majority) decision in *Dir. Pub. Prosecutions* v. *Blady*, 1912, 2 K. B. 89; 81 L. J. K. B. 613; 22 Cox C. C. 715; 76 J. P. 141; 106 L. T. 302; 28 T. L. R. 193: K. B. D.—which, however, is still valuable for 'the common law exceptions,' for which see below. And (ii) in s. 28 (3) of 4-5 G. 5, 58.

Compellability Generally.

As has already been mentioned, it is not possible to discuss competency (II.) wholly apart from compellability (III.).

The leading case on compellability is *Leach*, 1912, A. C. 305; 81 L. J. K. B. 616; 22 Cox C. C. 721; 106 L. T. 281; 76 J. P. 201; 28 T. L. R. 289; 56 S. J. 342; 7 Cr. A. R. 157: incest. Before the justices and at the trial defendant's wife called for the prosecution objected to give evidence, but was overruled: the C. C. A. dismissed the appeal: 7 Cr. A. R. 84, 1911; the H. L. reversed this order, *ib.* 171, and the conviction was quashed: *ib.* 172. The true construction, therefore, of s. 4 (1) of the statute is that in the cases governed by the sub-s. defendant's spouse cannot be compelled to give evidence against her or his will. *Acaster*, carnal knowledge, raised the same

* The present editor ventures to refer to "Spouse-Witnesses in Criminal Cases": London, 1913, p. 32. It is submitted that the term is a convenient one in respect of the testimony of a person whose husband or wife is the accused. Theoretically it would also describe the husband or wife of the 'prosecutor,' but in this sense it has little practical value.

point and was dealt with by the C. C. A. in the same way and at the same time as *Leach*, and is reported *ibidem*. On a reference by the Home Secretary the conviction was again considered by the C. C. A., but was not quashed: *ib.* 187; 22 Cox C. C. 743; 106 L. T. 384; 76 J. P. 263; 28 T. L. R. 321, the court not being satisfied that the wife was an unwilling witness. In his judgment Darling J. said: 'Speaking for myself and, I think, for the other members of the court [Phillimore and Channell JJ.], in consequence of these observations [in *Leach*] I shall, when the wife—in any case where she is not a compellable witness—comes to give evidence against her husband, ask her, 'Do you know you may object to give evidence?' and I shall also do so if she is called on behalf of her husband. That, I imagine, is what other judges will do for the present, though there is no decision which binds us to do it and the point is open to argument on an appeal to this court.'

Competency] Its comparative importance gives the first place to

(*a*) *Defence.*

The general rule is stated above.

Husband or wife of co-defendant *as witness for defence*] This subject can be more conveniently treated after that of a

Co-defendant as witness for defence]—which, accordingly, is inserted at this point. *Payne*, L. R. 1 C. C. R. 349; 41 L. J. M. C. 65; 12 Cox C. C. 118; 26 L. T. 41; 20 W. R. 390, 1872, shows that at common law 'where two prisoners are indicted and tried together, one is not a competent witness for the other.' There can be no doubt that the statute has got rid of this decision: *Macdonnell*, 2 Cr. A. R. 322; 73 J. P. 490; 25 T. L. R. 808, 1909, where it was expressly held by the C. C. A. 'that under s. 1 . . . prisoner is a competent, though not a compellable witness for a co-prisoner jointly indicted with him for the same offence'; *Hadwen* was cited in support. And though he only gives evidence on his co-defendant's case, he may be cross-examined on his own: *H. Rowland*, 3 Cr. A. R. 277, 1909. 'For the defence,' therefore, in s. 1 means *for the defendant or any co-defendant*. Perhaps *Macdonnell* only decided that one co-defendant may call another, and does not solve the question—may one co-defendant call the wife of another (with or without her husband's consent)? It is submitted that she may be so called *in the scheduled cases* mentioned in s. 4 (1). Two cases, however, seem to point the other way. In *Thompson*, L. R. 1 C. C. R. 377; 41 L. J. M. C. 112; 12 Cox C. C. 202, 1872, three defendants were on their trial, two for larceny and one for receiving; and it was held that the wife of the one could not be called for the two charged with larceny, all three being 'indicted in one indictment . . . and tried together,' 'although there were counts charging different offences.' *Locker*, 5 Esp. 107, same point, not cited. 'One of them could not be called as a witness for the others. This was so decided in *Payne* [above]. And as the wife stands in the same position as the husband, the present case cannot be distinguished from that,' *per* Bovill C.J., *i.e.* the court asserted a thoroughgoing parallelism in disability between co-defendants *inter se* and their respective wives. But the statute has destroyed *Payne*—see *Willis*, 1916—and the C. C. A. may have intended to assert under the statute the same parallelism in competency as the C. for C. C. R. had before it set up in incompetency; in which case *Macdonnell* decides that s. 1

means 'every person charged with an offence and the wife or husband . . . of any person so charged shall be a competent witness for any defendant,' subject, of course, to proviso (*c*), below.

In *Albert* and *Henry Sheriff*, 35 Law Jo. (newspaper) 663-4, 1900, Dec. 8—jointly indicted for larceny—the crown asked that defendants should be tried separately, in order that Mrs. Albert S. might appear as a witness against Henry S.—which, at common law, it was implied from *Payne* and *Thompson*, not then overruled, would be illegal if they were tried together (for if she could not be called for a co-defendant, she could not be called against him). Bruce J., thinking that he was bound by those two cases, granted the application with 'great reluctance.' So great an authority as the late W. F. Craies thought (*ib.*) that 'on the cases, assuming that they have not been overridden by the words of the statute, the learned judge seems to have ruled correctly. But it is not impossible that the Court for Crown Cases Reserved might hold both decisions to be impliedly overruled by the words of the new statute'—as the C. C. A. has in fact done. 'The real ground,' it has been said (pamphlet quoted p. 141 n., at p. 35, where other arguments will be found), 'of the decision [*Sheriff*], no doubt, was that as larceny is not one of the scheduled offences (s. 4 (1)), the Act did not affect the common law which would have excluded Mrs. Sheriff had the two men been jointly' tried. We now know from *Macdonnell* that the common law on this point has been altered by the statute. But the ancient identification of husband and wife has been preserved, and where any defendant may be called, his or her spouse may be called for him or her. The competency of a co-defendant's spouse *alone* explains certain words in s. 4 (1): 'The wife or husband of a person charged with an offence under any enactment mentioned in the Schedule to this Act may be called as a witness either for the prosecution *or defence and without the consent of the person charged*.' The words in italics * cannot possibly mean that a defendant's spouse can be called for him or her against defendant's will. 'Such a thing is unknown in our procedure. Moreover, the general rule about the defence enacted in s. 1 (*c*) distinctly contradicts any such meaning': *ib.* p. 18. The words in italics are unintelligible unless they mean that one defendant can call another's wife without the latter defendant's consent: *ib.* and p. 35. In bigamy, though a co-defendant is rare, it is not impossible to try a principal and accessory together. The words in s. 1 (*c*), 'save as in this Act mentioned,' are amply satisfied by the provisions in s. 4 (1) for witnesses for the prosecution and, it is submitted, by those for a co-defendant's witnesses. Except in the scheduled cases, a co-defendant's spouse cannot be called for the defence without his or her consent. 'Probably, if A. calls his wife, B., indicted with him, can adopt her as a witness': pamphlet, p. 18 n.

(*b*) *Prosecution.*

Spouse of defendant called for the crown] Spouse-witnesses are competent (i) when the offence is within the *amended* schedule, and, of course, (ii) when they are compellable.

(i) 'If the schedule be examined it will be found that every enactment *clearly* making a spouse-witness competent for the prosecution,

* The extraordinary formula, 'either for . . . . person charged.' is repeated *verbatim* in 4-5 G. 5, 58, 28 (3), and 2-3 G. 5, 20, 7 (6), above; the draftsman must, therefore, have attached some meaning to the phrase; in any case, there is something wrong with the wording.

before the Act, is included therein; enactments of competence or compellability excluded are, it is submitted, *pro tanto* repealed' (pamphlet, p. 18, note (*c*); every such enactment before the Act, *i.e.* from 1872 to 1898, is examined: pp. 11-18, *ib.*); though 'it is impossible to find any one principle on which the schedule was constructed': *ib.* p. 19, note (*f*).

(a) When the spouse is 'the prosecutor,' *i.e.* the sufferer by the offence: (1) by statute; (2) by the common law exceptions.

(b) When a third person is the prosecutor.

(a).

1. *One spouse prosecuting the other*] The only enactments *before the Act* authorising this are in the Married Women's Property Acts, 1882 and 1884 (which see), but the latter is not in the 1898 schedule. Its non-inclusion, however, was unimportant for the purpose of the statute, for the *offences* with which it deals (the only ones, by the way, against *property* in the schedule) are included (by the insertion of the 1882 A.), and so far as the 1884 A. extended the *competency* admitted by that of 1882 (if it did so at all), that extension is now made by the (1898) statute itself, which by s. 4 (1) puts the spouses on an equality in this respect. (The *compellability* admitted by the 1884 A. is in a very different position: see below.)

S. 4 (2) expressly keeps alive 'the common law exceptions'—which came into existence '*ex necessitate*'—in the crimes of personal violence (including threats thereof and attempts thereat) and forcible abduction and marriage (in which the use of force is a common law offence, if forcible marriage is not).

2. *The common law exceptions—personal violence*] It is quite clear that a wife is competent against her husband in respect of any charge which affects her liberty or person: *per* Hullock B., *Wakefield*, 2 Lewin, C. C. 1, 279, 1827. And *vice versâ* in all the cases where the wife could be the offender. Thus in *L. Audley* or *Castlehaven*, tried as a principal in the second degree, for a rape on his own wife, the judges resolved that though, in a civil case, a wife was not a competent witness, yet that in a criminal case of this nature, being the person grieved, on whom the crime is committed, she is to be admitted. 3 St. Tr. 402, 411, 1631; 1 Hale, P. C. 301, 629—apparently the earliest known instance of one spouse giving evidence against another. So of a husband indicted for an assault on his wife. *Azire*, 1 Str. 633, 1725; B. N. P. 287: 'where either a husband or wife have cause to demand sureties of the peace against the other, each may give evidence against the other,' Hawk. P. C. 72, 46, 79; and each may demand them for 'threatening to beat outrageously' the other: 1 *ib.* 1, 60, 4. So a wife is always permitted to swear the peace against her husband, and her affidavit has been permitted to be read, on an application to the K. B., for an information against the husband, for an attempt to take her away by force, after articles of separation. *Lady Lawley's case*, B. N. P. 287, 1731. On an indictment under rpd. 3 H. 7, 2, for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband *de facto*. *Fulwood*, Cro. Car. 488, 1638; *Brown*, 1 Vent. 243; 3 Keb. 193, 1674; *Haagen Swendsen*, 14 St. Tr. 559, 575, 1702.

And she was consequently a witness for him: *Perry, coram* Gibbs C.J., 1794, Hawk. P. C., above, cited in *Serjeant*, Ry. & Moo. 353,

1826, who was convicted with others for conspiring to procure her husband to marry her; Abbott L.C.J. refused to allow the husband to be called for the prosecution as conspiracy is not one of the exceptions. But a doubt has been entertained whether, if the woman afterwards assent to the marriage, she is capable of being a witness. In *Brown* it is said by Hale that most of the judges were of opinion that, had she lived with him any considerable time, and assented to the marriage, by a free cohabitation, she should not have been admitted as a witness. 1 P. C. 302. But Blackstone J. seems to concur in the contrary opinion. 4 Com. 209. And the arguments of East, on the same side, appear to carry great weight with them: 1 P. C. 454. In *Wakefield,* above, where defendants were charged, in one count, with a conspiracy to carry away a young lady, under sixteen, from the custody appointed by her father, and to cause her to marry one of them; and in another with conspiring to take her away by force, she being an heiress, and to marry her to one of them; Hullock B. thought that even assuming the witness to be at the trial the lawful wife of one of them, she was yet a competent witness for the prosecution, on the ground of *necessity,* although there was no evidence to support that part of the indictment which charged force (Lew. 288); and also on the ground that that defendant, by his own criminal act, could not exclude such evidence against himself.

On an indictment under 43 G. 3, 58, rpd., against *Whitehouse* for shooting at his wife, the latter was admitted as a witness by Garrow B. (and Holroyd J.) on the ground of the *necessity* of the case. Holroyd J. referred to *Jagger,* 1 East, P. C. 455, 1796: a husband attempted to poison his wife with a cake in which was arsenic; she was admitted to prove that the cake had been given her by her husband, and it was held by twelve judges rightly admitted. Holroyd J., however, said that he thought she could only be admitted to prove facts which could not be proved by any other witness. 2 Russ. Cri. 2281. On the same principle that her evidence is received to prove personal violence, her dying declarations are admissible in case of murder by her husband. *Woodcock,* 1789; *Johns,* 1790. And in similar cases of personal violence, the examinations of one spouse taken before a magistrate pursuant to the statute would be admissible against the other, where the witness, if living, would have been admissible. *Per contra,* on the charge of neglecting to maintain a wife whereby she becomes chargeable to the parish, she is not competent against her husband, for such neglect is not a personal injury to her; nor is there any necessity for calling her, as such neglect may be proved by others. *Reeve* v. *Wood,* 34 L. J. M. C. 15; 11 L. T. 449, 1864: Q. B.; but the first two enactments in the 1898 schedule have reversed this judgment.

There are some other instances by statute other than the Criminal Evidence A., but as they are covered by the latter, they need not be enumerated.

The common law exceptions may, therefore, be enumerated as personal injury (including threats and attempts) and forcible abduction and marriage: see the specific offences.

Treason] This has sometimes been said to be a common law exception. The point is discussed in the pamphlet mentioned, p. 141, n., and the evidence against this view shown, it is submitted, to be overwhelming. It may suffice here to cite Hale, 1 P. C. 301: 'A *feme*

covert is not a lawful witness against her husband in case of treason,' and none of the learned judges (Pickford, Avory and Lush JJ.) who discussed these exceptions in *D. P. P.* v. *Blady* even referred to treason.

(b).

Third party prosecuting] *i.e.* the spouse not being the immediate sufferer by the offence. The only exceptions to the common law rule of the inadmissibility of spouses against each other in this case are not to be found in the 1898 schedule; in respect of those scheduled offences by the commission of which the spouse is not the *immediate* sufferer, it may be pointed out that he or she is certainly injuriously affected by them. The other exceptions before the A. will be found in lists of abnormal competence, *e.g.* 2 Russ. Cri. 2272; Allen's edition of the 1898 A., App. C. p. 57, many of which relate to summary jurisdiction only, and some, perhaps, 'were wholly designed for the relief of the defendant' [and not of the prosecution: pamphlet, p. 14; see p. 141, n.], while none (except the Married Women's Property A. 1884) *expressly* permits one spouse to be called against the other. Those enactments which contemplate indictment will be found under the specific offences, but it must be remembered in *all* cases of statutory exceptions that by s. 6 (1) of the A.—'This Act shall apply to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act'—is meant that where preceding enactments conflict with 'this Act,' the latter is to prevail; so that where they do not conflict, they are still law (*e.g.* p. , and the Evidence A., below); and that by s. 4 (1), where 'this Act' has not extended their enabling power—by inserting them in the schedule—the spouse may *not* 'be called as a witness for the prosecution . . . without the consent of the person charged,' unless the specific enactment authorises this extension, too. The common law rule is by no means whittled away as regards the prosecution: (it is, of course, quite gone as regards the defence: s. 1).

Under the 40-1 V. 14, the Evidence A. 1877, 'on the trial of any indictment or other proceeding for the non-repair of any public highway or bridge or for a nuisance to any public highway, river or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding and the wife or husband of any such defendant shall be admissible witnesses and compellable to give evidence.' This A. was expressly preserved unaffected by s. 6 (1) of the 1898 A. (because though the 1877 A. goes further in this respect than that of 1898, the proceedings are *essentially* civil; and even more so since s. 20 (3) of the Cr. A. A. made proceedings in appeals therein actually civil). So 50-1 V. 28, 10, Merchandise Marks A. 1887; s. 4 of 46-7 V. 3, 1883, Explosive Substances A.; s. 53 (2) of the Corrupt Practices Prevention A. 1883: similarly under 51-2 V. 64, Law of Libel Amendment A.; 4 E. 7, 15, 12, Prevention of Cruelty to Children A.; Betting and Loans (Infants) A. 1892, 55-6 V. 4, 6.

Crimination by one spouse of other when witness on trial of third party] See *Privilege of Witnesses.*

Intervention of third person] A conversation between husband and wife may be proved by third persons who are present at or overhear it. *Smithies*, p. 57; *Simons*, p. 38; *Bartlett*, p. 57. And it has been held

that any statement made or list given by defendant's wife to a third person in his presence on his instructions may in like manner be proved. *Mallory*, 13 Q. B. D. 33; 53 L. J. M. C. 134, 1884: C. C. R., where Coleridge L.C.J. doubted whether, if she had done so in his absence [and without his instructions?], the evidence would have been admissible.

Marriage dissolved, &c.] Where the relation of husband and wife has once subsisted the common law rule holds, even after it has ceased, in respect of matters which occurred during the continuance thereof. Thus s. 1 (d) of the principal statute, p. 177, almost expressly re-enacts 16-7 V. 83, 3, p. 177.

Lawful *husband and wife*] If there is not a legal marriage the common law rule does not, of course, apply. So where a woman had married the plaintiff and lived with him as his wife, but had left him on the return of a former husband, who had been absent from England upwards of thirty years, and was supposed to be dead: Patteson J. held that there was no objection to her giving evidence for the defendant. *Wells* v. *Fisher*, 1 Moo. & R. 99; 5 C. & P. 12, 1831. Of course, a woman who cohabits with a man as his wife under his name, but is not so in fact, is a competent witness for or against him. *Batthews* v. *Galindo*, 4 Bing. 610, 1828. See also *Young*, 5 Cox C. C. 296, 1851, defendant's deceased wife's sister, whom he had 'married,' admitted in evidence against him; after her statement that she was his wife, the prosecution was allowed to prove by her that the marriage was void; 'if,' said Erle J., 'on the *voir dire* there is an *objection* to competency, there may also be examination to remove that *primâ facie* objection'; *Blackburn*, 6 Cox C. C. 338, 1853: the questions whether (1) witness deposing on the *voir dire* that she is wife of defendant can be contradicted by evidence that she had stated the contrary, and (2) the issue is for judge or jury, were not decided as witness was withdrawn.

III. Compellability of Spouses.

For the leading case, see *Leach*, 1912, above. Apart from *privilege*, the only difficulty that arises is in the case of spouse-witnesses; the statute is silent on the point, and the judgment in *Leach* was broadly founded on the view that such a witness could not be compellable without express enactment.

By statute—defendant] The only instances of a compellable defendant are by s. 259 of 39-40 V. 36, Customs Consolidation A. 1876, and 40-1 V. 14, Evidence A. 1877—both of civil proceedings (the latter in substance though criminal in form; 'and even for the prosecution': *Kenny*, Outlines Cr. L., p. 402, 8th ed.).

By statute—spouse-witness] There is only one instance in *wholly* criminal proceedings, viz., in s. 1 of 47-8 V. 14, M. W. P. A. 1884; for s. 21 of 38-9 V. 63, Sale of Food and Drugs A. 1875, in using the word *shall* in 'the defendant may, if he think fit, tender himself and his wife to be examined on his behalf and he or she *shall*, if he so desire, be examined,' probably did not intend to make the spouse compellable; if it did, by the Interpretation A. 1889, s. 1 (1) (a), a

wife could also compel her husband. Moreover, s. 21 only touches summary jurisdiction.

S. 1 of M. W. P. A. 1884] The s. clearly makes the prosecuting spouse compellable either for the crown or the defence:* see above.

Third person charged] Either spouse may, of course, be *subpœnaed* and on opposite sides: *Houlton, Jebb*, 24, 1823, where prosecutor's wife was tendered for defence, but rejected: eleven Irish judges held that this was wrong and defendant was pardoned. In 1852 Erle J. said that on the trial of an indictment 'both are admissible either to corroborate or contradict or discredit each other': *Stapleton* v. *Croft*, 21 L. J. Q. B. 251.

The common law exceptions—prosecution] The crown lawyers having failed (in *Leach*) to establish that competency involved compellability, apart from statute, the question remains whether that rule holds at common law, which was also maintained by those authorities. There seems to be no decision on the point at all. It was argued, *ib.*, that 'if a man attempted to murder his wife, she would be compelled to go into the box for the crown'; if this be true of one common law exception, it must be of all.

Fraudulent or forcible abduction] The statutory offences under 24-5 V. 100, 53-4, are also common law offences; but see p. 144. As they are scheduled, the woman, if married to defendant, would, according to *Leach*, not be a compellable witness against him; hence if there be compellability at common law, there would be a contradiction. It is by no means clear that the statute intended to abrogate the common law of spouse-witnesses altogether, for s. 4 (2) expressly saves part of it. S. 6 (1) does not affect compellability,* and in any case only abrogates 'any enactment in force' and not (as s. 12 of the M. W. P. A. 1882 does) 'any statute or rule of law to the contrary.' If that view is correct, the wife would be a compellable witness for the crown.

Defence] It is certain that on any charge on which one spouse is compellable *against* the other, she or he is compellable *for*. 'It is, perhaps, a reasonable speculation that the common law, which frankly recognised the subordination of the wife to the husband, would not have tolerated her refusal to 'obey' him if he called her when she was a competent witness. Its application to-day would be reciprocal': pamphlet, p. 29. But there is no express authority on the point.

* The pamphlet cited p. 141, n., is clearly incorrect on this point, pp. 15-6.

WITNESSES.

IV. Accomplices.

An accomplice is a person who has either been convicted of or confessed guilt connected with the charge on trial; hence it is not always easy at any given moment to decide whether a witness is an accomplice, *e.g.* for the purpose of corroboration: see *F. A. Martin,* 1910. So when it appeared that the chief witness was very probably a guilty receiver and there was no caution, c. q.: *Jennings,* 7 Cr. A. R. 242, 1912: larceny.

Confessed] Notwithstanding the common law rule which formerly prevailed that witnesses who were interested in the inquiry were not admissible, an exception was always made in the case of an accomplice who was willing to give evidence; and this exception has been stated to be founded on necessity; 'it is no exception against a witness that he hath confessed himself guilty of the same crime, if he have not been indicted for it; for if no accomplices were to be admitted as witnesses, it would frequently be generally impossible to find evidence to convict the greatest offenders.' Hawk. P. C. 2, 46, 94 and foll.; 'accomplices who are indicted are good witnesses for the King [until they be convicted'; this is not now law: *Tomey,* 1909]: 2 Russ. Cri. 2269.

It is not a matter of course to admit an (accused) accomplice to give evidence on the trial, even though his testimony has been received by the committing magistrates; but an application to the court for the purpose must be made. 1 *Phill. Ev.* 91, 10th ed. The court usually considers not only whether defendant can be convicted without such evidence, but also whether they can be *with* it. If, therefore, there be sufficient evidence to convict without, the court will refuse to allow him as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse. Thus, where several men were committed as principals, and several as receivers, but no corroboration could be given about the receivers, against whom the evidence of the accomplice was required, Gurney B. refused to permit one of the principals to become a witness. *Mellor,* 1833. So in *Saunders,* 1842, 'on a motion to admit an accomplice, Patteson J. said, 'I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification, and there is no corroboration, that will not do.' And in *Salt,* 1843, . . . where there was no corroboration of an accomplice, Wightman J. refused to allow him to become a witness.' 2 Russ. Cri. 2284 *c.* And again in *Sparks,* 1 F. & F. 388, 1858, where the prosecution asked to call an accomplice who had pleaded guilty, Hill J. refused until the other evidence had been given in order to see whether there was sufficient corroboration.

Practice] It now makes no difference whether the accomplice has been convicted or not, or whether he be joined in the same indictment

with defendant or not; *Hawkins*, above, implies the proviso that he be not put upon his trial at the same time, but the statute has abrogated the common law of defendant-witnesses: 2 Russ. Cri. 2284. Where A., B., C., and D. were indicted together, after plea, and before they were given in charge, Williams J. allowed D. to be removed from the dock, and examined as a witness against his associates. *Gerber*, T. & M. 647, 1852. See also *Winsor* v. *R.*, 1 Q. B. 311, 1866.

The practice, where such testimony is required before the grand jury, and he is in custody, is for counsel to move that he be allowed to go before the grand jury, 'pledging his own opinion, after a perusal of the facts of the case, that the testimony is essential.' 2 Russ. Cri. *ib.*, after 2 Stark. Ev. 12, 3rd ed.; if the application is granted, he is not included in the indictment: *ib.* Where the accomplice has been jointly indicted and, before the trial begins, it appears that his evidence will be required, the usual practice is, before opening the case, but after arraignment, to apply to have him acquitted by offering no evidence. *Rowland*, Ry. & Moo. 401, 1826. See also a remark of Cockburn C.J. in *Winsor* v. *R.* approving of this course (or, of that of first convicting and sentencing, if practicable), where the prosecution call the witness, although, as pointed out by L. Coleridge C.J. in *Bradlaugh*, below, he did not lay it down *as a proposition of law* that the accomplice could not be called without being first acquitted; Cockburn C.J. said (6 B. & S. 178) that his remark in *Payne*, 1872, at 354, only meant 'what is convenient.' Where the case has proceeded against all defendants, but no evidence appears against one of them, the court may, on application of prosecutor, order that one to be acquitted for the purpose of giving evidence against the rest. *Frazer*, 1 M'Nally, *Rules of Evidence*, 56, 1797.

Wife of accomplice] The wife of a co-defendant who has pleaded guilty but is not called, is not in the position of an accomplice: *Willis*, 1 K. B. 933; 85 L. J. K. B. 1129; 80 J. P. 279; 114 L. T. 1047; 32 T. L. R. 452; 12 Cr. A. R. 44, 1916; overruling *Neal*, 7 C. & P. 168, 1835, severely criticised in *C. Payne*, 8 Cr. A. R. 172, 1913; it seems that it would have made no difference if her husband had been called. In any case the jury should be warned: *Payne*. There may, of course, be a spouse-accomplice, *e.g. Jellyman*.

Co-defendant incriminating not necessarily an accomplice] Where one giving evidence for himself implicated the other, having previously made a statement of the same sort which the latter did not contradict, and the jury convicted both, the C. C. A. refused the latter relief on the ground of the former being uncorroborated; 'if J.'s story was true he was not an accomplice, and if M.'s story was true he was not an accomplice.' *F. A. Martin*, 5 Cr. A. R. 4, 1910.

Competent for defendant] See last par. It is quite clear that accomplices are competent witnesses for the defendant, with whom they themselves committed the crime for which they are all *separately* indicted. *Bilmore*, 1 Hale, P. C. 305, 1644. If he is charged in the same indictment, but not 'given in charge,' and his trial is postponed, he may be called without being acquitted, either for the crown or the defence; but, as stated above, if called for the crown, the better course is to take an acquittal; and if called for the defence, said L. Coleridge C.J., there was no power to compel an acquittal to be taken. *Brad-*

laugh, 15 Cox C. C. 217, 1883; but the point is of little importance since any defendant can give evidence.

Promise of pardon] Although Hale thought that if a man have a promise of pardon 'if –*i.e.* 'upon condition that'—he gives evidence against one of his own confederates, this disables his testimony'; 2 P. C. 280; yet [Editor's note] 'the contrary opinion hath prevailed, see *Tong's case,* Kel. 18, 1662, and *Layer* [16 St. Tr. 158-63] . . . but most certainly it is a great objection to the credibility if not to the competency of the witness'; see also 1 P. C. 304, where, as Kel. says, 'he takes a difference where the promise of pardon is to him for disclosing the treason and where it is for giving of evidence'; all the judges 'advised that no such promise should be made or any threatenings used to them in case they did not give full evidence.' The K. B. in *Darrel,* 10 Mod. 321, 1716, had no doubt that a pardoned accomplice was a good witness. In *Reilly,* 1787, one convicted of perjury was pardoned and admitted against his suborner; the pardon restored his competency. This the judges held to be right, as a pardon 'not only respites the convict from punishment, but entirely absolves him from the crime.'

Corroboration—caution to jury] It has been repeatedly laid down that a conviction on the testimony of an uncorroborated witness is legal; 1 Hale, P. C. 305, implies this, and Hawkins, 2, 46, 96, expresses it: 'It hath also been determined that a prisoner may be legally convicted on the evidence of an accomplice though unconfirmed by any other evidence. But it seems to be the general opinion that unless some fair and unpolluted evidence corroborate and give verisimilitude to the testimony of an accomplice, a person convicted under such circumstances ought to be recommended to mercy.' Both the rule and the rider have been recognised in innumerable cases and notably in *Attwood,* 1 Lea. 464, 1788, by the twelve judges; *Stubbs,* D. & P. 555; 1 Jur. N. S. 1115; 4 W. R. 85; 7 Cox C. C. 48; 25 L. J. M. C. 16, 1855: C. C. R., where Jervis C.J., Parke B., Wightman, Creswell and Willes JJ. held: 'The rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only, and not a rule of law. *Semble,* that a judge should advise the jury to acquit unless the testimony of the accomplice be corroborated not only in the circumstances of the offence, but also in the participation in it by the accused, and that where there are several prisoners and the accomplice is not confirmed about all, the jury should be directed to acquit the prisoners about whom he is not confirmed; but *held* that this being a rule of practice only, if a jury choose to act on the unconfirmed testimony of the accomplice, the conviction cannot be quashed as bad in law.' And *In re Meunier,* 1894, 2 Q. B. 415; 63 L. J. M. C. 198, where Cave J. said, 'The evidence must be laid before the jury in each case. . . . I know of no power to withdraw the case from the jury for want of corroborative evidence, or to set aside a verdict of guilty on that ground.'

The judgment in *Stubbs* was accepted, on a review by the C. C. A. (five judges) of a great many cases (to which, therefore, no further reference need be made) in which there had been much fluctuation in the decisions, in *Baskerville,* 1916, 2 K. B. 658; 86 L. J. K. B. 28; 25 Cox C. C. 524; 80 J. P. 446; 60 S. J. 696; 12 Cr. A. R. 81: gross indecency; the headnote (Cr. A. R.) adding: 'The nature and extent of such corroboration under certain statutory provisions are the same

as those indicated under 'the rule of practice' above.' There L. Reading C.J. said: 'This rule of practice has become virtually equivalent to a rule of law, and since the Criminal Appeal A. came into operation this court has held that in the absence of such a warning by the judge the conviction must be quashed: *Tate,* 1908, 2 K. B. 680; 1 Cr. A. R. 39; *Beauchamp,* 2 Cr. A. R. 41, 1909; *Threlfall,* 1914. If, after the proper caution by the judge, the jury nevertheless convict the prisoner, this court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. . . . But this court in the exercise of its powers will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this court, after considering all the circumstances of the case, thinks the verdict 'unreasonable' or that it 'cannot be supported having regard to the evidence': C. A. A. 1907, s. 4 (1). This jurisdiction gives larger powers to interfere with verdicts than had heretofore existed in criminal cases.' Hence when there was no corroboration and no caution, c. q.: *W. Mason,* 5 Cr. A. R. 171, 1910. The slighter the corroboration the more emphatic should be the warning to the jury: *Warren,* 1909.

Even if a witness is put forward as an accomplice only in the alternative, there must be corroboration: *Carr,* 2 Cr. A. R. 317, 1909.

Accomplice's evidence against one co-defendant] 'We see no reason in principle why a different rule on corroboration should apply to a prisoner tried with another against whom there is corroborative evidence of the accomplice's story, from that applicable if the first prisoner had been tried alone. In that case the uncorroborated evidence of the accomplice would be admissible against him, but it would be the judge's duty to give the proper caution to the jury; and it would be equally incumbent on the judge to give the warning to the jury when the prisoner is tried with another against whom there was corroboration of the accomplice's story; if the judge failed to give the warning this court would be bound to set aside the conviction': *Ib. Dawber and others,* 3 Stark. N. P. 34, 1821—all defendants convicted on evidence of accomplice confirmed only against one—is, therefore, no longer law, but the learned Editor's note on the old practice is interesting.

No caution] On the other hand, when there is no doubt whatever about the trial though the C. C. A. 'cannot say a single word in favour of' the summing-up, it will not quash merely on this ground: *Bowler,* 2 Cr. A. R. 169, 1908; but in *G. Bryant* the reverse was held.

Nature of corroboration] The authorities are naturally by no means so well agreed what is the nature or amount of the corroboration deemed desirable. See *Swallow,* &c., 31 St. Tr. at 980, 1813, and *Gallagher,* 15 Cox C. C. at 318, 1883. Stephen, Dig. Art. (21), requires corroboration 'in any material particular,' but material to what? A recent authority says: 'It is now settled (i) that there must be corroboration both of the circumstances of the crime and the identity of the prisoner; (ii) and that where there are several prisoners there must be corroboration about all, and the jury should be advised to acquit those against whom there is none; (iii) that the accomplice must be corroborated by independent evidence. . . .

'. . . Facts which tend to render more probable the truth of a

witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue and although happening before the date of the fact to be corroborated. . . . But facts which are not more consistent with the truth of such testimony than the reverse are inadmissible. The corroborative facts and evidence must, however, be proved otherwise than by the testimony of the witness to be corroborated, and the question of their admissibility is one of law for the judge and not one of fact for the jury.' *Phips*. 482-3.

Obviously no general rule can be framed as a test of corroboration in all cases. Perhaps the most helpful is *T.*'s, s. 970: 'The real rule appears to be that the extent of the corroboration required will depend upon the gravity of the crime': *per* Gurney B., *Jervis,* 2 M. & Rob. 42, 1837.

The real danger is that the accomplice should relate the circumstances truly and, at the same time, attribute a share in the transaction to an innocent person, not so much to one who was absent from the scene—for an *alibi* is comparatively easy to prove—but to one who was present.

What appears to be required is, that there should be some fact deposed to independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the defendant is implicated in it. Thus upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the defendant and himself had stolen two sheep, and that the brother gave one of them to defendant, who carried it into the house in which the latter and his father lived, and the accomplice stated where the skins were hid. On the houses of the father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen, and the skins were found in the place named by the accomplice. Patteson J. held that this was sufficient: the finding of the mutton in the possession of defendant in itself being a confirmation of the testimony of the accomplice for the jury to consider on the charge of receiving. If the confirmation had merely gone to matters only affecting the accomplice—*e.g.* the finding of the skins—for he might have put them there himself—that would not have been enough. But defendant was acquitted. *Birkett,* 8 C. & P. 732, 1839. When the only corroboration was defendant's remark on arrest, 'Do you think I should be such a fool as to have the stuff here for you to get it?' on which the judge asked the jury, 'Do you think that there is anything that amounts to an admission of guilt?' the C. C. A. approved: *Lucy,* 4 Cr. A. R. 16, 1910. In *Wilson,* &c., 6 Cr. A. R. 128, 1911, Alverstone L.C.J. said: 'It must not be supposed that corroboration is required amounting to independent evidence implicating the accused,' on which the C. C. A. in *Baskerville* said: 'If this means that the judge should not warn the jury to require independent corroboration of some part of the story which implicates or involves the accused, it goes too far.' In *Blatherwick,* Alverstone L.C.J. said: '*Everest* [2 Cr. A. R. 130; 73 J. P. 269, 1909] goes too far; *Wilson* [above] is' correct. In *D. Watson,* 1912, C. alleged that defendant employed him to go among thieves and get stolen property in order that defendant might get more by returning it to the owners than by selling it, and it was proved that he in fact so dealt with some owners; the judge thought this was corroboration, but the C. C. A. did not. See *Wyman,* 13 Cr. A. R. 164, 1918. At common law

corroboration does not imply implication in a 'material' particular: *W. Willis,* 1916.

Perhaps the extreme limit of latitude in corroboration was reached in *Kennaway,* 1917, 1 K. B. 25; 86 L. J. K. B. 300; 25 Cox C. C. 25; 81 J. P. 99; 115 L. T. 720; 12 Cr. A. R. 147: forgery of a will. Two convicted accomplices deposed that they had conspired with defendant to forge a will in which he said he could not appear as executor because he had appeared in that capacity in a will which he had forged eighteen years before, and that if he did it again suspicion might be directed to him. He denied on oath that he had made the statement to the accomplices; in cross-examination he was asked about the details of the earlier forgery, which was produced, with a view to showing that he had forged it, his attention being specially drawn to the similarity of handwriting of a signature therein with one in the document charged; the judge admitted this cross-examination 'on the ground that the answers might tend to corroborate the accomplices' story,' and was upheld by the C. C. A. on the ground—'If the prisoner had in fact been guilty of a similar forgery in . . . the earlier will, the probability was that the accomplices' story that he told them so and gave that as his reason for not being executor . . . was true and therefore . . . corroboration of their evidence. The cross-examination was consequently relevant to the issue at the trial.' It was not explained how the evidence in chief of the earlier will was relevant. This decision was criticised in 33 L. Q. R. 53, Jan. 1917. Non-denial on arrest may be corroboration of an accomplice's statement: *Feigenbaum,* 14 Cr. A. R. 1, 1919.

A previous conviction on facts in issue in another trial is not (at any rate, *per se*) corroboration: *per* C. A., overruling K. B. D. in *Mash* v. *Darley:* bastardy; but see p. 288. In that case the K. B. D., 1914, 1 K. B. 1, relied on *In the estate of Crippen* that proof of a conviction is presumptive proof of the *commission.* The latter case was anticipated by *Prince of Wales Assocn.* v. *Palmer,* where Romilly M.R. held that the finding of a coroner's jury—'murder'—against a given person threw the burden of proof in a civil case on the party alleging the contrary.

Corroboration inter se] The question being whether defendant was present, Littledale J. told the jury that, if the statements of two accomplices were the only evidence, he should not advise them to convict, adding. 'It is not usual to convict on the evidence of one accomplice without confirmation, and in my opinion it makes no difference that there are more than one.' *Noakes,* 5 C. & P. 326, 1832. ['*Sed quære': per* Stephen J., 7th ed.] The C. C. A. decidedly took this view in *Gay,* 2 Cr. A. R. 327, 1909, where there were five accomplices, Alverstone L.C.J. saying, 'This court will certainly not hold that the evidence of a number of accomplices needs any less corroboration than that of one accomplice. . . . It may be that at the close of the case for the prosecution there was not enough evidence before the jury to make it safe to convict. But appellant chose to go into the witness-box and to call evidence on her behalf, and this court must look at the whole body of evidence': see *Defence.*

Approvers—their modern position] Even in Blackstone's time 'this course . . . hath been long disused': 4 Comm. 330. The principles of the system were considered in *Rudd,* below, and some of them are

still relevant. Thus in *A. James,* 9 Cr. A. R. 142, 1913, the C. C. A. avowedly rewarded an accomplice whose evidence materially helped the prosecution by reducing his sentence for burglary from seven to three years' p. s. But it must be remembered that the attitude of the crown is materially different since any defendant can give evidence for himself.

The practice now adopted is, if a *primâ facie* case cannot otherwise be made out, (for the magistrate—*Atkinson,* Mag. Prac. (1916) p. 174—or) for the court to direct that he shall be examined on an understanding that if he gives his evidence in an unexceptionable manner he shall be recommended for a pardon, or, as all the judges put it, he 'ought not to be prosecuted for his own guilt so disclosed by him, nor perhaps for any other offence of the same kind, which he may accidentally, and without any bad design, have omitted in his confession; but he cannot by law plead this in bar of any indictment, . . . nor avail himself of it upon his trial, for it is merely an equitable claim to the mercy of the crown, from the magistrates' express or implied promise of an indemnity upon certain conditions that have been performed. It can only come before the court by way of application to put off the trial, in order to give the prisoner time to apply elsewhere.' *Rudd,* Cowp. 331; 1 Lea. 115, 1775. Atkinson, above, adds: 'In case his evidence seems necessary to secure a conviction the magistrate 'should direct that the fact be mentioned at the assizes or q. s. before' bill submitted. A prisoner, under sentence for murder, on being brought before the K. B. by *habeas corpus,* pleaded, *ore tenus,* that the king, by proclamation in the Gazette, had promised pardon to any person, except the actual murderer, who should give information whereby such murderer should be apprehended and convicted; and that he, not being the actual murderer, had given such information, and thereby entitled himself to the pardon; but it was held (quite apart from the facts) that he had no *legal* claim. *Garside,* 2 A. & E. 266, 1834. After giving his evidence, but not in such a way as to entitle him to favour, an accomplice may still be indicted for the same offence; and though he may have conducted himself properly, he is sometimes proceeded against for *other* offences. Thus, where an accomplice was admitted against a receiver of stolen goods, who was convicted, and the witness was afterwards prosecuted in another county for horse-stealing, and convicted, a doubt arising whether he came within the equitable claim to mercy, it was referred to the judges, who were unanimous that the pardon was not to extend to offences for which he might be liable to prosecution out of the county; and he underwent his sentence. *Duce* (undated), 1 *Burn's Justice,* 211, 24th ed. by Chetwynd (1825). So where an accomplice who had been admitted against his companions in robbery, and had conducted himself properly, was afterwards himself tried for burglary at the same assizes, Garrow B. submitted to the judges whether he ought to have been tried after the promise of pardon. but they were all of opinion that though examined for the crown, on the application of the prosecution, there was no *legal* objection to his being tried for any offence with which he was charged, and that it rested entirely in the discretion of the judge whether, in such a case, to recommend to mercy. *Lee,* R. & Ry. 361, 1818; in *Brunton,* 1821, *ib.* 454, the judge was dissatisfied with his conduct as 'King's evidence' in a burglary (of which he was not charged) and ordered him to be tried on a totally different charge; on his conviction the judges thought that execution of sentence was entirely for the judge's discretion. [With respect to other offences, therefore, the witness is not bound to

answer on his cross-examination. *West,* 1 *Phill. Ev.* 91 n., 10th ed. (1821).] Where a receiver discovered the principals in a felony under a reasonable hope of favour, and also disclosed another felony of the same kind under an impression that by the course he had taken he had protected himself from the consequences, Coleridge J. successfully recommended the counsel for the prosecutor not to proceed with the indictment for such other felony, adding, however, that if it was persisted in he was bound to try the case. *Garside,* 2 Lew. C. C. 38, 1838.

A defendant who, after a false representation made to him by a constable in gaol that his confederates had been taken into custody, made a confession, and was admitted against them, but on the trial denied all knowledge of the subject, was afterwards tried and convicted on his own confession; and the conviction was upheld by all the judges. *Burley,* 2 *Stark. Ev.* 13, 3rd ed. Where an accomplice who was called against several defendants gave evidence which showed that all, except one, who was apparently the leader, were present at a robbery, but refused to give any evidence about that one being present, and the jury found all guilty, Parke B. thinking that the accomplice had refused in respect of the particular one in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried. *Stokes,* 1837, *ib.* So where an accomplice in burglary, who had been allowed to go before the grand jury, on the trial pretended to be ignorant of the facts on which he had before given evidence, and two out of three defendants were in consequence acquitted, Coleridge J. ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded. *Moore,* 2 Lew. C. C. 37, 1838. So where an accomplice, after making a full disclosure before the magistrate, refused when before the grand jury to give any evidence at all, Wightman J. ordered him to be indicted, and he was convicted on his own confession. *Holtham,* 1843, 2 Russ. Cri. 2284 n. The defendant made a statement implicating himself and others in a Fenian conspiracy, to a constable, voluntarily, and then repeated it to a magistrate on oath. He then swore a further statement as a witness, adding, 'I came here to save myself.' No inducement was held out to him and he was not cautioned, the magistrate regarding him as an approver. Subsequently, though bound over, he refused to prosecute. Both his sworn statements were received against him in treason-felony. But the conviction was quashed by a majority, some judges thinking that both informations ought to have been rejected, some the second; two thought they were properly received. *Gillis,* 11 Cox C. C. 69; 14 W. R. 845, 1866: C. Crim. Ap. Ireland.

Agents provocateurs, *spies, informers, detectives, &c.—not accomplices*] Such persons employed in entrapping criminals 'are entirely distinguished in fact and in principle from accomplices,' *per* Maule J., *Mullins,* 3 Cox C. C. 526: spy on Chartists, 1848; 'and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators.' Followed in *Bickley,* 2 Cr. A. R. 53; 73 J. P. 239; 53 S. J. 402, 1909: woman police spy buying noxious drug. Where a watchman agreed, with his master's consent, to let thieves into the premises at night, it was argued that what they did was not *invito domino* and so not larceny; but though nothing was taken, the judges held otherwise: *Egginton,* &c., 2 Lea. 913; 2 B. & P. 508, 1801. See *A. Chandler,* 1912. In *B. Mortimer* (L. J.) L. Alverstone C.J. said: 'I do not

like police traps any more than does anybody else; but at the same time there are some offences the commission of which cannot be found out in any other ways, and unlawful acts done in consequence of the trap are none the less unlawful.' So *Heuser*, 6 Cr. A. R. 76, 1910: police officers assenting to informer—who was held to require corroboration—repeating gross offence; and cf. *Confessions* and *Aiders*.

Sexual, &c. offences] In certain cases there may be legal (as well as moral) guilt in both parties and one may be an accomplice: *Heuser*, above; *Baskerville; B. Brown* (i): c. q.; *Stone*, 6 Cr. A. R. 24, 89, 1910: c. q.; *B. Brown* (ii), *ib.* 147, 1911; *Bloodworth*, 9 Cr. A. R. 80, 1913 (the last four, incest); in *B. Brown*, 1911, the C. C. A. said: 'It would not be right in every case to direct a jury not to act without corroboration'; but not in others; *Tyrrell*, 1894; *Dimes*, 7 Cr. A. R. 43; 76 J. P. 47, 1911: incest.

WITNESSES.

V. Examination.

i. *Preliminary Points.*

Out of court] A defendant, if a witness or not, cannot be ordered out of court while he behaves himself becomingly. *Berry*, 1897. In general the court will, on the application of either side, direct that all the witnesses but the one under examination shall leave the court. *Charnock*, 125 St. Tr. 1396-7, 1696: treason; *R. Johnson*, Fost. Cr. L. 46, 1728: outlawry. And the *right* to require the unexamined witness to retire may be exercised at any period of the case: *per* Alderson B., *Southey* v. *Nash*, 7 C. & P. 632; 48 R. R. 843, 1837; but this is not borne out by *Selfe* v. *Isaacson*, 1 F. & F. 194, 1858, where it was held the court had a discretion and the plaintiff a right to remain in court. And even if the witness is under examination 'it is almost a right for the opposite party to have' him 'out of court while a discussion is going on about his evidence,' *per* Coleridge J., who acted on this principle, *Murphy*, 1837. It has been said that a defendant cannot claim this as a *right*. *Cook*, 13 St. Tr. 348, 351; *Vaughan, ib.* 494, 1696; *Goodere*, 17 St. Tr. 1015, 1741. But the practice is otherwise. The rule has been held not to extend to the attorney in the case, who may remain and still be examined as a witness, his assistance being in most cases necessary to the proper conduct of the case. *Pomeroy* v. *Baddeley*, Ry. & Moo. 430, 1826. But it extends to 'the prosecutor,' if it be proposed to examine him as a witness. *Newman*, 3 C. & K. 260; 1 El. & Bl. 268; 22 L. J. Q. B. 156, 1852, *per* L. Campbell C.J., who said, 'as prosecutor he has a right to be in court': *i.e.* if only prosecutor. So, as it seems, a physician, or other professional person, who is called to give an opinion as a matter of skill on the circumstances of the case, may be allowed to remain.

If a witness remains after an order made for the witnesses on both sides to withdraw, the rejection of his evidence is entirely in the discretion of the judge, but in the Exchequer it was peremptorily excluded; and so it was by Park J. in *Wylde*, 1834; *Colley*, Moo. & Malk. 329, 1829; *Parker* v. *M'William*, 6 Bingh. 683, 1830; *per* Coleridge J., *Thomas* v. *David*, 7 C. & P. 350, 1836. But in *Chandler* v. *Horne*, 2 Moo. & Rob. 423, 1842, Erskine J. stated that it was now settled by all the judges that the judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence; and he may commit him for contempt; and see *Cobbett* v. *Hudson*, 1 E. & B. 11; 29 L. J. Q. B. 11, 1852; *T.* s. 1401.

Trial in camera] In *The Governor of Lewes Prison*, 1917, 2 K. B. 254; 86 L. J. K. B. 1514; 81 J. P. 173; 33 T. L. R. 222, a court-martial had been held *in camera* although a rule of procedure under the Army A. 1881, forbade it. The K. B. D. (seven judges) thought that 'there was an inherent jurisdiction in every court to exclude the public if it became necessary for the proper administration of justice.

. . . That was the true meaning of the decision of *Scott* v. *Scott*': 1913, A. C. 417. See *Ex p. Lapierre,* 1906.

For a child, &c. giving evidence in certain cases, see *Evidence* under *Children.*

Incest] By s. 5 of 8 E. 7, 45, 'All proceedings under this A. are to be held *in camera.*'

Names on the indictment] See rule 1 (5) of the Indictments A. 1915, where 'intended' must mean a name endorsed (almost invariably by the prosecutor) but not examined.

Although a prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment; *Simmonds,* 1 C. & P. 84, 1823; *Whitbread, ib.* 84 n., 1823; yet it is usual to do so in order that defendant may cross-examine them; *Simmonds,* where as the prosecutor did not call one, the judge did. *Taylor, ib.* n., 1823; *Bodle,* 6 C. & P. 186, 1833. Cf. *Bull,* 9 C. & P. 22, 1839: manslaughter, where Vaughan J. said: 'In cases of this kind counsel ought not to keep back a witness because his evidence may weaken the . . . prosecution.' The prosecutor is not bound to call witnesses merely because their names are on the back of the indictment, but the prosecutor ought to have all such witnesses in court, so that they may be called for the defence, if they are wanted. If, however, they are called for the defendant, he makes them his own witnesses. *Woodhead,* 2 C. & K. 520, 1847, *per* Alderson B. And see *Cassidy,* 1 F. & F. 79, 1858, from which it appears that Parke B., Cresswell J., and L. Campbell C.J. agree in this ruling.

The court has no *power* to oblige a prosecutor to give to a defendant the additions and places of residence of witnesses named on the back of an indictment. *Gordon,* 2 Dowl. Pr. R. Q. B. 417; 12 L. J. M. C. 84, 1842, where there was strong reason for doing it.

Homicide] Where the widow and the daughter of deceased were present at the time when a fatal blow was supposed to have been given, and the widow was called for the prosecution—in murder—Patteson J. directed the daughter to be called also, although her name was not on the indictment, and she had been brought to the assizes by the defence; saying, 'Every witness who was present at a transaction of this sort ought to be called; and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusions on the real truth of the matter.' In that case the judge called, and himself examined, one of the surgeons at the *post-mortem* 'for the furtherance of justice' as he was 'a material witness, who is not called on the part of the prosecution'; his name was not on the back of the indictment. *Holden,* 8 C. & P. 609, 1838. See also *Stroner,* rape, 1 C. & K. 650, 1845, where Pollock C.B. insisted on two material witnesses not bound over and not named on the back of the indictment, *present for the defendant,* being called for the prosecution, adding, 'I shall allow the counsel for the prosecution every latitude in examining them.' And it seems that the same course should be pursued even when the person is a near relative of the defendant, as a brother, *Chapman,* 8 C. & P. 558, 1838, where, as the brother was a witness at the inquest, 'and that not at the instance of the prisoner,' L. Abinger C.B. thought the prosecution ought to call him, and if he showed any unfair bias might cross-examine him; or a daughter, *Orchard,* 1838, *ib.* n.

Judge calling witness] A judge has power in a criminal (but not in a civil) case: *In re Enoch,* 1910, recognised by s. 1 (2) of 8 E. 7, 15, to call and examine one who has not been called by either side: *Simmonds; Holden,* above; and if he does so (unlike the case of his recalling a witness, below), neither party can cross-examine without the judge's leave. Such leave ought, however, to be granted if the evidence given is adverse to either, but the cross-examination should be confined to the answers given, and a general cross-examination should not be permitted. *Coulson* v. *Disborough,* 1894, 1 Q. B. 316; 70 L. T. 617; 10 T. L. R. 429; 58 J. P. 784; 42 W. R. 449; 9 R. 390; *Watson,* below. In *Cliburn,* 62 J. P. 232; 127 Sess. Paps. 368, 1898, a solicitor was called by the court at his own request 'in the interests of justice,' but Fulton C.S. refused to allow the prosecution to cross-examine him, but allowed it to question him on certain points. Cf. *Davis,* 149 Sess. Paps. 168, 175, 1908; the judge calling a witness and prosecution taking him over. For the judge calling evidence of sanity, see *Mental Unsoundness.* Where letters in German had been used the court—three judges—called a witness to translate them, with the approval of the C. C. A. (five judges): *M.*, 32 T. L. R. 1; 11 Cr. A. R. 213, 1915.

Recalling witnesses] The judge may recall witnesses—including defendant: *Seigley,* recalled and cross-examined. Where, after the examination of witnesses to facts for defence, the judge (there being no counsel for the prosecution) recalled and examined a witness for the prosecution, it was held, that defendant's counsel had a right to cross-examine again: *per* Taunton J., *Watson,* 6 C. & P. 653, 1834. Although the prosecutor has closed his case, and the counsel for defendant has taken an objection that there was not enough evidence in law, the judge may, it seems, make any further inquiries of the witnesses he thinks fit, in order to answer the objection. *Remnant,* R. & R. 136, 1807.

Evidence by consent] Where there were two prosecutions for felony, and counsel for defence offered to admit the evidence taken on the first trial, as given in the second; Patteson J. doubted whether that could be done, even by consent, in a case of felony, but he directed the witnesses to be resworn, and read their evidence over to them from his notes. *Foster,* 7 C. & P. 495, 1836. In cases of misdemeanour, evidence may be taken by consent: *per* Patteson J. *ib.* But there seems to be no other authority for this exception, and it is contradicted by *Phips.* 11. Perhaps the true rule refers only to trials in the K. B. (D.): see *Morphew.* And when the attorneys on both sides had agreed that the formal proofs in perjury should be dispensed with, and that part of the prosecutor's case admitted, L. Abinger C.B. said, 'In a criminal case tried on the Crown side [n. b.] of the assizes, I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel.' The latter declining to do so, and the formal proof not being complete, defendant was acquitted. *Thornhill,* 8 C. & P. 575, 1838.

Objection to competency—voir dire] See *Competency,* above. It was formerly considered necessary to take the objection on the *voir dire: Layer,* at 158; *L. Lovat,* 1746; 1 *Phill. Ev.* 85, 10th ed. (1852); 'but this strict and ancient practice has been much modified; as appears by authorities which can be traced back in our Law Reports beyond

the last century.' *Ib.* The examination of a witness, to discover whether he was interested or not, was frequently to the same effect as his examination in chief, so that it saved time, and was more convenient, to let him be sworn in the first instance. In *Stone* v. *Blackburne,* 1 Esp. 37, 1793, it was said by L. Kenyon, that objections to competency never come too late, but may be made at any stage. See also *Jacobs* v. *Layborn,* 11 M. & W. at 685, 1843. But the most convenient time to object is before the witness is sworn, *Yardley* v. *Arnold,* 10 M. & W. at 145, 1842, when he is questioned by the court on the points suggested by the objector, and extrinsic evidence on the point may also be received; *Bartlett* v. *Smith,* 11 M. & W. 486, 1843; cf. *A.-G.* v. *Hitchcock; Cleave* v. *Jones,* 7 Ex. 428; 21 L. J. Ex. 105, 1852.

Where a witness who was deaf and dumb had been examined on the *voir dire,* and an interpreter was sworn to interpret by signs which he said he could do, but after some such evidence he found that they could not understand one another, the judge refused to leave the evidence of that witness to the jury, but left the case to them on the other evidence. And it was held that he had acted rightly. *Whitehead,* L. R. 1 C. C. R. 33; 35 L. J. M. C. 186; 10 Cox C. C. 234, 1866.

Defendant-witness] See that title. When he is to be called: see *Trial.*

ii. *Examination in chief—leading questions*] The witness being supposed to be in the interest of the side calling him, it is a rule, that on such examination leading questions, '*i.e.* questions which directly or indirectly suggest to the witness the answer he is to give,' Best, s. 641, shall not be put to him. Questions to which the answer 'yes,' or 'no,' would not be conclusive on the matter in issue, are not in general objectionable; but if such answer would be conclusive, 'on any part of the issue,' the question would be objectionable. Best, *ib.* Thus in *R. Wilson,* 9 Cr. A. R. 124, 1913, false pretences by a publication, the C. C. A. condemned asking prosecutrix 'Did he say it was an existing publication?' 'Did he say he was acting as their agent?': c. q. partly on this ground. It is necessary, to a certain extent, to lead the mind of the witness to the subject of the inquiry: *per* L. Ellenborough, *Nicholls* v. *Dowding,* 1 Stark. 81, 1815. Thus, where the question is, whether A. and B. were partners, a witness may be asked whether A. has interfered in the business of B. *Ib.* So where a witness being called to prove a partnership could not recollect the names of the members of the firm, so as to repeat them without suggestion: L. Ellenborough, alluding to a case before L. Mansfield, in which the witness had been allowed to read a written list of names, ruled, that there was no objection to asking the witness whether certain specified persons were members of the firm. *Acerro* v. *Petroni,* 1 Stark. 100, 1815.

Identification] So, for the purpose of identification, a particular defendant in the dock may be pointed out to a witness, who may be asked whether he is the man he meant. *Watson,* 1817, 32 St. Tr. at 74, where L. Ellenborough said to counsel, 'You may ask in the most direct terms—you may say, 'Look at the prisoners.'' So, also, ruled by him in *De Berenger,* Stark. 129 n.; cf. *M. Maguire,* 26 St. Tr. 293, 1795, where defendant was placed *in court* among others 'as nearly of his own condition in appearance as may be'; and *J. Smith,* 1 Cr. A. R. 203, 1908, where the absence of such persons was severely

criticised by the C. C. A.; but see *Best,* s. 643. 'Still, cases often arise where identification so prompted is worthless and where convictions founded thereon might be quashed': *Phips.* 465, citing *Dickman,* 5 Cr. A. R. 142-3; 74 J. P. 449; 26 T. L. R. 640, 1910. In *Gilling,* 12 Cr. A. R. 131, 1916, the C. C. A., after hearing further evidence, quashed a conviction on the ground that the evidence of identification was unsatisfactory. So where a question arose about the contents of a letter which had been lost, and to contradict one witness about the contents, another witness was called; L. Ellenborough ruled, that after exhausting the witness's memory about the contents, he might be asked 'if it contained a particular passage recited to him, which had been sworn to on the other side, otherwise it would be impossible ever to come to a direct contradiction.' *Courteen* v. *Touse,* 1 Campb. 42, 1807.

On the same principle, viz. the difficulty or impossibility of attaining the object for which the witness is called, unless leading questions are permitted to be put, they have been allowed where they are necessary to establish a contradiction. Thus, where counsel, cross-examining, asked a witness about some expressions he had used, for the purpose of laying a foundation for contradicting him, and the witness denied having used them, 'called a person to prove that he had, and read to him the particular words from his brief, Abbot C.J. held that he was entitled to do so.' *Edmonds* v. *Walter,* 3 Stark. 7, 1820; but this *form* of question has been criticised: *Best,* s. 642.

'Hostile' witness] Where a witness in chief by his conduct in the box shows himself decidedly adverse to the side calling him, it is in the discretion of the judge to allow him to be cross-examined: *Bastin* v. *Carew,* Ry. & Moo. N. P. C. 127, 1824: plaintiff calling defendant—'a situation which of necessity makes him adverse'; *Clarke* v. *Saffery, ib.* 126, 1824: *per* Coleridge J., *Murphy,* 1837, at 306, 308; *per* L. Abinger C.B., *Chapman,* 1838; *Stroner.* The inconsistent statement which leads the judge to permit such a course may be before the judge but not put in: *W. Smith,* 2 Cr. A. R. 86, 106, 1909; see 28-9 V. 18, 5; or it may be a material variation, *e.g.* in a date, from witness's deposition below: *J. Williams,* 8 Cr. A. R. 133; 77 J. P. 240; 29 T. L. R. 188, 1913. Somewhat similar to this is the question whether, where a witness, called for one side, is afterwards recalled by the other, the latter may cross-examine him; it was held, by L. Kenyon, that he may; for having been originally examined as the witness of one party, the privilege of the other to cross-examine remains through every stage of the case. *Dickinson* v. *Shee,* 4 Esp. 67, 1801: doubted *T.* s. 1433; 'but the better opinion is' that he may not: *Phips.* 470.

iii. *Cross-examination*] Leading questions are admitted on cross-examination, in which much larger powers are given than 'in chief.' The form, however, depends in some degree, like that of an examination in chief, on the bias and disposition shown by the witness. If he should display a zeal against the side cross-examining him, great latitude with regard to leading questions may with propriety be admitted. But if, on the other hand, he betrays a desire to serve the side which cross-examines him, although the court will not in general interfere to prevent counsel from putting leading questions, yet it has been rightly observed, that evidence obtained in this manner is very unsatisfactory and open to much remark. The rule was thus laid down by Buller J.: 'You may lead a witness upon a cross-examination, to bring him

directly to the point as to the answer; but not to go the length . . . of putting the very words into the witness's mouth which he was to echo back again.' *Hardy,* 24 St. Tr. 755, 1794.

Where an objection was made to leading a willing witness, Alderson B. said, 'I apprehend you may put a leading question to an unwilling witness, on the examination in chief, at the discretion of the judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not.' *Parkin* v. *Moon,* 7 C. & P. 405, 1836.

Cross-examination of co-defendant or his witnesses] The co-defendant incriminated may cross-examine: *Woods and May,* 6 Cox C. C. 224, 1853; *Burdett,* Dears. & P. C. C. R. 431; 24 L. J. M. C. 63; 6 Cox C. C. 458, 1855; whether the right existed if that evidence had not criminated a prisoner was left open: cf. *Hadwen.*

Cross-examination on previous statements in writing] See *Depositions* generally and *Letters.* It was settled in *The Queen's case,* at 292, that, when on cross-examination a witness is asked whether or not he has made any previous statement of a particular kind, the other side may intervene and ask whether the statement was in writing or verbal. If it appears to be in writing, then the 'inquiry is stopped, because the writing must be itself produced.'

The Criminal Procedure A. 1865] By 28-9 V. 18, 4: 'If a witness upon cross-examination, as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.'

S. 5: 'A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.' Since this A. of 1865 the settled practice has been as follows:—A witness may be cross-examined on what he said before the magistrate, counsel cross-examining may show him the deposition, and ask him whether he still adheres to the statement he has made in court, without reading the deposition in court or putting it in, but counsel is then bound by the answer of the witness, unless the deposition is put in to contradict him, and it is not admissible to state that the deposition does contradict him unless it is so put in. *T.* s. 1449-50. In *Garner,* 6 T. L. R. 110; 54 J. P. 424, 1889, the C. for C. C. R. held that the judge or chairman at any time before the verdict may read to the jury depositions which have not been put in though they have been used in cross-examination by prosecuting counsel. When the attention of the witness has been called to the writing, and it is desired to contradict him, the writing must be put in evidence. 'that the whole may be read.' *Riley,*

4 F. & F. 964, 1866; *Wright, ib.* 967, 1866—depositions in both cases: *per* Channell B., who pointed out that 'mere omission of a statement' is not contradiction. In *Hughes,* 1868 (*previous editions of this work*), Byles J. said the proviso 'as the judge may think fit' applied equally before any answer had been given by the witness or after—in fact to the whole of the trial; and the use he always made of a deposition was to have it read before any attempt was made to contradict a witness by it.

If counsel cross-examining puts a paper into the witness's hand [*e.g.* to refresh his memory] and questions him on it, 'I take the distinction to be this,' said Denman L.C.J., 'if it leads to anything, that is if anything comes of the questions,' . . . the other side 'has a right to see the paper, and re-examine upon it; but if the thing misses entirely [*e.g.* as where witness denies knowledge of it] and nothing comes of it,' he has not the right; but 'if he does more or comment on the contents, he may be required to put it in as his own evidence.' *Phips.* 468. See *Banks,* 1916; *Duncombe,* 8 C. & P. 369, 1838.

In Christopher, Smith, &c., 1 Den. C. C. 536; 2 C. & K. 994; 4 Cox C. C. 76, 1850, the magistrate's clerk had put, while copying the depositions *out of court,* magistrate and defendants being absent, some suggestions to the witnesses, the answers to which were inserted by him therein. Afterwards the witnesses appeared again before the magistrates, and, in the presence of defendants, were re-sworn; the depositions were read over, an opportunity was given to defendants to cross-examine, and the depositions were then signed. On the trial the defendants' counsel, without putting them in, proposed to cross-examine on a material point, in the *additions,* which the judge refused to permit; but the C. C. C. R. held that the question was proper, inasmuch as the magistrate's clerk, a person in no authority, 'could not, by any act of his, attach to the writing a character which would exclude parol evidence of what was so written': c. q. See *Depositions.*

Limits of cross-examination] See *Evidence to Contradict,* &c., and *Cargill, ib.* A witness may be questioned not only on the subject of inquiry, but on any other subject, however remote, for the purpose of testing his credibility, his memory, his means of knowledge, or his accuracy. Whether or not the question put will have that effect will depend on the circumstances of the case, and frequently also on information which is in possession of the cross-examiner only; judges, therefore, are in the habit of granting considerable licence to counsel in this matter, from the implicit confidence which is placed in them that they will not turn the power, which is put in their hands for the purposes of justice, into an instrument of oppression. The moment it appears that a question is in course of putting which does not either bear on the issue, or enable the jury to judge of the *value* of the testimony, it is the duty of the court to interfere, as well to protect the witness from what then becomes an injustice or an insult, as to prevent time from being wasted. Cf. *T.* s. 1434; *Best,* s. 130.

In their Annual Statement for 1917 the General Council of the Bar reproduced 'the substance' of ss. 148, 149, 152 of the Indian Evidence A. 1872, in rules (1-5, below) which they approved, thus:

'The Council are of opinion that they correctly state the general principles by which counsel should be guided in such matters, and that greater particularity is unattainable.

1. Questions which affect the credibility of a witness by attacking his character but are not otherwise relevant to the actual inquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true.

2. A barrister who is instructed by a solicitor that in his opinion the imputation is well-founded or true, and is not merely instructed to put the question, is entitled *primâ facie* to regard such instructions as reasonable grounds for so thinking, and to put the questions accordingly.

3. A barrister should not accept as conclusive the statement of any person other than the solicitor instructing him that the imputation is well-founded or true, without ascertaining, so far as is practicable in the circumstances, that such person can give satisfactory reasons for his statement.

4. Such questions, whether or not the imputations they convey are well-founded, should only be put if in the opinion of the cross-examiner the answers would or might materially affect the credibility of the witness; and if the imputation conveyed by the question relates to matters so remote in time or of such a character that it would not affect or would not materially affect the credibility of the witness, the question should not be put.

5. In all cases it is the duty of the barrister to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person, and to exercise his own judgment both as to the substance and the form of the questions suggested to him.'

For the case of a defendant-witness, see that title.

When may a witness refuse to answer questions? see *Privilege* and *Phips.* 472.

Witnesses to character] When the prosecution cross-examined them Alderson B. said: 'It is not usual to cross-examine witnesses to character, except you have some definite charge to which to cross-examine them,' *i.e.* (perhaps) charge against *them. Hodgkiss,* 7 C. & P. 298, 1836; there is the same exception of a previous conviction of defendant: 9 Halsbury, 368.

Evidence before grand jury] A witness asked about this in cross-examination must answer: *per* Parke B., *Gibson,* C. & M. 672, 1842.

Witness producing documents only] which can be proved by another, if he is not sworn, he is not subject to cross-examination. *Simpson* v. *Smith,* 1822, *cor.* Holroyd J.; 2 *Phill. Ev.* 467, 10th ed.: magistrate producing information; *Davis* v. *Dale,* M. & M. 514, 1830. Thus where a sheriff's officer had been subpœnaed to produce a warrant of the sheriff, after argument, he was ordered to do so without having been sworn. *Murlis,* M. & M. 515, 1830: perjury. But where the producing person is sworn, the other side is entitled to cross-examine him, although he is not examined in chief. *Brooke,* 2 Stark. 472, 1819. See *Rush* v. *Smyth.* So, where a witness has been asked only an immaterial question, and his evidence is stopped by the judge, there is no right to cross-examine him. *Creevy* v. *Carr,* 7 C. & P. 64, 1835. But where a witness is sworn, and gives some

evidence, if it be merely to prove an instrument, he is to be considered a witness for all purposes. *Morgan* v. *Bridges,* 2 Stark. N. P. 314, 1818.

On inadmissible documents] See *Seham Yousry,* where L. Coleridge J., continuing the passage p. 123, said: 'Th es ame procedure was adopted in regard to other documents described as being from the Consular Office in Cairo. They could not be put in, and the jury might easily surmise that these documents were proofs that no such marriage as alleged existed. The documents were flourished, their contents not obscurely indicated; but the judge did warn the jury in this case that they must not take their contents as evidence.' But where counsel for defendant cross-examined a doctor on a report which he had not made, the crown was allowed to give evidence of the contents of the report, with the approval of the C. C. A.: *Mullarkey,* 14 Cr. A. R. 44, 1919; but such report must be identified as referring to the state of the defendant or the alleged sufferer.

iv. *Re-examination*] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must of course be confined thereto. *T.* s. 1474. 'The re-examination of a witness is not to extend to any new matter, unconnected with the cross-examination, and which might have been inquired into on the examination in chief. If new matter is wanted, the usual course is to ask the judge to make the inquiry; in such cases he will exercise his discretion, and determine how the inquiry, if necessary, may be most conveniently made, whether by himself or by the counsel,' or defendant. 2 *Phill. Ev.* 473, 10th ed. Cf. p. 51. In *Prince* v. *Samo,* 7 A. & E. 627; 7 L. J. Q. B. 123; 3 N. & P. 139; 1 W. W. & H. 132; 2 Jur. 323, 1838, the Q. B. noting the distinction made by Abbott C.J. in *The Queen's case,* at 297, between a party to the suit and a third person, 'overruled' (*T.* s. 1474 n.) the doctrine there laid down, and held, that when a witness was asked if the plaintiff had not, in his cross-examination at a former trial, admitted insolvency, he was not at liberty on re-examination to detail any statement made by the plaintiff 'in chief' at the former trial, if that statement was unconnected with the insolvency. See *Phips.* 480, and *Sturge* v. *Buchanan,* 10 A. & E. 605; 12 D. & P. 573, 1839. An accomplice cross-examined to credit admitted two other robberies on the night of that then charged; on re-examination the crown was not allowed to go into details (in order to show that defendants were implicated); cross-examination, said Littledale J., had only gone to credit, and only questions arising thereout could be asked to criminate. *Fletcher and others,* 1 Lew. 111, 1829. In cross-examination the prosecutor admitted having spoken ill of his father: in re-examination it was proposed to ask him how his father had behaved before he spoke thus. On objection, Parke B. said the question might be put, for the father's conduct had been made evidence by the cross-examination to discredit the witness, and the latter was entitled to show that his language was justified. *St. George.*

Where one of the plaintiff's witnesses voluntarily stated on cross-examination facts not strictly evidence, but which might prejudice the plaintiff, it was held that unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them. *Blewett* v. *Tregonning,* 3 A. & E. 583, 1835.

v. *Miscellaneous points—refreshing witness's memory*] Where a defendant had been examined before the lords of the council, and a witness took minutes of his examination, which were neither read over to him after they were taken, nor signed by him; it was held that although they could not be admitted in evidence as a judicial examination, yet the witness might be allowed to refresh his memory with them, and having looked at them, to state what he believed was the substance of what defendant then confessed. *Layer.* He may refer to any entry or memorandum he has made shortly after the occurrence of the fact to which it relates, although the paper would not of itself be evidence, *Kensington* v. *Inglis,* 8 East, 288-9, 1807; to an unstamped receipt, *Maugham* v. *Hubbard,* 8 B. & C. 14, 1828; or to entries made by another in his presence and read out to him, *Langton,* 2 Q. B. D. 296; 46 L. J. M. C. 136; 13 Cox C. C. 345, 1876, C. C. R. But he cannot refresh his memory by even *his own* extracts from a book, if he has no other recollection, *Doe* v. *Perkins,* 3 T. R. 749, 1790; or from a copy of extracts from a written book: for the rule requiring the best evidence makes it necessary to produce the original, though used only to refresh the memory. *Burton* v. *Plummer,* 2 A. & E. 343, 344, 1834; cf. *Alcock* v. *The Royal Exchange Ins. Co.,* 13 Q. B. 292, 1849.

But where the original is produced, though witness has no recollection *apart* from it, he may thus refresh his memory: barristers for defence (murder) called themselves to prove by notes on their briefs that on a former trial, when the jury disagreed, a witness for the crown 'had materially varied his evidence' from that at this trial. *Guinea,* Ir. Circ. R. 167, 1841. So where a witness on looking at a writing has his memory so refreshed that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him. *Langton,* above. Thus where it has been material 'to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them.' *T.* s. 1410, and cases there cited. A solicitor was allowed to look at his own account of interviews with defendant, dictated by him to a stenographer, then copied in longhand and read over by him soon afterwards, though the shorthand writer could have been called. *Dexter,* 19 Cox C. C. 360, 1899.

Where the witness cannot speak without referring to a book, the book must be produced in court: *per* Coleridge J., *Howard* v. *Canfield,* 5 Dowl. P. C. 417, 1836. If produced by or to a witness, the counsel for the other side has a right to see it, and cross-examine from it: *Hardy,* at 824, 1794; or he may look at it and ask when it was written, without being bound to put it in evidence. *Ramsden,* 2 C. & P. 603, 1827. If he cross-examines to other entries than those referred to by the witness, he makes them part of his own evidence: *per* Gurney B., *Gregory* v. *Tavernor,* 6 C. & P. 281, 1833; the jury may see the entries.

Photographs] A photograph, taken from defendant in bigamy, and said by her (according to the 'second' husband) to be that of the 'real' husband, was allowed to be shown to a witness who had known him and was present at the marriage in 1855, and she was asked whether it represented the man whom she had seen married: and to a man in that husband's regiment, who had seen him alive in 1863, and swore that there was no other man of the same name in the regiment, on the ground, *per* Willes J., that it was 'a visible representation of the image

or impression made on the minds of the witnesses by the sight of the person' it represents, and therefore is in reality 'only another species of the evidence which persons give of identity when they speak merely from memory': both believed the photograph was of the man each had known. *Tolson,* 4 F. & F. 103, 1864. But this form of identification is unreliable unless amply corroborated: *Frith* v. *Frith,* 1896, Prob. 74 ['In matrimonial cases, except in very special circumstances, the court will not act upon identification by a photograph only']; 1 Russ. Cri. 993. In *Chadwick, &c.,* 12 Cr. A. R. 247, 1917, c. were qd. partly on the ground that the identifying witnesses had previously been shown photographs amongst which those of the defendants were differently mounted from the rest.

The fact that defendant's photograph is in the hands of the police should as far as possible be kept from the jury, so as not to influence them: *A. Palmer,* 10 Cr. A. R. 77, 1914. So *Varley, ib.* 127, c. q. partly because the jury probably inferred that appellant was known to the police. But where a witness stated that the police showed him several photographs out of which he picked appellant's, the C. C. A. pointed out that the photographs were not necessarily of convicted persons and approved of the action of the police. *Kingsland,* 14 Cr. A. R. 8, 1919.

Identification—belief] Belief is as much a fact as any other. *T.* s. 1415. It is the constant practice to receive a witness's belief of the identity of a person, or of a certain writing being that of a particular individual, though the witness will not swear positively to these facts. See *Miller,* 3 Wils. 427, 1773. For false evidence so given, a witness may be indicted for perjury. *Pedley,* 1 Lea. 325, 1784; *Schlesinger,* 10 Q. B. 670; 17 L. J. M. C. 79; 2 Cox C. C. 200, 1847. See *Perjury* and next par.

Opinion—expert] Although, in general, a witness cannot be asked what his opinion ['inference or belief': *Phips.* 361] on a particular question is, since he is called for the purpose of speaking about *facts,* other than his opinion, only; yet where matter of skill and judgment—'upon which competency to form an opinion can only be acquired by a course of special study or experience': *Phips.* 363—is involved, a person competent to give an opinion may be asked what that opinion is. Thus an engineer may be called to say what, in his opinion, was the cause of a harbour being blocked up. *Folkes* v. *Chad,* 3 Dougl. 157; 4 T. R. 498, 1782. In a variety of other cases, also, such evidence has been admitted. 'Many nice questions,' observes L. Mansfield, 'may arise on forgery, and on the impressions of seals, whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken.' *Ib.* So, it seems, is the opinion of any person in the habit of receiving letters, of the genuineness of a post-mark. See *Abbey* v. *Lill,* 5 Bingh. 299, 1829. See *Documentary Evidence.* So the opinion of a shipbuilder, who has not seen the ship, on a question of seaworthiness. *Thornton* v. *Roy. Exch. Ass. Co.,* Peake, N. P. C. 25, 1791; *Beckwith* v. *Sydebotham,* 1 Camp. 117, 1807; the opinion of brokers on a policy: *Chapman* v. *Walton,* 10 Bingh. 57, 1833. However, the Q. B. in *Campbell* v. *Rickards,* 5 B. & Ad. 840, 1833, held, overruling several previous decisions, that the materiality of a fact, concealed at the time of insuring, was a question for the jury alone. 'Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice

in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties acted in one way rather than another.' So antiquaries on the date of ancient handwriting. *Tracy Peerage,* 10 Cl. & Fin. at 191, 1843, where, however, L. Campbell expresses the opinion 'that hardly any weight is to be given to the evidence of what are called scientific witnesses.'

Fallibility of experts] The testimony of experts is usually considered to be of slight value, since they cannot be indicted for perjury, [they] are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will. . . . Indeed, where the jury accept the mere untested opinion of experts in preference to direct or positive testimony about facts, a 'new trial may be granted.' *Phips.* 366; see *Abinger* v. *Ashton.*

Statute—C. C. A.] By s. 9 *d, e,* of the Crim. Ap. A. 1907, the court has special powers; and see Rule 41 thereunder. In *J. E. Jones,* 2 Cr. A. R. 88, 103, 1909, the court heard a gunmaker, not called at the trial, to rebut doctors' evidence thereat that certain wounds were not self-inflicted. In *T. Smith,* 3 Cr. A. R. 73, 87; 74 J. P. 84, 1909, leave for an expert in handwriting (on fraudulent cheque) was refused, but the court dealt with the point itself: c. q.

Where it was suggested that a forged will, which together with pieces of paper 'used for the purpose of setting it up,' *i.e.,* supporting it, had been written over pencil marks which had been rubbed out, Parke B. (and Tindal C.J.) held, that the evidence of an engraver who had examined the papers with a mirror, and traced the pencil marks, was admissible for the prosecution, but that the weight of the evidence would depend upon the way in which it would be confirmed. *Williams,* 8 C. & P. 434, 1838.

Experts—insanity] It is the constant practice to ask medical men their judgment on the cause of a death by violence; and where, in murder, the defence was insanity, the judges were all of opinion that in such a case a medical witness might be asked whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it. Several of them doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz. whether, from the other testimony given in the case, the act charged was, in his opinion, an act of insanity. *Wright,* R. & Ry. 456, 1821, on the authority of which Park J. allowed a medical man, who had heard a trial for cutting and maiming, to be asked whether the facts and appearances proved showed symptoms of insanity. *Searle,* 1 Moo. & R. 75, 1831. And it seems that in *McNaughten,* 10 Cl. & F. 200, 1843, such questions were allowed to be asked. 2 Russ. Cri. 2262 (*h*). See the last words of the judge's answers in *T. Mason,* 7 Cr. A. R. 67; 76 J. P. 184; 28 T. L. R. 120, 1911: murder, it was held that an expert who has not seen the body, but has heard its condition described by the witnesses in their evidence, may state his opinion that death was not self-inflicted. In *Loake,* 7 Cr. A. R. 71, 1911, the court

heard *fresh* evidence of insanity *in the family* which ought to have been called at the trial, and from an expert—the circumstances, apparently, being exceptional. *Lumb, ib.* 264, 1912.

Professional works] So, also, skilled witnesses may refresh their memory by referring to professional treatises, although such treatises are not admissible in evidence: *Sussex Peerage,* below; *T.* s. 1423; and at all events a medical witness may be asked whether he has not in the course of his reading become acquainted with such and such results of scientific experience, and he may state that his judgment is founded in part on what he has read, though the books themselves could not be read. *Collier* v. *Simpson,* 5 C. & P. 74, 1831. Foreign law-books were formerly read to prove the foreign law; *e.g.* in *Picton,* 1806; but see below.

Experts—foreign law] In proving the laws, written or unwritten, of foreign countries, competent witnesses are admissible. The law of a foreign state must be proved by the *parol* evidence of witnesses possessing professional skill: *De Bode's case,* 8 Q. B. at 246, 1844, overruling *Clegg* v. *Levy,* 3 Camp. 166, 1812, which permits mere authenticated copies of foreign laws to be read; *Sussex Peerage,* 11 Cl. & Fin. at 114-7; 8 Jur. 793; 65 R. R. 11, 1844; *Nelson* v. *L. Bridport,* 8 Beav. 527, 1845; *T.* s. 1423. But in *Arton,* affidavit evidence of French law by a French advocate was received: 1896, 1 Q. B. at 511, note; *per* Phillimore J., *Govr. of Brixton Prison, ex parte Percival,* 21 Cox C. C. at 397, 1907: fugitive offender; *Phips.* 367-8. Thus, in abduction, a Scotch barrister was examined whether the marriage, as proved by a witness, would be a valid marriage according to the law of Scotland. *Wakefield,* 1827. See also *Lindo* v. *Belisario,* 1 Hag. Cons. 216, 1795; *Dalrymple* v. *Dalrymple,* 2 Hag. Cons. at 59, 1811; *Middleton* v. *Janverin, ib.* 437, 1802; cf. *Lacon* v. *Higgins; Povey,* 1852—woman giving evidence of practice in Scotland; *Cocks* v. *Purday,* 2 C. & K. 269, 1846. 'Foreign unwritten laws, customs, and usages, may be proved, and, indeed, must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses instructed in the laws, customs, and usages, under oath.' *Story,* on the Conflict of Laws, s. 642, 8th ed. (Boston, 1883), referring here to English law; so *T.* above, to the same effect, who by 'customs' or 'usages' must include legal ones, for 'a foreign *custom* or *usage* is . . . a matter of fact (just as . . . in this country), and therefore can be proved by any witness who is acquainted with the fact.' *T.* s. 1425, citing cases. See *Documentary Evidence,* and 24-5 V. 11; and for marriage, under *Bigamy.*

For the procedure, see *United States of America* v. *McRae,* L. R. 3 Ch. Ap. at 86, 1867, *per* L. Chelmsford C.

Laws or customs of savage states] See *In re Bethell,* 38 Ch. D. 220, 1888, where an inquiry was directed into the marriage customs of the Baralongs, and the depositions of a chief, taken in Bechuanaland, which, with other facts, was certified by the chief clerk. So of the same question in New Zealand in 1829: *Armitage* v. *Armitage,* L. R. 3 Eq. 343, 1866.

Other law] See *Documentary Evidence.*

WITNESSES.

VI. Privilege.

Its nature] Every such question as is admissible the witness is bound to answer, unless he can show that he has the privilege of silence by reason of some peculiarity in his situation. Similarly of the production of documents. *Phips.* 186, 200.

The privilege arises in three ways: i. on the ground that to answer would expose him to consequences so injurious that he ought to be allowed to decline; ii. that to answer would be a breach of confidence, which he ought not to be forced to commit; iii. that to compel him to answer would be against public policy. 'The privilege may be that either of the witness himself or of another whom he represents'. . . in the latter case 'he will *not be allowed*, without the principal's consent, to disclose the protected matter.' *Phips.* 186.

The difference between privilege and incompetency is that an incompetent witness ought not to be examined, and if he is examined inadvertently, his testimony is not legal evidence, *i.e.* the verdict may be set aside; but a privileged witness *may* always be examined, and his testimony is perfectly legal if the privilege be not insisted on.

If a witness be compelled to answer in cases where he claims and ought to have been allowed his privilege, that is not a ground for reversing a conviction on complaint of the defendant, as the only person injured is the witness. *Kinglake,* 11 Cox C. C. 499, 1870.

Civil consequences] It was always considered that a witness is privileged from giving an answer which might directly subject him to forfeiture of estate. Forfeiture is now abolished *except* on outlawry by 33-4 V. 23, 1. The old rule is recognised and the existing rule is stated in 46 G. 3, 37, by which it was declared and enacted 'that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty or of any other person or persons.' So, *generally* of *the production of documents; T.* s. 1464.

In a previous edition of this work a doubt was expressed whether the exception of 'penalty' 'extends to penalties to be recovered by a common informer, or otherwise in a civil manner,' but no other authority seems to share the doubt. *T.* s. 1453. Among the consequences to be apprehended need not be included

Actions for libel or slander] for none 'lies against a witness in respect of his evidence [on affidavit, or in proof, or in the box]. He is absolutely privileged for anything he may say . . ., however maliciously, in reference to the ca[u]se.' *Best,* s. 126; *Dawkins* v. *L. Rokeby,* L. R. 7 H. L. 744, 1875; *Seaman* v. *Netherclift,* 2 C. P. D. 53, 1876,

C. A.: the ground is public policy. In *Watson* v. *McEwan,* 1905, A. C. 480, the H. L. held that the protection extended to 'statements made to the client and solicitor in preparing the proof for trial.' As L. Halsbury there remarked, 'The communication complained of was no communication to strangers—to persons outside the litigation': protection could not be claimed, where, as Sir William Jones said in *L. Stafford's case,* 7 St. Tr. 1514, 1680, 'The evidence hath been printed and published to the world before it hath been given. I say, not that it was not necessary in this case, which was a national cause . . . but I do say it would not be fit to be done in other cases, for the notifying of the evidence is the way to have it falsified or corrupted.'

Ecclesiastical consequences] a. Apparently the only ecclesiastical proceeding a *layman* could conceivably fear is 'a criminal suit,' which 'is usually brought against a clergyman, but may be instituted against a layman for violation of ecclesiastical law': 11 *Halsbury's Laws of England,* p. 515; such suits, however, can only technically be described as criminal: *ib.* 516. For criminal proceedings in the ordinary sense the jurisdiction of these courts over *laymen* is obsolete: *ib.* p. 505. In *Phillimore* v. *Machon,* 1 P. D. 481, 1876, L. Penzance in the Arches Court of Canterbury, held that that court had no jurisdiction in false swearing by a layman, adding, 'I can only express my surprise that with the ordinary criminal courts of this country open to him . . . any person should have thought it worth while to make this experiment for the revival of a jurisdiction which, if it has not expired, has so long slumbered in peace.' A layman witness, therefore, need not subject himself to such jurisdiction as an ecclesiastical court still posseses over him, by virtue of the above statute.

b. *A fortiori* this is true of clerics of the Church of England, over whom that jurisdiction is much wider.

There cannot be a doubt that a judge, in deciding whether or not a witness is entitled to the privilege, would consider whether the danger suggested by the witness was 'real and appreciable with reference to the ordinary operation of the law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct': *per* Cockburn C.J. *Boyes,* 1 B. & S. 311; 30 L. J. Q. B. 301; 7 Jur. N. S. 1158; 9 Cox C. C. 32; 5 L. T. 147, 1861, and below, where, despite his pardon, a witness pleaded fear of impeachment for bribery in a Parliamentary election—a procedure unheard of; and the mere chance of an obsolete jurisdiction like the ecclesiastical, or that of impeachment, being set in motion would very likely not be considered as entitling the witness to his privilege.

Criminal consequences] That the witness will be subjected to a criminal charge, however punishable, is clearly sufficient ground for claiming the protection. [The proviso that 'the alleged crime has been committed within the jurisdiction of English law or on British soil,' *per* Phillimore J., in *Re Atherton,* below (where Canada was 'for this purpose, in the same position as a foreign country'), cannot, in view of *U. S. A.* v. *McRae,* be maintained. The distinction, however, is that the foreign incriminating law must be proved to the judge's satisfaction more formally. So *Phips.* 200: 'crimes, penalties and forfeitures, cognisable not only by English but foreign law,' are

within the rule.] Thus, the father of a bastard child could not be compelled to confess the fact, as he was thereby subjected to punishment under 18 Eliz. 3, 2 (rpd.): *St. Mary, Nottingham,* 13 East, 58 *n.*: before 1810. Nor could a witness be compelled to answer a question which even had a tendency to convict him of usury. *Cates* v. *Hardacre,* 3 Taunt. 424, 1811. And if a witness was *improperly* compelled, *after objection taken by him,* to answer questions tending to criminate him, it would appear that such answers would not be admissible in evidence against him should he be subsequently tried on a criminal charge—the only exception to depositions being admissible evidence against the deponent. *Coote,* 1873. The C. C. A. seemed to be of the same opinion in *Noel,* 1914, but it was not necessary to decide the point. But if the time limited for the recovery of the penalty have expired, the witness may be compelled to answer. *Roberts* v. *Allatt,* M. & M. 192, 1828.

Whether or not a witness who has been pardoned is bound to answer questions which tend to show him guilty of the pardoned offence is perhaps doubtful. Apparently *not,* according to North C.J. in *Reading,* 7 St. Tr. 296, 1679; but that case has been much doubted. See last case above; and in *Boyes,* 1861, it was held by the Q. B. that a pardon took away the privilege of the witness in such a case. Cf. *Hay* v. *Justices of the Tower.*

By the Corrupt and Illegal Practices Prevention A. 1883, 46-7 V. 51, 59 (1), witnesses before any election court, or before election commissioners, are not excused from answering concerning election offences; but (a) if they answer every question truly, they are to receive a certificate which will be a bar to all proceedings against them for any such offences, and (b) 'an answer by a person to a question put by or before any election court shall not, except in the case of any criminal proceeding for perjury in respect of such evidence, be in any proceeding, civil or criminal, admissible in evidence against him.' See *Leatham,* 1860. By (2), if any legal proceeding be taken against the holder of such a certificate for offences before the date thereof, in respect of the election certified, the court must, in proof, stay the proceedings and may award him costs.

By the interpretation clause, s. 64, the word 'indictment' includes 'information,' which gets rid of *Slator,* 8 Q. B. D. 267; 51 L. J. Q. B. 246, 1881: *ex-officio* information for perjury, held not to be included in 'indictment'; as do the words 'any criminal proceeding' of the objection raised in *Buttle,* L. R. 1 C. C. R. 248; 39 L. J. M. C. 115; 10 Cox C. C. 566, 1870, where it was held that answers given before a *commission* could not be used on a *trial* for perjury committed at the trial of a petition about the same election.

Similar provisions are applied to witnesses in respect of offences under the Explosive Substances A. 1883, 46-7 V. 3, 6.

A witness on the examination [s. 25 of 1914 A.] of a bankrupt is within the general rule: *Baldwin* on *Bankruptcy,* 11th ed. (1915), p. 570; and see s. 166 below.

Bankrupts] By s. 15 of 4-5 G. 5, 59, the Bankruptcy A. 1914: 'Public Examination of the Debtor': (4) 'Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs and the causes of his failure.' (5) (6) The official receiver shall, and the trustee may, 'take part therein.' (7) 'The court may put such questions to the debtor as it may think expedient.' (8) 'The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the court may

put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over either to or by the debtor, and signed by him, and may thereafter, save as in this Act [s. 166, below] provided, be used in evidence against him.' It was held under the Bky. Acts, 1883 and 1890, that 'a debtor who is in custody' or under remand on a criminal charge is bound, at his public examination in bankruptcy, to answer all such questions touching his conduct, dealings and property as the court allows to be put to him, 'even although the answers may incriminate him, and the inquiry . . . extends to all matters which the court' could 'take into consideration' under (rpd. s. 8 of the 1890) s. 20 of the 1914 A.: *In re Atherton,* 1912, 2 K. B. 251; 81 L. J. K. B. 791; 106 L. T. 641; 19 Mans. 126, where, owing to the possible extradition of the debtor, the usual practice of not pressing certain questions against a debtor charged criminally could not be followed; but Phillimore J. said: 'The official receiver, so far as he properly may, will not communicate the result of the examination to the police. He is not to go out of his way to furnish the police here with facts before the magistrate has committed.'

S. 166 of the 1914 A. is: 'A statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours' in s. 85 of 24-5 V. 96.

Trade secret] When the proprietor of certain unpatented pills cross-examined on their composition claimed the protection of the court, on the ground of its being a trade secret the disclosure of which would be a great loss to him, L. Lyndhurst ordered him to answer, but suggested to counsel 'the propriety of not going further into this subject than the ends of justice required.' *Webb,* 1834.

A question for the judge] The judge is to decide whether or not the witness is entitled to the privilege, subject to the correction of a superior court. What queries he ought to make in order to satisfy himself on this point has been the subject of considerable difference of opinion. In *Fisher* v. *Ronalds,* 12 C. B. 762, 1852, it was unnecessary to decide the point, but Maule J. said, 'It is the witness who is to exercise his discretion, not the judge. The witness might be asked, 'Were you in London on such a day?' and though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission would complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him.' It was equally unnecessary to decide the point in *Osborne* v. *The London Dock Company,* 10 Ex. 701, 1855, but the question was a good deal discussed; Alderson B. observing (with the approval of Cockburn C.J. in *Boyes,* above) that 'a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offence to the' witness; while Parke B. clearly inclined to the view that the witness ought to satisfy the court that the effect of the answer will be to endanger him: he stated that this was the opinion of the majority of the judges who considered *Garbett,* 1 Den. C. C. 236; 2 Cox C. C. 448,

1847: c. q.: though they expressly refrained from deciding the point; and he also cited L. Truro, who, in *Short* v. *Mercier,* 3 Mac. & G. 217, 1851, said, 'A defendant, in order to entitle himself to protection, is not bound to show to what extent the discovery sought may affect him, for to do that he might oftentimes of necessity deprive himself of the benefit he is seeking; but it will satisfy the rule if he states circumstances consistent on the face of them with the existence of the peril alleged, and which also render it extremely probable.' In *Sidebottom* v. *Atkyns,* 3 Jur. N. S. 631, 1857, Stuart V.-C. holding strongly that the view of Maule J. (and of Jervis C.J. stated to be the same) went much too far, compelled a witness to answer questions although he swore that he should thereby subject himself to a criminal prosecution. But in *Adams* v. *Lloyd,* 3 Hurl. & Nor. 351, 1858, Pollock C.B. distinctly approves of Maule J.'s statement (above), and does not accept the doubts, adding, 'The only exception I know of is this—where the judge is perfectly certain that the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege, then the judge is right in insisting on his answering the question.' Cockburn C.J. said: 'If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question.': in *Boyes,* 1861, above, the rule in which may be taken to be well established; it was adopted by the Court of Appeal. *Ex parte Reynolds,* 20 Ch. D. 294; 51 L. J. Ch. 756, 1882. Cf. *Charlesworth,* 1861, and (arising therefrom) *Ex parte Fernandez,* 30 L. J. C. P. 321; 6 H. & N. 717; 7 Jur. N. S. 529; 10 C. B. N. S. 3; 4 L. T. 324, 1861.

The result is that the bare oath of the witness, that he is endangered by being compelled to answer, is not to be considered as necessarily sufficient.

Questions tending to degrade] Every question must be answered and every required document produced: *Phips.* 86, 200, whether it tend to degrade the witness or not, *if it be material to the issue,* unless it tend to render him or his or her spouse liable to penalties or punishment. As the credibility of a witness is always in issue, he must, perhaps, therefore, answer questions which are in no other way material than as affecting his credibility. *T.* s. 1460. On the other hand, every question which is not material to the issue is improper, and it is not only improper, but unbecoming, to put questions to a witness, the very putting of which tends to degrade him, and which, not being material, he cannot be compelled to answer. And as every witness is entitled to the protection of the court in which he appears, any improper attempt to degrade him unnecessarily will immediately be repressed, without waiting for him to object to the question. Thus, when in conspiracy to defraud, &c., a defendant was asked in cross-examination a question suggesting that he was a party to bigamy, the judge at once intervened and duly cautioned the jury not to let the question prejudice them, the C. C. A., which has often insisted on this judicial duty, thought that in the circumstances of this case enough had been done to dispel any such effect: *Kurash,* under *Defendant's Character*; cf. other cases, *ib.,* for the commonest form of this irregularity is in *cross-examination* and in respect of *previous convictions,* both of which titles see.

Privilege of spouses inter se] Even before the 1889 A. doubt had arisen whether the principle which considers husband and wife as

one person, extends to protect each from answering questions which tend to criminate the other, even although they are neither of them on trial, or in a situation in which the evidence can be used against them. All the cases since 1788, with one exception, treat the husband or the wife as a competent witness in such circumstances. In *All Saints, Worcester,* L. Ellenborough said: 'If we were to determine, without regard to the form of proceeding whether the husband was implicated in it or not, that the wife is an incompetent witness on every fact which may possibly have a tendency to criminate her husband, or which, connected with other facts, may perhaps go to form a link in a complicated chain of evidence against him, such a decision, I think, would go beyond all bounds; and there is not any authority to sustain it, unless, indeed, what has been laid down, as it seems to me, somewhat too largely in *R.* v. *Cliviger* [*Inhabs. of,* 2 T. R. 263, 1788] may be supposed to do so. I would observe that the court [K. B.] does not mean to break in on the rule founded in the policy of the law, that husband and wife shall not be permitted to be witnesses for or against or to criminate each other; but that is a different matter from *incompetence* because his or her testimony may produce some latent possible effect.' See also *Inhabs. of Bathwick,* 2 B. & Ad. 639, 1831; *Williams,* 8 C. & P. 284, 1838, where the wife of a man already convicted of stealing was admitted against another defendant *separately* indicted for the *same* larceny. The case the other way is that of *Gleed,* 1832, 2 Russ. Cri. 2280, in which, on a charge of stealing wheat, Taunton J. (and Littledale J.) refused to allow a wife to be called in order that she might be asked whether her husband, who had absconded, was not present when the wheat was stolen, and delivered it to defendant: 'it is sought to make the woman charge her husband not obliquely, but directly and immediately'; but that case would hardly prevail against the above decisions. In *Thurtell, Annual Register,* 1824, 1, Mrs. Probert, whose husband had previously been acquitted, was the principal witness; *per* Alderson B. in *Williams,* above.

In *Elizabeth and James Martin,* 17 Cox C. C. 36, 1889—neglect of a child—Wills J. held, at the close of the prosecution, that there was no case against the husband, but declined to discharge him on the ground that 'the wife electing to go into the . . . box, the case was not over and the husband must . . . take his chance of the wife's evidence making against him': *sed quære.* Clearly the husband was only subjected to that peril because his wife's evidence was, by statute, admissible against him on that indictment. The common law rule, then, is that spouses, neither being on trial, must not directly by their evidence tend to criminate each other, and in any case whatever where such crimination is permissible by common law or statute, it must be strictly confined to the exceptional issue.

And the tendency of the courts is to spare such witnesses as much as possible: *All Saints, Worcester;* and *Cartwright* v. *Green,* 8 Ves. 405, 1802, wife not compelled in equity to make discovery of a felony against her husband.

By 16-7 V. 83, 3, 'No husband shall be compellable to disclose any communication made to him by his wife during the marriage,' and *vice versâ.*

That, if the husband or wife has been already convicted, acquitted, or pardoned, there will be no ground for claiming the privilege seems to follow from *Williams,* above.

Legal adviser privileged—but not confessor] The matters with respect to which the privilege of silence or secrecy exists on the ground of confidence are those which have come to the knowledge of the witness *as professional legal adviser*. *Wilson* v. *Rastall*, 4 T. R. 758, 1792; *Duchess of Kingston's case*, 20 St. Tr. at 573; 1 Lea. 146, 1776. The privilege of the Bar was carefully vindicated by Mr. Arthur Murphy before a Committee of the whole House of Lords in *Captain Thomas Baillie*, 21 St. Tr. 358, 1778, for whom he had been counsel; after express request by the client and his opponent, the E. of Sandwich, with whom Mr. Murphy had confidentially negotiated, he was sworn and gave evidence.

Other professional persons, whether physicians, surgeons, or clergymen, have no such privilege: *Ib.* Nor bankers: *Daye*, 1908. Thus where defendant, a Roman Catholic, made a confession before a Protestant clergyman, the confession was permitted to be given in evidence, and he was executed. *Sparke*, cited *Peake*, N. P. C. 78, about 1791, where L. Kenyon observed that he should have paused before he admitted the evidence; but there appears to be no ground for this doubt. In *Gilham* it was assumed by defendant's counsel that a clergyman is bound to disclose what is revealed to him as matter of religious confession. See *Addenda*.

In *Watson* v. *M'Ewan* L. Halsbury thought that the relation between patient and doctor might 'raise very serious and difficult questions.' In *Du Barré* v. *Livette*, *ib.* 1791, L. Kenyon refused to hear in a civil action the interpreter between defendant, a thief, and his attorney repeat conversations between them about the former's criminal trial, but admitted his own first-hand conversations in the absence of the attorney. In *Reen, &c.*, 2 Cr. A. R. 311, 1909, before hearing appellant's solicitor the C. C. A. ascertained that he had his authority to state what passed between them in the prison.

So the agent of the solicitor stands in the same situation as the solicitor himself, and the conversations of an attorney cannot be admitted against his client. *Parkins* v. *Hawkshaw*, 2 Stark. N. P. C. 239, 1817; *Goodall* v. *Little*, 20 L. J. Ch. 132, 1851, letters passing between solicitors privileged, but not those passing between co-defendants to be put before solicitors. So a clerk to the solicitor. *Taylor* v. *Foster*, 2 C. & P. 195, 1825; *Inhabs. of Upper Boddington*, 8 D. & R. 726, 1826. So a barrister's clerk, subpœnaed to produce his master's retainer in a cause, was not allowed to be called. *Foote* v. *Hayne*, Ry. & Moo. 165, 1824.

Capacity of legal adviser must be professional] The information must have been necessarily obtained by the legal adviser in his professional capacity. Thus a solicitor, who has witnessed a deed produced in a cause, may be examined on the true time of execution; or if a question arise about a rasure in a deed or bond, he may be asked whether he ever saw the instrument in any other state, that being a fact within his own knowledge; 'but he ought not to be permitted to discover any confessions his client may have made to him on such head.' B. N. P. 284. But L. Abinger C.B. said that that passage applies only 'where the attorney has his knowledge independently of any communication from the client.' *Wheatley* v. *Williams*, 1 M. & W. 533, 1836. It was there held that a solicitor is not compellable to state whether a document shown to him by his client during a pro-

fessional interview, was in the same state as when produced at the trial, namely, whether it was stamped or not. In *Dwyer* v. *Collins,* at 646 Ex., it was held, that the right of a solicitor not to disclose matters with which he has become acquainted in the course of his employment as such, does not extend to matters of fact which he knows by *any other means* than confidential communication with his client, though, if he had not been employed as solicitor, he probably would not have known them; and that on this ground, a solicitor of a party, called by the other side, is bound to answer on a trial, whether a particular document belonging to his client *is in his possession, and is then in court.* So *Coates* v. *Birch,* 2 Q. B. 252, 1841. In both cases secondary evidence was thus let in. In *Doe* v. *Andrews* L. Mansfield said, 'An attorney has no privilege to refuse to give evidence of collateral facts' where the attorney refused to give evidence of his own attestation against his client. In *Farley,* 1 Den. C. C. 197, 1846, when the wife of a defendant took, by his instructions, a forged will to a solicitor, and asked if he could advance her husband some money upon the mortgage of property mentioned therein, and the solicitor made no charge for the interview; it was held, that he could give an account of the interview. So where a forged will was put into a solicitor's hands among some title deeds, which defendant sent with the will, so as to raise no suspicion; it was held, by all the judges, that the communication was not privileged. *J. Jones,* 1 Den. C. C. R. 166, 1846: see *Tuffs;* and *Avery,* below.

Matter must be confidential] And the matter must also be one which is a subject of professional confidence. Thus the clerk of a solicitor may be called to identify a person, though he has only become acquainted with him in his professional capacity; for it is a fact cognisable both by the witness and by others, without any confidence being reposed in him: *Studdy* v. *Saunders,* 2 Dow. & Ry. 347, 1823; though the contrary was, on one occasion, ruled by Holroyd J., *Parkins* v. *Hawkshaw.* So a solicitor's clerk may be called to prove the receipt of a particular paper from the other party, for it is a mere fact. *Eicke* v. *Nokes,* Moo. & M. 303, 1829. So a solicitor conducting a cause may be called and asked who employed him, in order to show who is the real defendant and to let in his declarations. *Levy* v. *Pope,* Moo. & M. 410, 1829. So he may be called by the other side to prove that his client is in possession of a particular document, in order to let in secondary evidence of its contents, notice to produce having been given. *Beavan* v. *Waters,* M. & M. 235, 1828. So to prove his client's handwriting, though his knowledge was obtained from witnessing the execution of the bail-bond in the action. *Hurd* v. *Moring,* 1 C. & P. 372, 1824; *Robson* v. *Kemp.* So where an attorney is present when his client is sworn to an answer in chancery, on an indictment for perjury, he will be a good witness to prove the fact of the taking of the oath, 'for it is a fact in his own knowledge and no matter of secrecy committed to him by his clients.' Bull. N. P. 28. But in *Watkinson,* 9 Str. 1121, 1740, the reverse view was taken. L. Brougham, however, in *Greenhough* v. *Gaske'l,* observes, 'the putting in the answer, so far from being a secret disclosed, was in its very nature a matter of publicity,' and that *Watkinson* could not be considered as law. And see *Doe* v. *Andrews.*

There is no doubt that the privilege may be equally claimed, whether the client be defendant or any other person, or whether the subject

of the confidence be the charge against defendant or any other professional communication. *T.* s. 919.

The law, and the cases on the subject, were considered by the C. for C. C. R. in *Cox and Railton,* 14 Q. B. D. 153; 54 L. J. M. C. 41; 52 L. T. 25; 33 R. 396; 49 J. P. 374; 15 Cox C. C. 611, 1884; when the unanimous judgment of the court was delivered by Stephen J., viz. that those communications *only* are privileged which pass between a solicitor and his client in professional confidence, and in the *legitimate* professional course; and that communications to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it are not privileged. See also *Annesley* v. *L. Anglesea,* 17 St. Tr. 1229, 1743; *Avery,* 8 C. & P. 596, 1838; *Farley,* above; and *Russell* v. *Jackson,* 9 Hare, 392, 1851. Cf. *Brown,* 1862.

Election petitions—solicitor, agent, &c.] S. 59 (5) of 46-7 V. 51, is: 'Where a solicitor or person lawfully acting as agent for any party to an election petition respecting any election for a county or borough has not taken any part or been concerned in such election, the election commissioners inquiring into such election shall not be entitled to examine such solicitor or agent respecting matters which came to his knowledge by reason only of his being concerned as solicitor or agent for a party to such petition.'

Public policy—grand jury] See *Watson,* 1817, under *Competency; Jurors.* According to a case in 1650, a clerk attending on a grand jury shall not be compelled to reveal what was given in evidence. *Trials per Pais,* ch. 15, p. 387, 8th ed. (1766); see 12 Vin. Ab. 38, *Evidence* (B. a. 5). *Gazard,* 8 C. & P. 595, 1838, p. 140, is not now law.

Informers, &c.] Another class of privileged communications are those disclosures which are made by informers, to the government, the magistracy, or the police, with the object of detecting and punishing offenders. The general rule on this subject is thus laid down by Eyre C.J.: 'It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a defendant; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made appear that really and truly it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me that it is within the ordinary course to do it.' *Hardy,* at 808, 1794. It is not every communication made by an informer, to any person to whom he thinks fit to make it, that is privileged from inquiry, but those only which are made to persons standing in a certain situation, and for the purposes of legal or other investigation. Communications made to government respecting treasonable matters are privileged, and a communication to a member of government is to be considered as a communication to government itself; and that person cannot be asked whether he has conveyed the information to government. *Watson,* 1817, 32 St. Tr. 101; 2 Stark. 136. So a person employed by an officer of the executive government, to collect information at a meeting supposed to be held

for treasonable purposes, was not allowed to disclose the name of his employer, or the nature of the connection between them. *Hardy,* at 753; *Watson,* Gurney's Rep. 159; 32 St. Tr. 100; 2 Stark. 135. So where a prosecution is carried on by the Director of Public Prosecutions and he is called as a witness, he may refuse to give the names of persons from whom he has received information and the nature of that information, unless the judge should think the disclosure necessary in the interests of defendant. *Marks* v. *Beyfus,* 25 Q. B. D. 494; 59 L. J. Q. B. 579; 38 W. R. 705; 17 Cox C. C. 196, 1890: C. A.

The protection extends to all communications made to officers of justice, or to persons who form links in the chain by which the information is conveyed to officers of justice. A witness who had given information, admitted, in treason, that he had communicated what he knew to a friend, who had advised him to make a disclosure to another person. He was asked whether that friend was a magistrate, and on his answering no, he was asked—who was the friend? It was objected, that the person by whose advice the information was given to one standing 'in the situation of magistrate,' was 'to all intents and purposes the informer,' and that his name could not be disclosed. The judges differed. Eyre C.J., Hotham B., and Grose J. thought the question objectionable; Macdonald C.B. and Buller J. were of opinion it should be admitted. Eyre C.J. said, 'all those questions which tend to the discovery of the channels by whom the disclosure was made to the officers of justice,' are not permitted to be asked. Such matters cannot be disclosed, 'upon the general principle of the convenience of public justice.' If it is objected to 'it is no more competent for the defendant to ask who the person was that advised him to make a disclosure, than it is to whom he made the disclosure in consequence of that advice;—than it is to ask any other question respecting the channel of information, or all that was done under it.' Hotham B. said, that the disclosure was made under a persuasion, that through the friend it would be conveyed to a magistrate, and that there was no distinction between a disclosure to the magistrate himself, and to a friend to communicate it to him. Macdonald C.B. said, that if he were satisfied that the friend was a link in the chain of communication, he should agree that the rule applied, but that not being connected either with the magistracy or the executive government, the case did not appear to him to fall within the rule; and the opinion of Buller J. was founded on the same reason. *Hardy,* at 811. The above cases were cited and considered in *Att.-Gen.* v. *Briant,* 15 M. & W. 169, 1846, where the court decided, that upon the trial of an information for a breach of the revenue laws, a witness for the crown cannot be asked in cross-examination, 'Did you give the information?'

But 'this rule does not apply to private prosecutions': *Phips.* 182; on an indictment for poisoning, the police having, in consequence of certain information, found the bottle containing the poison, in a place used by defendant, a policeman declined to state from whom he had received the information; but Cockburn C.J. ordered him to answer the question, which in the particular instance turned out to be material, the information having been supplied by two girls not called; 'they could have stated,' said the judge, 'how it was they had come to know that the bottle was where it was found, and perhaps could have given some clue to the person who put it there': verdict, 'not guilty.' *Richardson,* 3 F. & F. 693, 1863.

The line between public and private prosecutions not being clearly

drawn for this purpose, it is for the judge to decide whether the information is protected or not.

Oath of office—implied exception] Where an oath of office has been taken not to divulge matters which have come to the knowledge of a person in his official capacity, he will not be allowed, where the interests of justice are concerned, to withhold his testimony. Thus, where the clerk to the commissioners of the property tax being called to produce the written appointment of a collector, objected on the ground that he had been sworn not to disclose anything he should learn as clerk, L. Ellenborough clearly thought that the oath contained an implied exception of the evidence to be given in a court of justice, in obedience to a *subpœna:* he had to produce the book and answer all questions respecting the collection of the tax, as if no such oath had been administered to him. *Lee, q. t.* v. *Birrell,* 3 Camp. 337, 1813.

Whose is the privilege] See *per* Pollock C.B., below. The mode of taking the objection depends on the person to whom the privilege belongs. If the objection be on the ground that the answer would expose the witness to penal consequences, then it belongs to the witness himself, and to him only, who may insist on or abandon it, as he thinks fit. *Thomas* v. *Newton,* M. & M. 48 n., 1826; *Adey,* 1 Moo. & R. 94, 1831; in both of which L. Tenterden said that counsel ought not to be allowed to argue the question in favour of the witness. And it seems still more improper for counsel interested in excluding the evidence to suggest the objection to the witness. Frequently, indeed, the court, especially with an ignorant witness, will explain to him his position and the protection to which he is entitled—see *Acaster*—and the practice has been approved of. It has, indeed, sometimes been asserted that a question tending to criminate a witness cannot be *put,* which is an obvious error, as, until put, it cannot be seen whether or not the witness will insist on his privilege. Of course, the court will not allow a witness to be attacked with questions which he obviously cannot be compelled to answer, merely for the purpose of insulting him, which explains how it is that sometimes the court has interfered without waiting for the witness to claim his privilege. See under *Witnesses,* and *T.* ss. 1465-6.

If the privilege be claimed on the ground of professional confidence, then the privilege belongs to the person who reposes the confidence, who may insist on or waive it at his pleasure. See *Goldstone* v. *Williams, &c.,* 1899, 1 Ch. at 52. The rule seems to be that it will be assumed that the privilege is insisted on unless the contrary be shown, and that it is not, therefore, generally necessary that the client should be present and insist personally on his privilege. *T.* s. 911, s. 922; *Doe* v. *Ross*; *Newton* v. *Chaplin*; *Phelps* v. *Prew,* 3 E. & B. 430, 1854. If the professional adviser chose to take on himself the risk of answering the question, the court could hardly prevent him, though it might express its indignation at a manifest breach of professional confidence. *T.* s. 927.

It was once thought that if the witness began to answer he must proceed; but in *Garbett* nine judges against six held that this was not so; and that the witness was entitled to his privilege at whatever stage of the inquiry he chose to claim it.

Effect of refusing to answer] Where a witness is entitled to decline answering a question, and does decline, the rule is said by Holroyd J.

to be, that 'his not answering can have no effect with the jury.' *Watson,* 1817, referring to *Harris* v. *Tippett,* 2 Camp. 637, 1811. So where a witness refused to answer a question, on the ground that he had been threatened with a prosecution respecting the matter, and the counsel in his address to the jury remarked thereon, Abbott C.J. interposed and said, that no inference was to be drawn from such refusal. *Rose* v. *Blakemore,* Ry. & Moo. N. P. C. 384, 1826. A similar opinion had been expressed by L. Eldon. *Lloyd* v. *Passingham,* 16 Ves. at 64, 1809. But it was said by Bayley J. in *Watson,* 2 Stark. 153; 32 St. Tr. 491, 'If he refuse (to answer), this is not without its effect with the jury. If you ask a witness whether he has committed a particular crime, it would perhaps be going too far to say that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may.'

Effect of not refusing to answer] Answers given to questions to which the witness might properly have objected, but does not, are admissible against him as admissions. *Smith* v. *Beadnell,* 1 Camp. 33, 1867: bankruptcy, which title see. But not answers to questions to which he objects, but is *wrongly* compelled to answer: *Garbett.* See also *Coote,* 1873, and *Kinglake,* 1870.

Houses of Parliament] What passes in parliament is in the same manner privileged. Thus, on a trial for a libel on Mr. Plunkett, a member of the Irish House of Commons, the Speaker being called and asked whether he had heard Mr. Plunkett speak in parliament on matters of a public nature, L. Ellenborough said that the Speaker was warranted in refusing to disclose what had taken place in a debate in the House of Commons. He *might* disclose what passed there, and if he thought fit to do so, he should receive it as evidence. To the fact of Mr. Plunkett having spoken in parliament, or taken any part in the debate, he was bound to answer. That was a *fact* containing no improper disclosure of any matter. *Plunkett* v. *Cobbett,* 5 Esp. 136; 29 St. Tr. 71, 72, 1804. Pollock C.B. allowed a member to be asked whether Mr. L. was Speaker on a certain date, saying, 'I remember . . . it was proved L. Ellenborough was a peer by evidence that he had been seen sitting and acting as a peer within the House of Lords,' but the witness claiming privilege, would not allow him—nor another who thought that the House would not object to what he had to say—to be asked whether defendant voted on that date, without the permission of the House having been obtained. This having been done in the case of the Clerk of the House, he was allowed to depose: *Chubb* v. *Salomons,* 3 C. & K. 75, 1852. A clerk who has the leave of the House to give evidence need not produce it in writing: *Forbes* v. *Samuel.* Low J. was satisfied that a member of the House of Commons *voted* on certain dates, 'by the production of the original ticked division lists and the official division lists of the House,' and that he *spoke* by the evidence of the 'Hansard' shorthand writers, who produced their original shorthand notes and identified defendant; but he refused to receive the printed 'Hansard': *Tranton* v. *Astor,* 33 T. L. R. 383, 1917. On the same ground, viz., that the interests of the state are concerned, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced on behalf of defendant, was accurate. *Watson,* 1817, 2 Stark. 148. L. Tenterden C.J. refused to allow *W. Cobbett* to ask L. Melbourne why the King pardoned a convict: 2 St. Tr. N. S. 873, 1831. Cf. *Chatterton* v. *Sec. of State*

for India, 1895, 2 Q. B. 189; 64 L. J. Q. B. 676; 72 L. T. 858; 59 J. P. 596; 14 R. 504.

ii. *Of Documents.*

Official communications] It has always been held that official communications relating to matters which affect the interests of the community at large may be withheld; thus the communications between the governor and law officers of a colony, *Wyatt* v. *Gore*, Holt N. P. C. 299, 1816; between the governor of a colony and one of the secretaries of state, *Anderson* v. *Hamilton*, 2 B. & B. 156 n.; 8 Price, 244, 1816; between a governor of a colony and a military officer, *Cooke* v. *Maxwell*, 2 Stark. 183, 1817, are privileged. So where, in high treason, L. Grenville was called on to produce a letter intercepted at the post-office, which was supposed to have come to his hands, it was ruled that he could not be required to produce it, for that secrets of state were not to be taken out of the hands of his Majesty's confidential servants. *Anderson* v. *Hamilton*, *per* L. Ellenborough.

Confidential reports] (on 'affairs of State,' *Phips*. 180) are within the rule, though not on the ground which denies them to be 'public documents'; *e.g.* 'It would be most dangerous to admit confidential reports made to the War Office or to the Board of Ordnance as evidence of public rights. The public had no voice in the matter, and the whole gist of the rule on public documents is that the publicity must be contemporaneous, and publicity means such publicity as would afford the opportunity of correcting anything that was wrong': *per* Farwell J., *Mercer* v. *Denne*, 1904, 2 Ch. 544; 74 L. J. Ch. 71; 68 J. P. 479.

In *Dickson* v. *The Earl of Wilton*, 1 F. & F. 419, 1859, a clerk from the War Office was sent with a paper which had been asked for, with instructions to object to its production and nothing more. L. Campbell ordered it to be produced (perhaps because he did not consider the mere objection of a subordinate officer sufficient, *T.* s. 947): actual malice took away the privilege. See below. In *Beatson* v. *Skene*, 29 L. J. Ex. 430; 5 H. & N. 838, 1860, the War Secretary had been subpœnaed to produce certain documents written to him by an officer. He attended, but objected to produce them on the ground that his doing so would be injurious to the public service. Bramwell B. refused to compel him to do so, and a new trial was moved for on this amongst other grounds. The documents, even if produced, would not have been admissible; but Pollock C.B. in delivering the considered judgment of the Exch. C., said that the majority of the court entirely concurred in the ruling of Bramwell B. He said: 'We are of opinion that if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how is this to be determined? It is manifest it must be determined either by the presiding judge, or by the responsible servant of the crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, whether the production of the document would be injurious to the public service, must be determined, not by the judge, but by the head of the department having

the custody of the paper; and if he is in attendance and states that, in his opinion, the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. . . . If the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not, as the judge may think proper, or, as was the case in *Dickson* v. *E. of Wilton,* . . . where a subordinate was sent with the document, with instructions to object but *nothing more,* then, indeed, the case may be different, and the judge may compel the production of it.'

Communications—documents] defined by Darling J. as 'any written (or printed) thing capable of being evidence . . . it [being] immaterial on what the writing' is inscribed: *Daye,* 1908, 2 K. B. 333; 77 L. J. K. B. 659; 21 Cox C. C. 659; 72 J. P. 269; 99 L. T. 165: K. B. D., where a sealed packet was held to be a document; it was admitted that there was written matter inside. See *Best, Evidence; Chattels.* Documents in a previous action remain privileged, but secondary evidence of their contents may be given; *Calcraft* v. *Guest,* 1898, 1 Q. B. 759: C. A., overruling *Fisher* v. *Heming,* 1809, 1 *Phill. Ev.* 116: 'as a general rule, . . . once privileged always privileged,' *per* Lindley M.R. But see *Cleave* v. *Jones,* and *Lloyd* v. *Mostyn,* 10 M. & W. 481, 482, 1842, where Parke B. asked: 'Suppose the instrument were even stolen and a correct copy taken, would it not be reasonable to admit it?' Although some doubt has been entertained about the extent to which matters communicated to a lawyer professionally are privileged, where they do not relate to a suit or controversy either pending or contemplated, and although the rule was attempted to be restricted by L. Tenterden C.J. to the latter cases only; *Clark* v. *Clark,* 1 Moo. & Rob. 3; *Williams* v. *Mundie,* Ry. & Moo. 34, 1824; yet it seems to be at length settled, that all such communications are privileged, whether made with reference to a pending or contemplated suit or not. See all the cases commented on by L. Brougham C. in *Greenhough* v. *Gaskell,* 1 Myl. & K. 100, 1833. See also *Walker* v. *Wildman,* Madd. & G. 47, 1821; *Mynn* v. *Joliffe,* 1 Moo. & Rob. 326, 1834; *Moore* v. *Tyrrell,* 4 B. & Ad. 870, 1833. When the client may be compelled in equity to disclose communications made before any dispute arose, see *T.* ss. 924-5 and n., ss. 1793, 1793A.

Nor can a solicitor give evidence about the destruction of an instrument which he has been admitted in confidence as attorney to see (or to know) destroyed. 'One sense is privileged as well as another,' *per* L. Ellenborough. *Robson* v. *Kemp,* 5 Esp. 54, 1803. Cf. *Downer,* at 490.

The rule applies also to the professional advisers of strangers to the inquiry. Thus a solicitor is not at liberty to disclose what is communicated to him confidentially by his client, although the latter be not in any shape before the court. *Withers,* 2 Camp. 578, 1811.

Deeds] A communication in writing is privileged, as well as one by parol. Deeds and other writings deposited with a solicitor in his professional capacity, will not be allowed to be produced by him.

In *Volant* v. *Soyer,* 13 C. B. 231; 12 L. J. C. P. 83, 1853, a solicitor refused to produce a client's title deed; he was then asked what the deed was, but the judge disallowed the question, and refused also to examine the deed; the court held that he was right. Nor where a solicitor holds a document for a client can he be compelled to produce it, by a person who has an equal interest in it with his client. *Newton*

v. *Chaplin*, 10 C. B. 356, 1850. See *Dixon*, 1768, and *Bate* v. *Kinsey*. But a partner must produce his counterpart of the partnership deed, for it is his property and it is immaterial that its production would be a breach of his confidential relations with his partners: *Daye*, above, applied; but not, it seems, the deed in the joint possession of himself and his partners who are not all before the court, if one of them objects —nor, on the same ground, letters and copies of letters between his firm and their correspondent: see *Letters*. *Forbes* v. *Samuel*, 1913, 3 K. B. at 722 and 724; 82 L. J. K. B. 1135; 109 L. T. 599; 29 T. L. R. 544: a penal action.

DOCUMENTARY EVIDENCE.

i. Public.

'Document' is defined under *Privilege*.

'A public document is one recording facts which have been inquired into or taken notice of for the benefit of the public by an agent authorised and accredited for the purpose': *Sweet,* Law. Dict., 'Document,' founded on L. Blackburn's definition in *Sturla* v. *Freccia,* 5 App. C. 643, 1880; speaking of an ecclesiastical entry, he said: 'I do not think that 'public' there is to be taken in the sense of meaning the whole world. . . . I understand a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial or *quasi*-judicial duty to inquire. . . .' The phrase—undefined—occurs in s. 4 (2) of the Forgery A. 1913. Consequently records kept by the Post Office to show at what time telegrams are received and sent out are not public documents: *Heyne* v. *Fischel,* 110 L. T. 264; 30 T. L. R. 190, 1913. There is a convenient table of public documents and their mode of proof in *Stephen, Dig. Ev.* 6th ed. Appendix. The code of evidence to prove *bankruptcy* proceedings is a good example of the prevailing method of dealing with this subject.

Proof of Acts of Parliament, &c.] Every A. of Parliament made since 1850 is deemed to be a public A., and is to be judicially noticed as such, unless the contrary be expressly declared. 52-3 V. 63, 9, Interpretation A. 1889. Hence the courts will take notice of public Acts of Parliament, without their being specially proved. Where there was a clause declaring that it should be taken to be a public A., and should be taken notice of as such by all judges, &c., without being specially pleaded, it was not necessary to prove a copy examined with the Parliament roll, or a copy printed by the king's printer, but it stood on the same footing as a public A. *Beaumont* v. *Mountain,* 10 Bing. 404, 1834; *Woodward* v. *Cotton,* 4 Tyr. 689; 1 C. M. & R. 44, 1834; see also *Forman* v. *Dawes,* Carr. & M. 127, 1841. But such a clause in a private A. did not give the statute the effect of a public A. to bind strangers; the facts recited may be conclusive between the parties, such an A. being a mere contract between individuals. *Brett* v. *Beales,* Moo. & M. 416, 1829.

King's printer's copies—England and Ireland] By 41 G. 3, 90, 9, the statutes of England and of Great Britain since the union with Scotland, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted before the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Ireland; 'and in like manner the copy of the statutes of the kingdom of Ireland,' made in the Parliament of the same, printed by the king's printer, 'shall be received as conclusive evidence' of the statutes enacted by the Parliament of Ireland before the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Great Britain.

'Where the accuracy of' printed copies 'is questioned,' the Parliament roll itself is consulted: *Phips.* 521; as by the judges in *Casement,* 12 Cr. A. R. at 108, 1916; or on their behalf: *Nott,* 4 Q. B. 776, 1843. In *Layer,* at 202, 1722, the A.-G. and other counsel produced 'examined' copies; in *L. Preston,* at 661, a solicitor produced a copy he had himself examined at the Tower.

Statutes, &c., of British possessions and protectorates, including Cyprus] if purporting to be printed by the Government printer, are evidence by 7 E. 7, 16, the Evidence (Colonial Statutes) A. 1907, which saves 28-9 V. 63, s. 6 of which puts the certificate of the clerk, &c. of their legislatures and the proclamation of the colonial governor of the royal assent or 'disallowance' in the same position.

Sealing, stamping] By 8-9 V. 113, 'an Act to facilitate the admission in evidence of certain official and other documents,' s. 1: 'whenever, by any Act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, byelaw, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.'

Judges' signatures] S. 2, 'All courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.'

Statutes not public] S. 3, 'All copies of private and local and personal Acts of Parliament, not public Acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either house of parliament [or under the superintendence or authority of Her Majesty's Stationery Office, 45 V. 9, 2], or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed.'

The unrepealed part of s. 4 is set out under *Forgery.*

The proviso to s. 4 is: 'that whenever any such document as before mentioned shall have been received in evidence by virtue of this Act, the court, judge, commissioner, or other person officiating judicially, who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorised at its, or at his

own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court, or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the person or persons who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster, on application being made for that purpose.'

Colonial and foreign acts of state, &c.] By 14-15 V. 99, 7: 'All proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state, or British colony, to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document, filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs; or in the event of such court having no seal, to be signed by the judge; or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy, that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed, as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.'

Apothecaries] By s. 8, certificates of the qualification of an apothecary, under the common seal of the London Society of Apothecaries, shall be received in evidence 'without any proof of the said seal, or of the authenticity of the said certificate, and shall be deemed sufficient proof' of qualification.

Documents in England, Ireland, and colonies] By ss. 9, 10, provision is made for the admission in Ireland of documents in force in England or Wales and *vice versâ;* and by s. 11, for that of all those in the colonies (rpd. in British India, 38-9 V. 66: S.L.R.).

Acquittal or conviction] S. 13: 'Whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be

certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal as the case may be, omitting the formal parts thereof.' In 1730 the K. B. held that the record of an acquittal on indictment brought up by the keeper of the records at the Old Bailey would not be evidence on the *appeal* for the same crime: *Castell* v. *Bambridge;* but in 1794 minutes of an acquittal were accepted instead of the record: *Horne Tooke,* at 447 and 449. For 'person,' see below and *Mash* v. *Darley.*

Books and documents] S. 14: 'Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice or before any person, now or hereafter, having by law or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.'

Where a certificate from the proper officer, not purporting to be an examined copy, was produced by a witness who had got it from that officer, and had himself compared it with the original register, and found it correct, the contents were considered by the C. for C. C. R. to be proved. *Manwaring,* 1856.

Falsification of copies] S. 15: 'If any officer authorised or required by this Act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanour, and be liable upon conviction to imprisonment for any term not exceeding eighteen months.'

Power to administer oath] S. 16: 'Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.'

By 31-2 V. 37, 2, '*Primâ facie* evidence of any proclamation, order, or regulation' by the Crown, Privy Council, the Commissioners of the Treasury, or for the office of Lord High Admiral, Secretaries of State, trade committee of the Privy Council [the Local Government Board, the Education Department, the Postmaster-General, the Board of Agriculture—by subsequent statutes, for which see *Phips.* 523], may be given in all legal proceedings either by (1) the production of a copy of the *Gazette* containing such proclamation, &c., or (2) a copy of the proclamation, &c., authoritatively printed, or (3) in cases of proclamations, &c., by the Crown or Privy Council, &c., by an authoritatively certified copy or extract, which may be in print or writing, and no evidence of the handwriting of the person certifying (who in

each case is indicated in the schedule) is required. Extended by 45-6 V. 9. Applied to other documents, 58-9 V. 9; 62-3 V. 50, 21 (3), &c.; to Ministry of Munitions, 5-6 G. 5, 54, 18.

Companies' winding up] By 8 E. 7, 69, 220: 'Where any company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded.'

By s. 225: 'In all proceedings under this Part [IV. Winding Up] of this Act, all courts, judges, and persons judicially acting and all officers, judicial or ministerial, of any court, or employed in enforcing the process of any court, shall take judicial notice of the signature of any officer of the High Court in England or Ireland . . . or of the registrar of the court exercising the stannaries jurisdiction, and also of the official seal or stamp of the several offices of the High Court in England or Ireland . . . or court exercising the stannaries jurisdiction appended to or impressed on any document made, issued or signed under the provisions of this Part of this Act or any official copy thereof.'

S. 228 enacts the same of affidavits in Great Britain, Ireland 'or elsewhere within the dominions of His Majesty' or made before H.M. consuls or vice-consuls in any place there outside.

Case stated by any court in His Majesty's dominions for the opinion of another therein] See 22-3 V. 63.

Foreign law—ascertainment of] See 24-5 V. 11, and p. 170.

Previous conviction in indictment] By 24-5 V. 96, 116 (amended by the Indictments A. 1916), *a certificate* is made evidence by words identical with those in 28-9 V. 18, 6, below (except that in s. 116 'a copy of any summary conviction' is added as admissible); and cf. 34-5 V. 112, 18, below.

Previous conviction of witness] By 28-9 V. 18, 6: 'A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall upon proof of the identity of the person be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the name.' See under *Relevancy*.

By 34-5 V. 112 (Prevention of Crimes A. 1871), 18: 'A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.

A record or extract of a conviction shall in the case of an indictable

offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer, and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence, in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom, and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof.

A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section.

The mode of proving a previous conviction authorised by this section shall be in addition to and not in exclusion of any other authorised mode of proving such conviction.'

By 4-5 G. 5, 58, 28 (1), 'the record or extract' 'may in the case of a summary conviction consist of a copy of the minute or memorandum of the conviction' under s. 22 of the S. J. A. 1879, 'purporting to be signed by the clerk of the court,' &c.

The person convicted or acquitted under this s. or s. 13 of 14-5 V. 99, may be dead: *In the estate of Crippen,* 1911, P. 108; 80 L. J. P. 47; 104 L. T. 224; 55 S. J. 273; 27 T. L. R. 258.

By the Industrial and Provident Societies A. 1893, 56-7 V. 39, 75: 'Every copy of rules or other instrument or document, copy or extract of an instrument or document, bearing the seal or stamp of the central office, shall be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature.'

Journals of Parliament] See above. An assistant clerk produced a printed copy of the Journals of the H. of Commons, but he had not 'examined' the copy though he had compared the proof sheets with the MS. kept by the clerk; but Pollock C.B. rejected it: *Chubb* v. *Salomons,* on the authority of L. Erskine C. in *Melville,* at 683-5. In *Forbes* v. *Samuel* Scrutton J. rejected 'the return book' of the House elected in Dec. 1910, which the Journal stated had come to the Clerk of the House (in due course); but it is difficult to see, as the learned reporter in 3 K. B. 720 note, 1913, points out, why this book was not admissible under 7-8 W. 3, 7, 5. The same witness was allowed to produce the 'test roll' signed by all members though he could not identify a signature. The same witness produced 'an accurate copy of certain division lists . . . purported to be printed by the authority of the House of Commons.' On objection that it was 'merely a private record . . . of domestic matters' in the House, Scrutton J. ruled that it was 'admissible on the principle on which the Journals of the House are admissible.'

Election of members of House of Commons] An assistant Clerk of the Crown in Chancery produces the writ with the certificate of the returning officer endorsed. *Ib.*

Select Committee of the House of Commons] A shorthand writer who has taken notes of what has there passed is called and reads from them. *Ib.*; cf. *Layer*, at 214. For the old practice, see also *Gordon*, 1786, Dougl. 593, and St. Tr. 543.

Articles of war] A copy printed by the king's printer is evidence. *Withers*, in *Holt*, 1793, 5 T. R. 446, 442, 1784; *T.* ss. 521, 1530. They are embodied in 29-30 V. 109, Naval Discipline A. 1866, and 44-5 V. 58, the Army A. 1881.

Judicial proceedings] Many cases will be found under *Perjury*. And see this title in *Index;* and see below.

Recordum is a memoriall or remembrance in rolles of parchment, of the proceedings and acts of a court of justice which hath power to hold plea according to the course of the common law of reall or mixt actions, or of actions *quare vi et armis*, or of personall actions, whereof the debt or dammage amounts to fortie shillings or above, which wee call Courts of Record and are created by parliament, letters patents, or prescription . . . legally records are restrained to the rolles of such only as are courts of record and not to the rolles of inferiour nor of any other courts which proceed not *secundum legem et consuetudinem Angliae*. And the rolles being the records or memorialls of the judges of the courts of record, import in them such incontrollable credit and veritie as they admit no averment, plea, or proofe to the contrarie. And if such a record be alleaged and it be pleaded that there is no such record, it shall be tried only by it selfe; and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient . . . yet during the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance and therefore the roll is alterable during that terme, as the judges shall direct; but when that terme is past, then the record is in the roll and admitteth no alteration, averment or proofe to the contrarie.' Co. Litt. 260 a.; cf. 117 b. Cf. 1 Hale, 686, cited on *Conviction*.

Courts of record] 'Whether a court is a court of record or not depends on whether it has power to fine and imprisonment in way of punishment (not merely for safe custody—*note*) whether for contempt of itself or for other substantive offences. Courts of record are such as have been expressly made so by statute or by implication of a statute, that is by having statutory power to fine and imprison, and courts of record at common law. These latter are such civil courts as have power,' as stated by Coke, above, 'and such criminal courts as have power to fine and imprison. Courts not of record are those civil courts in which the proceedings are not according to the course of common law (except such as have been made courts of record by statute). All courts of record with the exception of the courts of the counties palatine are courts of the King. . . .' 9 *Halsbury's Laws of England*, 10. In a note, *ib.*, the following courts are enumerated as of record by statute: The High Court of Justice, the Court of Appeal, the Court

of Criminal Appeal, the Court of Record for the Hundred of Salford, the County Courts. From par. 4, *ib.*, it appears that the House of Lords, the Judicial Committee of the Privy Council, and the Courts of Chancery of the Counties Palatine of Lancaster and Durham are also courts of record. 'General quarter sessions and general sessions of the peace are inferior courts of record,' *ib.* 83. 'Convictions on summary proceedings before justices are matters of record. . . . Some authorities have doubted whether justices out of sessions acting judicially are judges of record, but the better opinion appears to be that they are,' *ib.* 75. *Ib.* 138-214, are enumerated 172 places which have borough or local courts of record, some of them more than one, most of them 'in abeyance,' *ib.* 30. There seems to be no other list in existence.

The rolls] Copies of records in the custody of the Master of the Rolls under 1-2 V. 94, purporting to be sealed and stamped with the seal of the Record Office are by s. 13 made evidence without further proof.

Common law rules] 'Most . . . , on the proof of records are, if not obsolete, rendered of little practical importance in criminal proceedings.' 2 Russ. Cri. 2128.

Coroner's court] is a common law court of record.

Inferior Courts of Record] See *T.* s. 1546, and below. Quarter sessions are not an inferior court 'within the meaning of the rule which prevents issuing a *venire de novo* to inferior courts': *Campbell* v. *R.*, 1846.

Reading record] This is peculiarly the province of the court: *per* L. Ellenborough, *Hucks*, 1816, where it was doubtful whether the word was 'meeting' or 'mutiny.'

Matter of record] See *T.* s. 1535, and *Thomas* v. *Ansley*. See, generally, *Phips.* 527-33, who enumerates, of the—

Superior courts] (1) the original records; (2) exemplification under the Great Seal or seal of the court—'practically obsolete now'; (3) examined copy; (4) office copy—as proofs. See also O. XXXVII. r. 4, and O. LXI. rr. 7, 28 of the Supr. Ct.

Of the House of Lords: Examined copies of the minutes or printed copies of the Journals. In Irish Divorce Bills, certified copies.

Of county courts: Registrar's minute book or copies sealed and certified by him of entries therein: 51-2 V. 43, 28.

Of courts not of record: Any verified minutes regularly kept or examined copy thereof; if none, oral evidence: *Steph. Dig. Ev.* App. See *Verdicts, Judgments, &c.*, below.

Indictment] Where, at assizes, to prove an indictment found at Q. S. the indictment itself, indorsed 'a true bill,' but without any caption, was produced by the clerk of the peace, together with his *minute* book of the proceedings, the K. B. held, that in order to prove the indictment it was necessary to have the record itself drawn up in strict form or an examined copy. *Smith*, 8 B. & C. 341, 1828; cf.

Cooke v. *Maxwell.* Same point in *Porter* v. *Cooper,* 6 C. & P. 354; 4 Tyr. 456; 1 C. M. & R. 388, 1854. But not 'during the continuance of the same commission' when the original and notes of the clerk are receivable: *Parry,* 7 C. & P. 839, 1837, relying on *Horne Tooke,* cited above. But where the object of the evidence was merely to prove the fact of a former trial, it was held in a trial for perjury that the production by the officer of the court, of the caption, the indictment with the indorsement of defendant's plea, the verdict and the sentence on it, and the minutes of the trial—'all the material from which the record must have been drawn up'—was sufficient, without the production of the record, or a certificate of the same, under 14-15 V. 99, 13. *Newman,* 2 Den. C. C. R. 390; 21 L. J. M. C. 75; 5 Cox C. C. 547, 1852.

Actions] In *Scott,* 2 Q. B. D. 415; 46 L. J. M. C. 259; 13 Cox C. C. 594, 1877: C. C. R., it was held that the existence of an action was sufficiently proved by the production, by the officer of the court, of the copy of the original writ filed, and of pleadings, and by a solicitor, of the original order to dismiss the action, under O. V. r. 12, and O. XLI. r. 1 respectively of the Supr. Ct., though the first of these was not signed according to the rule. The minutes of the Mayor's Court of London were allowed to be read as evidence of the proceedings there, the court assigning as a reason for not insisting rigidly upon the record being made up, that it was an inferior jurisdiction; the minutes in such a case ought to be perfect. *Fisher* v. *Lane,* 2 W. Bl. 834; 8 B. & C. 342, 1772.

The mode of examination usually adopted is, for the person who is afterwards to prove it, to examine the copy while another person reads the original, and this has been held sufficient. *Reid* v. *Margison,* 1 Camp. 469; *Gyles* v. *Hill, ib.* 471 n., 1808. It must appear that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records are kept. *Adamthwaite* v. *Synge,* 1 Stark. 183; 4 Camp. 372, 1816.

Where a record is lost, an old copy has been allowed to be given in evidence, without proof of its being a true copy. *Anon.,* 1 Ventr. 257, 1675; B. N. P. 228.

It seems to have been the usual practice for the clerk of assize or the peace to make up the record, and to attend with it at the trial. 2 *Phill. Ev.* 203; 2 *Russ. Cri.* 2128 n. 'But now the records are never made up, either in civil or criminal cases.' *Phips.* 528.

The certificate of the enrolment of a deed pursuant to the statute is a record and cannot be averred against: *Hopper,* 3 Price, 495, 1817.

Office copies, authorised copies, &c.] In a court of common law, an office copy has been held sufficient in the same court and in the same cause; 'but in another court or in another cause in the same court, the copy must be proved,' *per* L. Mansfield, *Denn* v. *Fulford,* 2 Burr. 1177, 1761. And so it seems that an issue out of the Court of Chancery may be considered as a proceeding therein, and an examined office copy was held evidence therein. See *Highfield* v. *Peake,* Moo. & Mal. 111, 1827. There appears to be no reason for distinguishing between the effect of office copies in different causes in the same court, the principle of the admissibility being, that the court will give credit to the acts of its own officers; and accordingly it was held in one case, that an office copy of an affidavit made in another cause in the same court was admissible. *Wightwick* v. *Banks,* Forrest, 154, 1801. But

since the passing of the Judicature Acts, these cases have become less important. See *Scott,* 1877.

There is a clear distinction between copies coming from an officer authorised to deliver them in the course of his duty and those from one not so authorised. *Appleton* v. *L. Braybrooke,* 6 M. & S. 34, 1817. For office copies being rejected for containing abbreviations, see *Christian,* Carr. & M. 388, 1842. For the rejection of copies of accounts returned by the Supreme Ct. at Madras to the Q. B., see *Douglas,* 1 C. & K. 670, 1845.

A copy of a judgment purporting to be examined by the clerk of the treasury (whose duty is not to make copies but to keep them for all to read), is not admissible without proof of examination with the original. B. N. P. 229.

Rules of court, &c.] A judge's order may be proved by the production of the order itself, or by an office copy of the rule by which it has been made a rule of court. *Still* v. *Halford,* 4 Campb. 17, 1814. Office copies of rules of court being made out and signed by officers of the court in the execution of their duty are sufficient evidence without being proved to have been examined. *Selby* v. *Harris,* 1 L. Raym. 745, 1698; so copy of depositions sworn at judge's chambers, signed by him, and duly delivered; *Duncan* v. *Scott,* 1 Campb. 99, 1807. And printed copies of the rules of a court for the direction of its officers, printed by the direction of the court, are evidence without examination with the original. *Dance* v. *Robson,* Moo. & M. 294, 1829.

District registries] Sealed documents are evidence: 36-7 V. 66, 61. For production thereof, see O. XXXV. r. 22 of Supr. Ct.

Inquisitions] Inquisitions *post mortem* and other private offices * cannot be read in evidence without proof of the commission on which they are founded, unless, as it seems, the inquisition be old (12 *Vin. Ab. Ev.* A. b. 42, p. 121, where an instance of one read in 1726 is given); 'but in cases of more general concern, as the minister's return to the commission in Henry the Eighth's time to inquire into the value of livings . . . the commission is a thing of such public notoriety that it requires no proof': *per* Hardwicke C. in *Sir H. Smithson's case* (before 1762), B. N. P. 228-9. An ancient extent of crown lands (1327), found in the proper office, and purporting to have been taken by a steward of the king's lands, and following the directions of the statute 4 E. 1, will be presumed to have been taken under a competent authority, though the commission cannot be found. *Rowe* v. *Brenton,* 8 B. & C. 747, 1828. See *Ancient Documents.*

Coroner's inquisition] The whole of it may be read where there is a trial on it, but not a 'rider' to the verdict; *e.g.* 'We all agree that she was not responsible for her actions at the time': *Harding,* 1908: murder.

* 'Inquest of Office . . . is a prerogative remedy for the benefit of the crown. . . . It is an inquiry made by a jury before a sheriff, coroner, escheator, or other officer of the crown, or by commissioners specially appointed concerning any matter that entitles the crown to the possession of lands and tenements, goods or chattels, *e.g.* by reason of an escheat, forfeiture, idiocy, &c. Extent is . . . a valuation of property by the oath of a jury.' Sweet, *Law Dictionary.*

Verdicts] Proof of a verdict depends on the purpose for which it is produced. Where it is offered in evidence, merely to prove that a cause came on for trial, the *postea* with the verdict indorsed is sufficient (under the old practice) to introduce an account of what a witness, who is since dead, then swore. *Pitton* v. *Walter,* 1 Str. 162, 1718; B. N. P. 243.

Judgment on verdict] But where it is necessary to prove not merely that a trial was had, but that a verdict was given, it must be shown that the verdict has been entered on the record, and that judgment thereon has also been entered there, for otherwise it would not appear that the verdict had not been set aside or judgment arrested. *Fisher* v. *Kitchingman,* Willes, 367, 1742; *Pitton* v. *Walter,* above. See *Judgments.* In one case, indeed, Abbott J. admitted the *postea* as evidence of the amount recovered by the verdict: *Foster* v. *Compton,* 2 Stark. 364, 1818; and L. Kenyon also ruled that it was sufficient proof to support a plea of set-off to the extent of the verdict: *Garland* v. *Schoones,* 2 Esp. 648, 1794; but these decisions appear to be questionable. *T.* s. 1570 n. 'When a writ is only inducement (*i.e.* introductory part of a pleading) to the action, the taking out the writ may be proved without any copy of it, because, possibly, it might not be returned, and then it is no record; but where the writ itself is the gist of the action, you must have a copy from the record' in the same manner as any other record. B. N. P. 234.

In perjury] The former practice is exemplified in *Browne,* Moo. & M. 315, 1829; *Meek,* 9 C. & P. 513, 1840; *Gordon,* Carr. & M. 410, 1842; and see *Perjury* for that and the present practice.

Affidavits] In what manner an affidavit filed in a cause is to be proved, does not appear to be well settled. In an action for malicious prosecution, an examined copy has been admitted. *Crook* v. *Dowling,* 3 Dougl. 75, 1782; but in *Rees* v. *Bowen,* M'Cl. & Y. 383, 1825, a copy that had not been used and without proof of identity was refused. A distinction has been taken—*Phips.* 532, and see next par.—between cases where the copy is to be proved in a civil suit, and where crime is the issue, *e.g.* in perjury. In *James,* 1 Show. 397; Carth. 220, 1693, defendant was convicted of perjury on proof of a copy of an affidavit having been examined with the original; it was urged that it was only a copy, and that there was no proof that it had been made by the defendant; but it appearing that it had been made use of by him in the cause, the court held it sufficient. This case was, however, doubted in *Crook* v. *Dowling,* where L. Mansfield said that in perjury he thought the original should be produced. Buller J. also observed that wherever identity is in question, the original must be produced. *Ib.* 77. So of answers in Chancery. It may be doubted how far the suggested distinction has any foundation in *principle,* the *consequences* of the evidence not being a correct test of the *nature* of the evidence.

Documents sworn abroad or on the high seas] For affidavits sworn in foreign parts, see above, *T.* ss. 1564-9, and 52-3 V. 10, 3 (2), 6 (2), extended 54-5 V. 50, 2, and 7 E. 7, 25; whereby affidavits, &c., in prize proceedings abroad are evidence: *ib.* For the relation between civil and criminal rules, see p. 1.

Proceedings in equity] A bill (now replaced by a writ) or answer

in Chancery, when produced for the purpose of showing that proceedings have taken place, or of proving the admissions made by defendant in his answer, may be proved either by production of the original bill or answer, or by an examined copy, and is *primâ facie* evidence of the identity of the parties (which may be rebutted). *Hennell* v. *Lyon*, 1 B. & Ald. 182, 1817; *Ewer* v. *Ambrose*, 4 B. & C. 25, 1825. For the distinction in perjury, see last par.; in which case it was necessary that the answer itself should be produced at the trial (if not before the grand jury), and positive proof given, by a witness acquainted with him, that defendant was sworn to it. *Chambers* v. *Robinson*, B. N. P. 239, 1726; *Lady Dartmouth* v. *Roberts*, 16 East, 340, 1812. To prove that the answer was sworn by defendant, it is sufficient to prove his signature and that of the master in Chancery before whom it purported to be sworn. *Benson*, 2 Camp. 507, 1810; *Morris*, B. N. P. 239; 2 Burr. 1189; 1 Lea. 50, 1760.

Where depositions in Chancery are offered in evidence as *an admission* against a party to the suit, or for the purpose of contradicting a witness, it is not necessary to produce the bill and answer. But the general rule is that they are not to be admitted without producing the bill and answer. 2 *Phill. Ev.* 210. When they are put in to show that the depositions are admissible, the other side has no right to read or use them; the judge only is to look at them for the purpose of determining, by seeing what was in issue in the suit, whether the depositions sought to be put in are evidence. *Chappell* v. *Purday*, 14 M. & W. 303, 1845.

Ancient depositions] Where the suit is so ancient that it was before bills and answers were enrolled, the depositions may be read without proof of them. 'Depositions taken by the command of Queen Elizabeth upon petition without bill and answer, were upon a solemn hearing in chancery allowed to be read.' B. N. P. 240, *L. Hunsdon* v. *Lady Arundell*, Hob. 112, 1617. So depositions taken in 1686 were allowed to be read without such proof: *Byam* v. *Booth*, 2 Price, 234, 1816; and answers to interrogatories in 1558, which were searched for and not found, were read in 1828. *Rowe* v. *Brenton*. But, in general, depositions taken under a recent commission cannot be read without proof of the commission; but an old commission may be presumed to be lost. *Bayley* v. *Wylie*, 6 Esp. 85, 1807. See *Ancient Documents*.

Decrees, &c.] A decree in Chancery (or Exchequer) may be proved by an exemplification or by an examined copy. *T.* ss. 1534-5. For the old practice, see B. N. P. 235, 244, citing Keb. 21, 1662. *Com. Dig. Testmoigne* (C. 1). The correct rule appears to have been that a party in order to avail himself of the contents of a decree, as an adjudication, and not merely to prove a collateral fact (as that *a decree* was made), ought properly to produce the bill and answer on which the decree was founded. 2 *Phill. Ev.* 207. See *Blower* v. *Hollis*, 3 Tyr. 356; 1 C. & M. 393, 1833.

For admissibility of decrees in equity, see *Pim* v. *Currell*.

Amendments] in a bill amended after answer were proved by an official of the six clerks who knew the handwriting of the amender. *Laycock*, 4 C. & P. 326, 1830.

Oral depositions] See *Depositions*.

Not before magistrates, &c.] The oral depositions of witnesses, who are since dead, may, in a trial between the same parties, when admissible, without any order of the court, be proved by the judge's notes, or by notes taken by any other person—'judge, counsel or reporter,' *Phips.* 419—who can swear to their accuracy, or the former evidence may be proved by any person who will swear from his memory to its having been given: *per* Mansfield C.J., *Mayor, &c. of Doncaster* v. *Day,* 3 Taunt. 262, 1810.

Bankruptcy] See *Bankrupts.*

Records and proceedings in county courts] By 51-2 V. 43, 28, the registrar's minute book of *all* proceedings is evidence; and that such minutes must prevail even over the contradictory evidence of the judge. *Dews* v. *Ryley,* 20 L. J. C. P. 254, 1851. And the proceedings of the county court can be proved in no other way: *Harmer* v. *Bean,* 3 C. & K. 308, 1853, where Parke B. said: 'It is a court of record without records': *Rowland,* 1858. See *Best Evidence.*

Judgments and proceedings of other inferior courts] '*e.g.* mayors' courts, sheriffs' courts'—some of which are courts of record—'courts-baron, like' proceedings 'in inferior criminal courts'—*Phips.* 530, may be proved by the minute book in which the proceedings are entered. *Chandler* v. *Roberts,* 1799, *Peake, Ev.* 72, 5th ed. An examined copy of the minutes will be sufficient. On a copy of an entry from the 'court book' of Worcester being produced by the town clerk, Holt C.J. said: 'A copy of any original is evidence wheresoever the original is evidence, *i.e.* if prov'd a true copy. . . . I remember *Hale,* at *Huntington* Assizes, allow'd a copy of a short note of a judgment in an inferior court as good evidence, tho' the judgment was not entered upon record. . . . We know it is not usual for inferior courts [not, *sic*—a misprint] to draw up their records, but only short notes, and copies of these notes being publick things are good evidence; otherwise of private things,' *e.g.,* 'copies of rent-rolls. Here . . . you must not only shew the record (for perhaps he is not concluded by that entry in a criminal case), nor can you prove it by witnesses only. . . .' *Hains,* Comberb. 337, 1695; 12 Vin. Ab. Evid. A. b. 26, 26-8. 'If it be shown that' the proceedings are not reduced 'into more formal shape,' they may be proved as above or by an officer of the court or any other competent witness. *Phips.* See *Dyson* v. *Wood,* 3 B. & C. 451, 453, 1824. *T.* s. 1572.

Inferior courts not of record] See above and *T.* s. 1546.

Police court summons] In *Hockham* and *Rugg,* 119 C. C. C. Sess. Paps. 59, 1893, Fulton C. S. directed an acquittal of perjury on the hearing of a case in which neither the summons nor the summons book was produced.

Probate] is proved by the production of the instrument itself; and proof of the seal of the court is not necessary. In order to prove the title of the executor to personal property, the probate as well as the will must be given in evidence. *Pinney* v. *Pinney,* 8 B. & C. 335, 1828.

Will of realty] By virtue of 'the Land Transfer Act, 1897, 60-1 V. 65, s. 1, . . . probate or letters may be granted even where there is

real property alone.' *Phips.* 412. 'Where the testator died after Jan. 1, 1898 [when that statute came into force], his' real estate vests in general in his executor, and the probate is consequently the only admissible evidence of the will. *T.* ss. 1759-61, 1856. 'Wills thirty years old prove themselves.' *Ib.* 533. In some other cases wills of realty were entitled to probate (*ib.* 512), 'but otherwise the will itself must, where the testator died before' that date, 'be produced.' 'Proof in common form, until it is revoked, establishes the title of the executors to administer the estate, and the probate copy given to them is conclusive evidence of the contents of the will in every English court.' *Strahan* on Wills, 82, 1908. To prove that the probate was revoked an entry of the revocation in the book of the Prerogative Court was good. *Ramsbotham,* 1 Lea. 25 *n.* 1787.

Letters of administration] So the book (of acts) of that court directing the grant of the letters is evidence. B. N. P. 246. And an examined copy of such act book is also evidence. *Davis* v. *Williams,* 13 East, 232, 1811.

20-1 V. 77, 22, 61-4, deal with evidence of probate, and by s. 69 an official copy of the whole or any part of a will, or a certificate of letters of administration, may be obtained, and, it seems, will be admitted in evidence where the probate is lost. *T.* ss. 1589-90. See also *Attesting Witness.*

Scots, Colonial law] 'must be proved as a fact by skilled witnesses, except' Scots in the H. L. or Colonial in the P. C.: *Phips.* 12. See statutes above. Where a magistrate has to be satisfied that a crime has been committed in a Colony, 'judicial notice cannot be taken of Colonial statutes which have to be proved by evidence . . . and if the crime alleged . . . is one depending on a Colonial statute, evidence must be given of the meaning of the crime' therein and 'whether the facts on the depositions bring the case within' that statute. The K. B. D. 'can either send the case back to the magistrate to receive such evidence or can itself receive such evidence by affidavit.' *Ex parte Percival,* 1907.

Foreign law] The law of a foreign state may be proved by the parol evidence of witnesses possessing competent legal skill: pp. 170, 190. The witness to prove a foreign law must be a person *peritus virtute officii,* or *virtute professionis.* A Roman Catholic bishop, who held in this country the office of a coadjutor to a vicar apostolic, and as such was authorised to decide on cases affected by the law of Rome, was therefore held, in virtue of his office, to be a witness admissible to prove the Roman law of marriage. *Sussex Peerage Case.*

Foreign judgment] That a judgment duly verified by a seal proved to be that of the foreign court, is presumed to be regular and agreeable to the foreign law, until the contrary is shown, is perhaps shown by *Alivon* v. *Furnival;* see 14-15 V. 99, 7. See also *Depositions,* above.

Documents in a foreign language] when relevant, must be translated on oath: *e.g.,* in libel; and see for indictments, p. 100. The party who puts in the foreign document must find an interpreter. *Vaughan,* 1696, at 512.

Awards] The award duly executed and the submission to the arbi-

tration must be produced, except when a statute permits a certified copy. *Phips.* 531; *T.* s. 1607.

Will of personalty] 'Probate . . . is primary evidence of the will, the original will not being even admissible for this purpose . . . where proof is required of the declaration of a deceased person contained in a will, the will itself is primary evidence and the probate secondary only.' *Phips.* 511.

Fiat of Attorney-General] In *Bates,* 1911, 1 K. B. 964; 80 L. J. K. B. 507; 75 J. P. 271; 22 Cox C. C. 459; 27 T. L. R. 314; 6 Cr. A. R. 154, in quashing a conviction where the court had no jurisdiction without this *fiat,* and it had not been obtained, L. Alverstone C.J. said: 'The old practice was that the A.-G.'s clerk went down to the assizes to prove his signature to the *fiat.* The consent of the A.-G. was never *taken* for granted, but I do not say that it is now necessary on every occasion to give formal proof of the A.-G.'s signature,' and counsel for the crown stated 'the *fiat* is produced, but it is not customary to prove the handwriting of the A.-G. by his official clerk or other witness unless the signature is challenged by the defendant.' So where the *fiat* had been obtained under 4-5 G. 5, 87, 1 (4), but not produced at the trial, no objection being there made, the C. C. A. refused to interfere: *Metz,* 84 L. J. K. B. 1462; 79 J. P. 384; 31 T. L. R. 401; 11 Cr. A. R. 164, 1915.

Consent of Director of Public Prosecutions under 8 *E.* 7, 59, 10 (4) (a)] A document purporting to be signed by him must be produced; 'it is sufficient if somebody who has been in correspondence with him says: 'I received this in ordinary course and I believe it to be signed by'' him; it need not be some one who knows his handwriting. But its receipt must be proved by sworn evidence of somebody not necessarily the clerk of the peace; 'an officer, clerk or some one in his office, or the person who gave the notice' (to the alleged habitual criminal) will do. *E. Turner,* 1910, 1 K. B. 346; 79 L. J. K. B. 176; 74 J. P. 81; 26 T. L. R. 162; 3 Cr. A. R. 155-6. But if objection is not taken at the trial, the court may assume that the consent has been obtained; the judge must be satisfied of it. S. 1 of 8-9 V. 113 does not apply to that consent: *Waller,* 1910, 1 K. B. 364; 79 L. J. K. B. 184; 74 J. P. 81; 26 T. L. R. 142; 3 Cr. A. R. 213.

Notice to 'proper officer of the court' under 8 *E.* 7, 59, 10 (4) (*b*)] No proof need be given unless it is challenged: *Westwood,* 77 J. P. 379; 29 T. L. R. 492; 8 Cr. A. R. 279, 1913.

Shorthand transcript] of 'proceedings on indictment' under 7 E. 7, 23, 16 (1), are not made evidence; R. 5 under that A. provides for its certification.

Public books and other documents] Whenever the contents of a public book or document are admissible as such, examined copies are likewise evidence, as of registers of marriages, deaths, &c.; as are likewise certified copies under 14-5 V. 99, 14. Thus, an examined copy of an Order in Council or of a secretary of state's licence is sufficient, without the production of the council books or the licence themselves. *Eyre* v. *Palsgrave,* 2 Campb. 605, 1811; see 31-2 V. 37 and *Forbes* v. *Samuel,* at 725 (K. B.). So copies of the transfer books

of the East India Company: *Anon.*, 2 Dougl. 593 *n.*, 1771; and of the Bank of England: *Bretton* v. *Cope*, Peake N. P. C. 43, 1791; *Marsh* v. *Collnett*, 2 Esp. 665, 1798; of a bank note filed at the bank: *Man* v. *Cary*, 3 Salk. 155, 1697; of the books of commissioners of land-tax: *King's case*, 2 T. R. 234, 1788; or of Excise: *Fuller* v. *Fotch*, Carth. 346, 1695; or of a poll-book at elections, *Mead* v. *Robinson, Willes*, 424, 1743, where the copy was signed by the returning officer. In one case the copy of an agreement contained in one of the books of Bodley's Library (which canot be removed) was exceptionally allowed to be read in evidence. *Downes* v. *Mooreman*, Bunb. 189; 2 Gwill. 659, 1724.

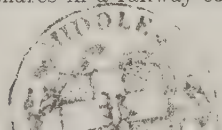
Register of newspaper proprietors] Copies of entries or extracts from this register, purporting to be certified by the registrar, or his deputy, or under the official seal of the registrar, are to be received as conclusive evidence; and certified copies or extracts are to be received as *primâ facie* evidence in all proceedings under 44-5 V. 60, 15.

Inland revenue, &c.] Regulations, minutes, and notices purporting to be signed by a secretary or assistant secretary to the Commissioners of Inland Revenue may be proved by the production of a signed copy, 53-4 V. 21, 24. For proof of documents under the Merchant Shipping A., see 57-8 V. 60, 695, 719; under the Friendly Societies A., see 59-60 V. 25, 53, 100; for those in elections, see under *Bribery*; and for the Customs, under *Smuggling*.

Corporation books, &c.] Corporation books may be given in evidence as public books, when they have been kept as such, the entries having been made by the proper officer, or by a third person, in his sickness or absence, which must be proved: *Hains; Mothersell*, 1 Str. 93, 1718. But a book containing minutes of corporation proceedings, kept by a person not a member of the corporation, and not kept as a public book, is inadmissible. *Ib.* An examined copy of a corporate book is evidence. *Brocas* v. *Mayor of London*, 1 Str. 307, 1720; *Gwyn's case*, 1 Str. 401, 1721. It is not settled whether the attesting witness to the seal of a corporation need be called: *Doe* v. *Chambers*, 4 A. & E. 410, 1836; or whether the seal of such a deed proves itself after thirty years. *Inhabs. of Bathwick.* Inspection of corporation books and other public writings is granted in civil actions, but not in criminal cases, where it would have the effect of making a defendant furnish evidence to criminate himself. *Heydon*, 1 W. Bl. 351, 1762; *Purnell, ib.* 37; 1 Wils. 239, 1748; *Cornelius*, 2 Str. 1210, 1744. By 45-6 V. 50, 24, provision is made for the proof of by-laws of any town council by the production of a written copy of such by-laws authenticated by the corporate seal, and by s. 22, for the proof of minutes purporting to be signed by the mayor, or a member of the council, or of the committee, appearing to be chairman of the meeting at which the minute is signed: *Robinson* v. *Gregory*, 20 Cox C. C. 781, 1905.

Companies] Certificates of incorporation, and certified copies of documents, filed and registered under 8 E. 7, 69, the Companies (Consolidation) A. 1908—which see above—may now be received in evidence by ss. 17 (1) and 243 (7) and 10 E. 7 & 1 G. 5, 23.

Shareholders] In *Nash*, 2 Den. C. C. R. 493; 21 L. J. M. C. 147, 1852, forging and uttering a transfer of shares in a railway company,



it was held that the register of shareholders, kept under 8-9 V. 16, 9, was evidence to prove that an individual was a shareholder without any authentication of the seal, and that it was unnecessary to give further proof that such individual was a shareholder.

For proof of licence or certificate under the Lunacy A., see s. 329 (2).

Bankers' books] By the Bankers' Books Evidence A. 1879, 42-3 V. 11, copies of entries in the books of any bank are made *primâ facie* evidence of such entry, and of the matters, &c. therein recorded, on proof that the book is one of the bank's ordinary books, &c., which proof may be given by a partner or officer orally or on affidavit, and that the copy has been examined—which may be also so proved—by 'some person' (s. 5), *i.e. anyone* who under s. 7 obtains a judge's order: *Albutt* and *Screen,* 6 Cr. A. R. 55; 75 J. P. 112, 1910; and its provisions are extended, by 45-6 V. 72, 11 (2), to any company carrying on the business of bankers, to which the Companies Acts, 1862 to 1880, applied. Under this A. any judge in any division of the United Kingdom has jurisdiction in any other. *Kissam* v. *Link,* 1896, 1 Q. B. 574; 65 L. J. Q. B. 433, C. A. A magistrate may make an order under s. 7. *Kinghorn,* 21 Cox C. C. 727, 1908: K. B. D.

The A. is primarily for the convenience of bankers and to facilitate proof of their transactions; it cannot be invoked merely to assist a defendant (in criminal libel) who wishes to prove that money passed to prosecutor and who can *subpœna* him to produce his pass-book or the bankers to produce copies of those entries; he is not entitled to get copies beforehand for any purpose he chooses. *Bono,* 29 T. L. R. 635, 1913: K. B. D.

Registers] 'The register of christenings, marriages, and burials is good evidence or the copy of it. Nay, proof *viva voce* of the contents of it without a copy has been admitted; yet the propriety of such evidence may well be doubted, because it is not the best evidence the nature of the case is capable of.' B. N. P. 247. A copy of a record or of a public book is not, in fact, secondary evidence; and therefore the opinion of Buller J. appears to be correct. A register is only one mode of proof of the fact which it records, and the fact may be proved without producing the register, by the evidence of a person who was present at it.

Marriage] Thus in bigamy, it was held sufficient to prove the marriage by the evidence of a person who was present at it, without proving the registration of either marriage or of any licence, or banns. *Allison,* Russ. & Ry. 109, 1806. See *Best Evidence.*

In proving a marriage (whether there is a register or not) some evidence of the *identity* of the parties, sufficient to satisfy the jury, must be given, as by proof of the handwriting, or by the bell-ringers, persons who were present at the wedding dinner, &c., but it is not necessary to call the subscribing witnesses: *per* L. Mansfield, *Birt* v. *Barlow,* 1 Dougl. 170 *a,* 1779. The identity is usually established by calling some person who was present at the ceremony. A maid-servant who proved that the wife always went by her maiden name till marriage-day, and then went out and ever since was called Mrs. ——, would suffice: *per* Buller J. *ib.*

By 6-7 W. 4, 86, 38, for registering births, marriages, and deaths in England, certified copies of entries purporting to be sealed or stamped with the seal of the office of the registrar-general, shall be evidence

of the birth, death, or marriage to which they relate, without further proof of such entries. But under 14-15 V. 99, 14, an extract from such register is admissible on its mere production. One certified by a deputy superintendent registrar is good. *Weaver,* L. R. 2 C. C. R. 85; 43 L. J. M. C. 13; 12 Cox C. C. 527, 1873.

Non-parochial registers] By 3-4 V. 92, certain non-parochial registers of births, marriages, and deaths, transferred to the general register office, or certified extracts therefrom, are made admissible in evidence; but in criminal cases, *e.g.* bigamy, the original registers must (s. 17) be produced: ss. 5-19 were extended by 21-2 V. 25, 3. For marriage registers in Ireland, see 7-8 V. 81, and extensions, amendments, &c.

Birth and death] By 52 G. 3, 146, 6, 7 (which is still in force for the registration of births and burials by clergymen of the church of England), it is provided that verified copies shall be annually sent to the registrar of the diocese. It seems that such verified copies, being public documents, are evidence as well as the originals, and may be proved by examined copies. But it is otherwise of the returns enjoined by the canons of 1603, which (*semble*) can only be used as secondary evidence, and so can examined copies of them: *per* Alderson B., *Walker* v. *Beauchamp,* 6 C. & P. 552, 1834.

By 37-8 V. 88, 38, 'an entry or certified copy of a birth or death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence or such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea.'

See further *Registration* under *False Declarations.*

ii. Private.

Ancient documents, terriers, maps, &c.*] In many cases ancient documents are admitted in evidence, to establish facts which, had they been recently made, they would not have been allowed to prove. These documents prove themselves, provided it appear that they are produced out of the proper custody: above. The proper repository of ecclesiastical terriers or maps is the registry of the bishop or archdeacon of the diocese; or, of a copy, if the original is lost, the parish registry. *Atkins* v. *Hatton,* 2 Anst. 386, 1794; *Potts* v. *Durant,* 3 Anst. 795, 1797. On an issue to try the boundaries of two parishes, an old terrier or map of their limits, drawn in an inartificial manner, brought from a box of old papers relating to the parish, in the possession of the representatives of the rector, was rejected, not being signed by any person bearing a public character or office in the parish. *Earl* v. *Lewis,* 4 Esp. 1, 1801.

On the trial of an indictment for the non-repair of a highway, a map of the parish produced from the parish chest, which map was made under an inclosure A. (private and not printed), is not receivable in evidence to show the boundaries of the parish, without proof of the inclosure A. *Milton, Inhabs.* of, 1843, where it was proved by the surveyor, who made the map in 1809, that he laid down those

* An account or list of lands, with details.

boundaries from the information of a man, then apparently about sixty, who went round them with him. Erskine J. held, that the map would have been receivable as 'reputation,' if it had been also proved that the man was dead, but, without that proof, it was not admissible. A map attached to an enclosure award of 1814, showing an ancient highway then in existence, is, being made by one of the public, good 'reputation' that the road shown there was *public*. *Berger*, 1894.

It must appear, too, that private ancient documents came from the custody of some person connected with the property. Thus, where on an issue to try a right of common, an old grant to a priory, brought from the Cottonian MSS. in the British Museum, was offered in evidence, it was rejected by Lawrence J., the possession of it not being sufficiently accounted for nor connected with any one who had an interest in the land. *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 91, 1810. So a grant to the abbey of Glastonbury, contained in an ancient MS., deposited in Bodley's Library, was rejected, as not coming from the proper repository. *Michell* v. *Rabbets*, *ib*. 1810. Maps from the British Museum (1676, 1681-2) and Guildhall Library (1703) were not admitted as evidence of particular facts without further proof, but a copy from the Record Office of a petition (1742), stated to have been filed there but not produced, was: *A.-G.* v. *Horner*. See also *Barber*, 1 C. & K. 434, 1844; Kirk Session Book and Certificate.

Seals] Where necessary, a seal must be proved by some one acquainted with it, but it is not requisite to call a witness who saw it affixed: *per* Lawrence J., *Moises* v. *Thornton*, 8 T. R. 307, 1799. Some seals, as that of London, require no proof. *Doe* v. *Mason*, 1 Esp. 53, 1793. See also 8-9 V. 113. The seal of a foreign court need no longer be shown to be genuine. *Henry* v. *Adey*, 3 East, 221, 1803, is no longer law by reason of 14-15 V. 99, 7. But that of the Bank of England must (*semble*), *Doe* v. *Chambers*. So must that of the Apothecaries' Company. *Chadwick* v. *Bunning*, R. & Moo. 306, 1825.

For the seals of corporations, joint stock or other companies, see statutes above.

A long list of seals proving themselves will be found in *Phips*. p. 14, and *T*. s. 6, and notes. 'The seal of a foreign or colonial notary public will not generally be judicially noticed.' *Ib*.

Although the seal need not be shown to be affixed by the proper person, yet the deed (it seems) may be invalidated by proof of the seal being affixed by a stranger, or without proper authority. The presumption, however, is that it was properly affixed. *Clarke* v. *Imperial Gas Co*., 4 B. & Ad. 315; 1 N. & M. 206; 2 L. J. K. B. 30, 1832.

Policies of insurance] when certified are '*primâ facie* evidence' that a child or young person is insured and of the person to whom the money is legally payable in proceedings under Part III. of the Children A. 1908.

Wages] See under *Children I.*

Copyright] 'Certified copies of the book of registry of the proprietorship of copyright are admissible in a criminal prosecution as

primâ facie proof of the proprietorship . . . and are not rebutted by evidence that the criminal assignments of the copyright are in writing but not produced': *per* Bosanquet C.S., *Willetts,* 70 J. P. 127, 1906.

Private documents—attesting witness] The execution of a private document, which has been attested by a subscribing witness, must be proved by calling that witness, 'when the validity of an instrument depends upon its formal attestation.' *T.* s. 1843: 'the most ancient and inflexible of all the rules of evidence running back to the time of the Franks': *Phips.* 492.

Attesting witness—when proof waived] Where the attesting witness is dead, beyond sea, or cannot be found after strict inquiry, or kept away by 'the other side': *Phips.* 494; see *Depositions; Anon.,* 12 Mod. 607, 1701; *Cunliffe* v. *Sefton,* 2 East, 183, 1801; or blind: *Wood* v. *Drury,* 1 L. Raym. 734, 1699; *Pedler* v. *Paige,* 1 Moo. & Rob. 258, 1833; or insane: *Currie* v. *Child,* 3 Campb. 283, 1812; or under sentence of death (but see under *Incompetency*); or absent in a foreign country, or not amenable to the process of the superior courts, being for instance, in Ireland: *Prince* v. *Blackburn,* 2 East, 252, 1802; *Hodnett* v. *Foreman,* 1 Stark. 90, 1815.

Handwriting] In all these cases evidence of the attesting witness's handwriting is admissible, 'or, if this is not obtainable, by presumptive or other available evidence': *Phips.* 494. Some evidence must be given in these cases of the identity of the executing party; and although there are cases to the contrary, it is now held that mere identity of name is not sufficient proof of the identity of the party. *Whitelock* v. *Musgrave,* 1 Crom. & Mee. 511; 3 Tyr. 541, 1833. The illness of a witness, although he lies without hope of recovery, is no sufficient ground for letting in evidence of his handwriting. *Harrison* v. *Blades,* 3 Campb. 457, 1813. Where the name of a fictitious witness is inserted: *Fasset* v. *Brown,* 1 Peake, N. P. C. 33, 1791; or where the attesting witness denies all knowledge of the execution: *Talbot* v. *Hodson,* 7 Taunt. 254, 1816; *Fitzgerald* v. *Elsee,* 2 Campb. 635, 1811; evidence of the handwriting of *the party* is sufficient proof of execution. So where an attesting witness subscribes his name without the knowledge or consent of the parties, *M'Craw* v. *Gentry,* 3 Campb. 232, 1812. Where there are two attesting witnesses, and one of them cannot be produced (above), it is not sufficient to prove his handwriting, but the other witness must be called. *Ib. Cunliffe* v. *Sefton,* above; except for wills of realty: *Phips.* 492. But if neither can be produced, proof of the handwriting of one only is sufficient. *Adam* v. *Kerr,* 1 B. & P. 360, 1798.

Where a person cannot sign his name, but makes his mark, that mark may be proved by any one who has seen him make the mark, and is acquainted with it: *per* Tindal C.J. with hesitation: *George* v. *Surrey,* Moo. & M. 516, 1830. Where a witness had only seen the person sign a bail-bond, and stated that the signature to the bill produced was like the handwriting which he saw, but that he could form no belief on the subject, this was held to be evidence of the handwriting to go to the jury: he was not allowed to form a judgment by comparing the two. *Aliter* if he had never seen the person write. *Garrells* v. *Alexander,* 4 Esp. 37, 1801; or where the witness had only seen the person write his name once, and then for the purpose of making the witness competent to give evidence in the suit. *Stranger* v. *Searle,* 1

Esp. 14, 1793. Where the witness has merely seen the party sign his name to another instrument to which he is the attesting witness, and is unable to form an opinion on the handwriting of the party, without inspecting that other instrument, his evidence is inadmissible, because 'his opinion rests on a comparison of hands.' *Filliter* v. *Minchin, &c.*, Manning's Digest of N. P. Reports, 131, 1819. In another case, in similar circumstances, Dallas J. allowed a witness to refresh his memory, by referring to a genuine signature in his possession, which he had formerly seen written. *Burr* v. *Harper,* Holt, N. P. C. 420, 1816. See *Lewis* v. *Sapio.*

It is not essential to the proof, that the witness should have *seen* the person write. There are various other modes in which he may become acquainted with the handwriting. Thus where defendant's attorney stated that he had never seen M. S., an attesting witness to the plaintiff, write, but that her name was subscribed to an affidavit, which had been used by the plaintiff, and that he had examined that signature, so as to form an opinion which enabled him to swear he believed the handwriting in question was hers, this was held by Park J. to be sufficient. *Smith* v. *Sainsbury,* 5 C. & P. 196, 1832. Formerly, a document could not, in criminal cases, be proved by comparing its handwriting with other criminal writing of the same hand. See now 28-9 V. 18, 8.

Experts] A witness giving evidence under this s. need not be a professional expert, or a person whose skill in the comparison of handwriting has been acquired in his profession or business. *Silverlock,* 1894, 2 Q. B. 766; 63 L. J. M. C. 233; 18 Cox C. C. 104; 72 L. T. 298; 58 J. P. 788; C. C. R.; *Derrick,* 5 Cr. A. R. 162, 1910: the C. C. A. does not necessarily (or even usually) call an expert when handwriting is in issue. *Treloar,* 9 Cr. A. R. 1, 1913. In *Brownhill,* 8 Cr. A. R. 258, 1913, that court seemed to think that the evidence of such experts should be conclusive before it is acted on, and itself examined specimens. So it did in *T. Rickard,* 13 Cr. A. R. 140, 1918, where the jury had no assistance at all: c. q.

Whether the evidence of persons skilled in detecting forgeries is admissible—if this was ever in doubt—is not well settled: *Phips.* 367. Such evidence by a post-office clerk, accustomed to inspect franks and detect forgeries, was admitted in *Goodtitle* v. *Braham,* 4 T. R. 497, 1792. Hotham B. thought that a post-office witness might, as an expert, give his opinion whether a handwriting was feigned or natural, *Cator,* 4 Esp. 117, 1802. See *Fitzwalter Peer.,* 10 Cl. & Fin. at 198, 1843; *T.* s. 1877; and '*Expert*' *Witnesses.*

Correspondence] 'If when letters are sent, directed to a particular person, on particular business, an answer is received in due course, it is a fair presumption that the answer was written by the person whose handwriting it purports to be': *per* L. Kenyon, *Cary* v. *Pitt,* 2 Peake, N. P. C. 130, 1797. So a witness had never seen *Alg. Sidney,* at 854, write, but had paid many 'notes' endorsed by him, without being 'called to account for mispayment': see *Admissions by Conduct.* 'To prove handwriting, it is necessary that a witness [not an expert?] should have either seen the person write or corresponded regularly with him or acted upon such a correspondence.' *J. O'Brien,* 7 Cr. A. R. 31, 1911. The farthest extent to which the rule has been carried is to admit a correspondent to prove handwriting, where he has acted on the letters, *ib.*; *Tharpe* v. *Gilsburne,* 2 C. & P. 21, 1825; and even

if the witness has never done any act on them, *Doe* v. *Wallinger,* Mann. Digest, 131, 1819. See further, below.

Execution by agent] Where a party to a deed directs another person to write his name for him, and he does so, that is a good execution by the party himself. *Inhabs. of Longnor,* 4 B. & Ad. 647, 1833. In such cases the subscription of the name by the agent, and his authority to subscribe it, must be proved.

Blackburn J. in *Morton,* 1873, said that Spelman's definition of deed (*factum*) was the best: viz.—'*scriptum solenne quo firmatur donum, concessio, pactum, contractus et huiusmodi*' (Glossary).

Attesting witness dispensed with—ancient documents] It is not necessary now to call the attesting witness of any instruments to the validity of which attestation is not necessary: 28-9 V. 18, 7. The former incapacity of convicted persons: *Jones* v. *Mason,* 2 Str. 833, 1729, was abolished by 6-7 V. 85, 1. When a document [*Phips.:* 'deeds and wills': *T.* s. 87] is thirty years old it proves itself and no evidence of its execution is necessary, 'however, there, by a presumption of law (which see), ought to be some account given of the deed, where found, &c.' B. N. P. 255; *Doe* v. *Burdett,* 4 A. & E. 1, 1835: the first case in which *thirty* years (instead of forty) were accepted was (*Phips.* 497) *Inhabs. of Farringdon,* 2 T. R. 466, 1788. And so with regard to a steward's books of account if they come from the proper custody: *Wynne* v. *Tyrwhitt,* 4 B. & Ald. 376, 1821; 'very old' letters, signed by the head of the family and brought from the muniment room: *Bere* v. *Ward,* 2 Phill. Ev. 246, 10th ed. 1821: see below; a will produced from the Ecclesiastical Court: *Doe* v. *Lloyd,* 1806, Peake on Ev. App. xli.; a bond: *Chelsea W. Co.* v. *Cooper,* 1 Esp. 275, 1795; and other old writings, *e.g.* receipts, *Fry* v. *Wood,* 2 Selw. N. P. 495, 13th ed. 1738; when the adversary has the document and refuses to produce it: *Phips.* 495, who gives other instances. Even if the attesting witness is alive and capable of being produced, it is unnecessary to call him where the deed is thirty years old. *Doe* v. *Wolley,* 8 B. & C. 22, 1828. If there is any erasure or interlineation in an old deed it ought to be proved in the regular manner by the witnesses, if living, or by proof of the handwriting of at least one, and that of the party, if dead. 'And this ought more especially to be done if the deed import a fraud' (by the alteration): B. N. P. 255; or it should be shown that possession has accompanied it. Gilb. Ev. 6th ed. 89.

Signatures] See that title.

Inadmissible documents, effect of] See that title.

Books consulted] See *Professional Works.*

Telegrams] See that title.

Mercantile documents] receipts, bank-books, &c. apparently stand on a peculiar footing when the issue is genuine business or not?: see *R. Sagar,* when they were excluded for the defence: c. q.

Calling for documents] If one side calls for papers, and inspects them, they will be rendered evidence for the opposite side: *Wharam* v. *Routledge,* 5 Esp. 235, 1805; *Wilson* v. *Bowie,* 1 C. & P. 10, 1823; if it is material to the issue: *Phips.* 473. Though it is otherwise, if

one side merely calls for papers without inspecting them. *Sayer* v. *Kitchen,* 1 Esp. 210, 1794.

Inspection of documents] Where letters necessary for the defence had been seized under a search-warrant, Keating J. made an order in favour of defendant for an inspection of them (but not for copies). *Collucci,* 3 F. & F. 103, 1861.

Stamps] By 54-5 V. 39, 14 (4):—'Save, as aforesaid [*i.e.*, in civil proceedings], an instrument executed in any part of the United Kingdom [which includes Ireland], or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done in any part of the United Kingdom, shall not, *except in criminal proceedings,* be given in evidence or be available for any purpose whatever unless it is duly stamped in accordance with the law in force at the time when it was first executed.' See under *Secondary Evidence.*

Letters] For the effect of a *correspondence,* see above; see under this title under *Treason;* cf. *Horne Tooke,* below. For complaint by female, see under *Hearsay.* For old letters, see *Bere* v. *Ward,* above, which was followed in *Doe d. Thomas* v. *Beynon,* 2 A. & E. 1840, where letters were admitted from a testator, written, in 1796—1800 to a niece, in whose possession they were found when she died in 1837.

The normal proof of a letter is by calling the writer or one of the writers: p. 3, where the alternatives are enumerated.

For *privileged* documents, see that title. Though a witness may be privileged not to produce letters to his firm (and copies), their correspondent may not be so privileged; hence, in *Forbes* v. *Samuel, ib.*, the firm's letters *to* a correspondent were produced on subpœna from the latter: K. B. 719.

In *Fisher,* 5 Cr. A. R. 174, 1910 (obtaining by false pretences), the representation was made to an agent who wrote it to his principal: it was held that this letter was rightly put in, though defendant had never seen it: he knew he was dealing with an agent and authorised the transmission of his statements to the principal. In *A. E. Stone,* 1910: incest, a letter from defendant admitting that he asked the girl to have connection with him was properly admitted, but his denial therein of the act *charged* was suppressed: c. q., the C. C. A. disapproving of this suppression.

A letter to defendant was properly excluded, but the judge used part of it against him, but omitted the part which was 'materially in his favour': c. q. *J. Gray,* 1911.

Letters not from or to defendant] These are specially relevant in *Conspiracy,* which see.

Cross-examination] See that title, *Co-defendants, Banks,* 1916, and *Seham Yousry;* the fact that defendant has seen a letter to a third person charging him with theft, does not make the contents admissible; nor was his silence on hearing it an admission, and the jury ought to have been cautioned on this point: c. q. *Brooks,* 1911. On a charge of sending a letter giving information to the enemy, the defence being that the transaction was innocent, the crown cross-examined defendant on three others, written by him to X. partly in German, by merely asking him if he wrote them; the C. C. A. (five judges) thought they might have been put in in chief.

Posting] For proof in the case of certain documents, see under *Lunatics.*

Documents found on or in possession of defendant] 'The papers ought to be read as being his papers which he once had in his possession, if nothing else had been the case': *per* Pratt C.J. in *Layer,* at 205, citing *L. Preston* (or *R. Grahme*), 12 St. Tr. 740, 1691: *per* Holt C.J.; so at 296, 'if that be so [that a witness has sworn truthfully that a paper is in defendant's writing], then all is well, and it ought to be read, not only as a paper that was in his possession, but as a paper that was writ by him': previously, at 211, he had allowed receipts from J[ames] R[ex], found on defendant, to be read: 'They are not read as if proved, the hand is not proved, bus as papers found on him' [in his possession?]: cf. *ib.* 192. So Eyre C.J.: 'all papers found in the possession of a man are *primâ facie* evidence against him if the contents of them have application to the' issue; 'it is always a very considerable explanation that nothing appears to have been done in consequence': *e.g.* no answer. *Horne Tooke,* at 620-1. See also *ib.* 733. But the documents must be proved to have been in defendant's possession with his knowledge: *Huet* (forgery), where twelve judges thought that a (very compromising) letter delivered at defendant's house after his arrest, though he had at first acknowledged that he recognised the writing, ought not to have been admitted. *Horne Tooke,* above, was cited, and, perhaps, *ib.* 127-8.

When, on arrest, a directed letter was found in the room in his brother's house where defendant was, and the latter said to the policeman that it had nothing to do with the present business, nothing being proved about the handwriting, Parke B. allowed it to be read against him on the ground of his statement showing his cognisance of the contents, which raises the presumption that it was written by his direction: *Barratt,* 9 C. & P. 391, 1840.

Inspection by defendant] See *Collucci.*

iii. *Interpretation of documents*] When the issue of false pretences depended on the meaning of a circular, it ought to have been left to the jury, as there is an exception to the general rule that the judge construes writings when 'the writing forms the subject of an indictment . . . and guilt or innocence . . . depends upon the popular meaning of the language employed': *Rosenson,* 12 Cr. A. R. 235, 1917. See *Evidence* under *False Pretences.*

B. JURISDICTION AND VENUE.

1. Jurisdiction.

The triability of an accused person by an English criminal court is due sometimes to the geographical spot where the offence is alleged to have been committed and sometimes to the *status* of the accused (which, however, is almost negligible when the spot is in England, but may directly affect the question which court has jurisdiction).

Venue is the technical name for the *court* to which the indictment is presented: see R. 2 of the Indictments A. 1915—except in the case of a peer charged with treason or felony, for a grand jury has nothing to do with jurisdiction or venue. The word is probably from Fr. *venir,* not L. *vicinia.*

Some English court can try: i. Any offence alleged to have been committed in England by (almost) anyone. ii. Certain offences alleged to have been committed in the dominions of the crown by any British subject or official. iii. Certain offences alleged to have been committed without the dominions of the crown by (1) a British subject (*status* being practically negligible), (2) aliens. [It is convenient, if not strictly logical, to add:] iv. Certain offences alleged to have been committed on British non-public ships and some foreign ships.

British *public* ships are 'British territory': but see under *Venue,* and *ib.* for 'British ship,' and for *Objections to the jurisdiction, ib.* and *Practice.*

i. *England,* for this purpose, is explained by Art. 560 in *Halsbury,* 9 L. of Eng. p. 272: 'At common law the exercise of criminal jurisdiction is limited to crimes committed within the land of England with its ports and harbours, bays, gulfs and estuaries, and so much of the outer coast as extends to low water mark. The courts of common law have always exercised jurisdiction over all persons who committed crimes within these limits, whether such persons were subjects of the King or resident aliens or mere casual and temporary alien visitors. In respect of acts done outside those limits there was no jurisdiction at common law,' but there *is* Admiralty jurisdiction, in English territorial waters (unless taken away by statute), and even within those limits the two jurisdictions are sometimes concurrent. See *Admiralty* under *Venue* and below.

For this purpose England includes Wales: by 27 H. 8, 26.

i. The exceptions are: (a) the sovereign: *The case of Charles I.,* 4 St. Tr. 995, 1649; *History of the Rebellion,* B. XI. 233, by Clarendon C. (b) Foreign sovereigns: *The case of Mary Queen of Scots,* 1 St. Tr. 1169, 1586. For the persons included in this privilege, see *Pitt Cobbett,* 1 Leading Cases, 95 (3rd ed. 1905), on *Mighell* v. *The Sultan of Johore,* 1894, 1 Q. B. 149, whence it seems that 'the titular head of a non-monarchical state' is within it. (c) Ambassadors, *i.e.* all 'diplomatic agents': *Pitt Cobbett, ib.* 301; and some persons about them: *ib.* 304. See *Alien friends* under *Treason.* But, according to 9 *Halsbury,* 245: 'The exemption of ambassadors of foreign states, their servants and retinue, from the criminal jurisdiction of the country to which they are accredited, though asserted by writers on international law, is not sanctioned by the English courts or by any authority on English

criminal law.' But *ib.* vol. 6, 428, it is stated: 'The immunities accorded to public ministers by the usages of nations, which have come to be known as international law, are expressly recognised in the law of England.' 'The recognition is threefold: (1) by writers of authority (see particularly 4 Co. Inst. 152; 1 Bl. Comm. 253; 4 *ib.* 70; Com. Dig. tit. Ambassador); (2) by judicial approval (*Triquet* v. *Bath,* 3 Burr. 1478, 1764; *Novello* v. *Toogood,* 1 B. & C. 554, 1823; *Parkinson* v. *Potter,* 16 Q. B. D. 152, 1885); (3) by . . . 7 Ann. c. 12.' The exact orbit of the immunity cannot be defined: 'it is a question of fact in each case' whether the person is within it: *ib.* 432.

Arrest] 'Possibly in the one instance of his engaging in acts contrary to' the 'safety' and welfare of the state to which he is accredited, he may be arrested: *ib.* 429. A British subject may avail himself of this immunity: *Macartney* v. *Garbutt,* 24 Q. B. D. 368; 62 L. T. 368; 54 J. P. 437; 38 W. R. 550, 1890: *per* Mathew J. Apparently, therefore, such a person could not be tried for treason. (It is not clear whether this form of immunity extends to a British territory.)

'British subject' in 4-5 G. 5, 17 = 'a person who [i] is a natural-born British subject, or [ii] a person to whom a certificate of naturalisation [granted under this, or any A. rpd. by this, A.: s. 27] has been granted': s. 27 (1).

By s. 1 (1), a 'natural-born British subject' = '(a) Any person born within His Majesty's dominions and allegiance; and (b) Any person born out of His Majesty's dominions, whose father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalisation had been granted; and (c) Any person born on board a British ship, whether in foreign territorial waters or not: Provided that the child of a British subject, whether that child was born before or after the passing of this Act [7 Aug. 1914] shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance or other lawful means, His Majesty exercises jurisdiction over British subjects.' (2) 'A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.' (3) 'Nothing in this s. shall, except otherwise expressly provided, affect the status of any' one born before Jan. 1, 1915 [*e.g.* proviso to sub-s. 1].

Before Jan. 1, 1915, natural-born British subjects were '(a) Children born within the dominions; (b) Children born abroad of a father who falls within category (a) (7 Anne, c. 7 & 4 G. 2, c. 21); (c) Children born abroad of a father who falls within category (b) (13 G. 3, c. 21)': *Piggott,* Nationality, I. xiii. p. 195. Thus, of persons born before Jan. 1, 1915, the following were British subjects: those born (1) within British dominions, unless born to an enemy father at a place in hostile occupation; (2) on board a British ship while on the high seas; (3) legitimate children of a natural-born British subject though born out of British dominions; (4) children born out of British dominions of a legitimate father born thereout, but legitimate grandchildren of one born within British dominions; (5) those naturalised in the United Kingdom (or a British colony); (6) those who during infancy have become resident in the United Kingdom with a naturalised parent or with a naturalised father while

in the service of the crown thereout; (7) a woman alien by birth who validly marries a British subject: *Sir Thomas Barclay,* British Subject in Encycl. Laws Eng. See *Sawyer,* 1815; and *Ibrahim* v. *R.*

In 5 G. 5, 34, 1, by (8), 'a British subject, in that s. . . . includes a woman who has married an alien, but who before the marriage was a British subject.' By s. 10, the wife of a British subject and of any alien are deemed respectively British and alien; if a husband ceases to be British the wife may by *declaration* remain British. By s. 11, a British woman become alien by marriage does not cease to be alien merely by the death of her husband or dissolution of the marriage, nor does an alien so become British cease in that way to be British. By s. 12, children who have ceased to be British may, within a year of attaining majority, declare and become British.

ii. *E.g.* murder on land, piracy, oppression. The instances are collected under *Abroad* in Index. For certain offences in India, see *India.*

iii.—1. Offences under the Explosive Substances A. 1883: see Index, *Abroad,* and some instances under iv.; also ss. 686-7 of the Merchant Shipping A. 1894, and, perhaps, *Conspiracy to Murder.* The Foreign Jurisdiction A. 1890, gives a jurisdiction to a 'British court' in foreign countries over British subjects who may be, by s. 6 (1), 'sent for trial to any British possession,' &c., in which England can hardly be included. By s. 4, in any proceeding 'in a court in Her Majesty's dominions,' the extent of the crown's jurisdiction is conclusively certified by a secretary of state. In *Ibrahim* v. *R.* an Afghan subject enlisted in an Indian regiment of the crown stationed in China, was within the jurisdiction of the Supreme Court of China because the China O. in Council, 1904, Art. III. says: 'British subject' includes 'a British protected person.'

2. Jurisdiction over aliens abroad is 'usually only in virtue of some special connection, such as service within three months on board a British vessel': 1 *Pitt Cobbett,* 219, citing s. 687; s. 686 also makes aliens on a British ship on the high seas amenable.

Other offences on the high seas or in foreign lands come under

iv. Ships: "'British courts will not take cognisance of an offence [other than piracy] committed outside British territory by a foreigner on board a foreign vessel': 1 *Pitt Cobbett,* 273, citing *Lewis,* 1857 (where the nationality of the *deceased* was regarded as indifferent; cf. 24-5 V. 100, 9). *Aliter,* if the ship is British: *Lopez,* 1858.

In *Piracy* ('which cannot take place independently of the sea': *Hall,* Intern. L. P. II. c. 6), the jurisdiction is universal in respect of place and person (*status* being negligible).

Foreign non-public ships] 'It is admitted [by international law] that foreign merchantmen come under the jurisdiction of a state when they enter its harbours or cast anchor off its shore. It is also agreed that the littoral state has jurisdiction over persons on passing vessels in breaches of its police and quarantine regulations; but most authorities consider that crimes and offences committed on foreign ships merely passing through territorial waters by persons on board such ships against persons or things also on board, are as such outside the jurisdiction of the bordering state, unless they involve a violation of the rights or interests of the bordering state or of its inhabitants who are neither members of the crew nor passengers': *Green's* Encycl. of Law of Scotland; 'Territorial Waters,' vol. 12, 1914, citing *Annuaire de l'institut de droit international,* xiii. 329.

The following table purports to include all cases:—

A crime alleged to have been committed by:	*is cognisable by:*
1. A British subject on a British ship in British waters	a common law or Admiralty court. 1.
2. A British subject on a British ship in foreign waters	any British court which can try that offence.* 2.
3. A British subject on a British ship on high seas	any British court which can try that offence. 3.
4. A British subject on an alien ship in British waters	a common law or Admiralty court.† 4.
5. A British subject on an alien ship in foreign waters	if he does not 'belong' to the ship, any British court which can try that offence; if he does, no British court. 5.
6. A British subject on an alien ship on high seas	if he does not 'belong'* to the ship, any British court which can try that offence; if he does, he is only triable for piracy. 6.
7. An alien on an alien ship in British waters	a common law or Admiralty court for certain offences; for others there would be an option of retaining the accused. 7.
8. An alien on an alien ship in foreign waters	no British court. 8.
9. An alien on an alien ship on high seas	no British court, unless the offence is piracy. 9.
10. An alien on a British ship in British waters	a common law or Admiralty court. 10.
11. An alien on a British ship in foreign waters	Admiralty court‡: concurrent jurisdiction in the foreign state. 11.
12. An alien on a British ship on high seas	any British court which can try that offence.§ 12.

For Admiralty jurisdiction, see *Venue*.

There seems to be no authority on crimes committed aboard British vessels or boats on foreign rivers and inland waters (not in a port or territorial waters) where Admiralty jurisdiction is not claimed; but there can be no doubt that in respect of the vessel there can be no British jurisdiction at all, though everyone concerned is British.

* If the ship is non-public there would be a concurrent jurisdiction in the foreign state: if it is public the concurrent jurisdiction (if any) would be very strictly limited. In the case of a seaman, &c. within s. 686 of the M. S. A. 1904, the law comes to exactly the same thing. In *Leslie*, 29 L. J. M. C. 97; 8 Cox. C. C. 269, 1860, C. C. R., the master of an English trading ship deported some Chilean political prisoners, under contract with the Chilean government, from Valparaiso to Liverpool. At the Assizes there he was convicted for their false imprisonment and of assault: this was upheld in respect of the duress on the high seas, but quashed in respect of that in Chilean waters; for there the court assumed that the local government was within its own law. Apparently the law is the same if they had been British subjects. It is clear that on a British *public* ship they would at once have been free.

† Apply note *, *mutatis mutandis*. ‡ *Carr's* case, 1882.

§ The *Felicidade* or *Serva's* case: eleven judges holding against two that there was no evidence that the ship was British or a lawful British possession so as to found Admiralty jurisdiction: conviction for murder of an English officer on board a captured slaver quashed.

2. Venue.

1. *On land*] *I.e.* 'a place next to that where anything that comes to be tried is supposed to be done': *Termes de la ley,* 1708, citing 35 H. 8, c. 6, 3, where the writ *venire facias* speaks of *xii liberas et legales homines de vicineto de B* as jurors.

In general, the offence must on the face of the indictment appear to have been committed within the jurisdiction of the court of trial: 'in general, all offences must be inquired into as well as tried in the county where the fact is committed': 4 Bl. Comm. 305; this is the most usual and (except that of boroughs) the only common law venue (for the Admiralty Court was never a common law court*): and if it appear by the evidence that the place where the offence was committed is not within that jurisdiction the variance unamended would at one time have been fatal: *e.g. T. Thomas,* Lea. 634, 1794: wrong county.

But the strictness of this rule has been modified in various ways, so that of late years but little attention has been paid to questions of venue, partly in view of provisions scattered through various Acts of parliament (*e.g.* in the case of corrupt practices, p. 447). Hence, a *plea to the jurisdiction* is almost unknown—if only because it 'must show what court has authority to . . . try': 1 Chitty, Cr. L. 438. For an instance, see *R. Johnson,* 6 East, 583, 1805: libel: judgment—*respondeat ouster.* Sometimes an Act provides an alternative venue (*e.g.* for offences against trade unions, 39-40 V. 22, 5).

Winter assizes] By 39-40 V. 57, there is power by order in council to unite neighbouring counties for the purpose of winter assizes, *i.e.* in November, December, or January ('by reason of the small number of prisoners or otherwise'). September and October are brought within that A. by 40-1 V. 46, and by 42-3 V. 1, that A. is extended to spring assizes, *i.e.* in March, April, and May. For the Central Criminal Court, see below.

Counties—boundaries—partly in one, partly in another] By 7 G. 4, 64, 12: 'Where any felony or misdemeanour shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanour may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein.'

It has been held, that the s. does not extend to trials in limited jurisdictions, but only to county trials. *Welsh,* 1 Moody C. C. 175, 1827: no jurisdiction in Southwark Q. S. held under a charter of E. 6: larceny on London Bridge. Where it appeared on the record that the court had no jurisdiction—an offence in Northamptonshire but close to the Lincolnshire boundary being tried at Lincoln Assizes—a conviction was not sustained, notwithstanding that the court really

* Stephen, J., perhaps doubted this: see 2 Hist. Cr. L. 17, and his edn. (7th) of this work, p. 240, retained till this edn.

had jurisdiction to try the offence, for the statute does not enable the prosecutor to lay the offence in one county and try it in another; but only to lay *and* try it in either. *Mitchell,* 2 Q. B. 636, 1842.

Local or transitory] The s. applies to offences which are local in their nature, such as burglary, as well as to larcenies and other transitory felonies, but for practical purposes the distinction is now obsolete. See *Ruck,* Hereford Spr. Ass. 1829; 2 Russ. Cri. 26, 1038.

Questions frequently arise whether any material part of an offence has been committed in a particular county where the trial is had; see the particular offences.

Distance] Since the Interpretation A. 1889 (s. 34), the measure for any later A. is by 'a straight line on a horizontal plane'; so before the A. Parke B. held on s. 12 (above): *Wood,* 1841.

Detached parts of counties] By 2-3 V. 82, 1, justices of the peace for any county may act as justices in all things relating to any detached part of any county, which is surrounded in whole or in part by the county for which such justices act, 'and all offenders in such detached part may be committed for trial, tried, convicted and sentenced, and judgment and execution may be had upon them, in like manner as if such detached part were to all intents and purposes part of the county for which such justices' act.

It has been held that the grand jury for the county which wholly surrounds a detached part of another county, may find an indictment for an offence committed in such detached part, and that the trial may be by a jury of such surrounding county. *Loader,* 1840, Dickinson's Q. S. 5th ed. (by Talfourd), p. 188 *e*; 1 Russ. Cri. 23 (*g*).

On a journey or voyage] By 7 G. 4, 64, 13: 'Where any felony or misdemeanour shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever, employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever, employed on any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanour may be dealt with, inquired of, tried, determined, and punished in any county through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanour shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony or misdemeanour may be dealt with, inquired of, tried, determined, and punished in either of the said counties through or adjoining to or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanour shall have been committed, in the same manner as if it had been actually committed in such county.'

The offence must be committed 'in or upon the coach,' to bring it within the above s.; therefore, where a guard of a coach, on changing horses at some distance from Penrith in Cumberland, carried a parcel to a privy, and, while there, took two sovereigns from it, Parke B. held, that he must be tried in Westmoreland, where the felony was com-

mitted. *Sharpe,* 2 Lew. C. C. 233, 1836. This s. is not limited to the carriage of common carriers and public conveyances. *Sharpe,* Dears. & P. C. C. 415; 24 L. J. M. C. 40; 6 Cox C. C. 418, 1854.

County of a city or town corporate] By 38 G. 3, 52, 3, indictments for any offence committed or coroners' inquisitions there found within 'the county of any city or town corporate,' may be ordered to be tried in the county next adjoining, or the bill may be preferred in that county in the first instance (s. 2). For an instance, see *Bolam.* The cities of London and Westminster and the borough of Southwark have always been exempted from this A. (s. 10). See 45-6 V. 50, 188, and sched. 6 (below).

By 14-5 V. 55, 19: 'Whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate within which her Majesty has not been pleased for five years next before the passing of this Act [Aug. 1, 1851] to direct a commission of oyer and terminer and gaol delivery to be executed, and until her Majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this Act, and the recognisances to appear to prosecute and give evidence taken by such justice, justices, or coroner, shall, in all such cases, be conditioned for appearance prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the next adjoining county; . . .' and for all purposes of the trial that court takes the place of that hitherto the proper one. By s. 24 and 45-6 V. 50, 242 (2) and sched. 9, Pt. 2, Northumberland is the next adjoining county to Berwick-upon-Tweed and Newcastle-upon-Tyne; Gloucestershire to Bristol; Cheshire to Chester; Devonshire to Exeter; and Yorkshire to (Kingston-upon-) Hull, as in sched. 6. Thus the margin would, for instance, be: 'County of Chester (being the next adjoining county to the county of the city of Chester), to wit.' But since the Indictments A. 1915, the point is of little importance.

An important alteration has been made in the boundaries of some counties by the Boundary A., 2-3 W. 4, 64, and by 45-6 V. 50, 228, so that if a felony be now committed in that part of the county of a town which has been added to it by one of these Acts, 'which had the effect of removing completely from one county to another for all purposes the transferred areas,' 1 Russ. Cri. 22, it is triable within the county of the town: *JJ. of Gloucestershire,* 4 A. & E. 689, 1836; and hence 'Clifton is now a part of Bristol and not of the county of Gloucester.' The prisoner was indicted for wounding with intent to do grievous bodily harm. The offence was committed at a place not previously part of but added to the borough of Haverfordwest (which is a county of itself by 35-5 H. 8, 26, 61) by the Boundary A. and declared by rpd. 5-6 W. 4, 76, to be part of the borough: it was held that defendant might be tried by a jury of the county-borough. *Piller,* 7 C. & P. 337, 1836.

2. *At sea—Admiralty*] The jurisdiction of the court of admiralty, according to Blackstone, extends to 'all crimes and offences committed either upon the sea or on the coasts out of the body or extent

of any English county,' 4 Bl. Com. 268, 'committed on board British ships, whether by subjects or foreigners, on the 'high seas'': *Pitt Cobbett,* 1 Lead. Cas. Int. L. 215, 3rd ed. Cf. 3 Inst. 113. The jurisdiction is expressly extended by 15 R. 2, 3; 'of the death of a man and of a maihem done in great ships being and hovering in the main stream of great rivers' (and so within the extent of a county), 'only beneath the bridges [*or* points] of the same rivers nigh to the sea and in none other places of the same rivers the admiral shall have cognisance; and also to arrest ships in the great flotes [= fleets] for the great voyages of the King and of the realm . . . and he shall have also jurisdiction upon the said flotes during the said voyages only.' And there are certain parts of the sea which, as being *intra fauces terræ,* are considered as belonging to the adjoining counties, and over these the court of admiralty has a concurrent jurisdiction. Thus, a murder was committed in Milford Haven (which is within the body of the county of Pembroke), seven or eight miles from the river's mouth, and sixteen miles below any bridge across the river; the passage where the murder was committed was about three miles across, the water was always perfectly salt, and the place itself about twenty-three feet deep, and never known to be dry but at very low tides. Sloops and cutters of one hundred tons were able in spring tides to navigate where the body was found, and nearly opposite the place men-of-war were able to ride at anchor. The deputy vice-admiral of Pembrokeshire had of late employed his bailiff to execute process in that part of the haven, but there was no evidence 'either way' about the execution of common law process there. There was a conviction. The judges were unanimous that the trial was rightly had at the admiralty sessions at the Old Bailey. 'During the discussion, the construction of' the words of the statute 28 H. 8, 15, 'in or upon the sea or in any other haven, river, creek or place where the admiral or admirals have or pretend to have power, authority, or jurisdiction,' 'by L. Hale (2 P. C. 16-7), was much preferred to the doctrine of L. Coke (3 Inst. 111, 4 Inst. 134-5),' who seems to doubt the concurrent jurisdiction; 'and most, if not all the judges seemed to think that the common law had a concurrent jurisdiction in this haven, and in other havens, creeks, and rivers in this realm.' *Bruce,* 2 Lea. 1093; R. & R. 243, 1812. See also *Cunningham,* 28 L. J. M. C. 66; Bell C. C. 72; 8 Cox C. C. 104, 1859, where a ship in the 'Bristol Channel, three-quarters of a mile from Glamorganshire, was held to be 'within the body' of that county.'

'*Great ships*'] *i.e. grosses niefs,* an expression nowhere defined. The development of ship-building has certainly not diminished the jurisdiction allowed in these words: it still extends whither 'great ships' could go in 1391.

Sea shore] It is clear that the common law and the admiralty have alternate jurisdiction between high and low water mark: 3 Inst. 113; 2 Hale, P. C. 17. In cases of doubt, *East,* 2 P. C. 804, thinks that the common law should be preferred.

High seas] Both the public and private vessels of every nation on the high seas and out of the territorial limits of any other state are subject to the jurisdiction of the state to which they belong. 'The expression 'high seas,' when used with reference to the jurisdiction of the court of admiralty, included all oceans, seas, bays, channels, rivers, creeks and waters below low-water mark, and where great ships could go, with the exception only of such parts of such oceans, &c.

as were within the body of some county: see 28 H. 8, c. 15; 4 Inst. 134; Com. Dig. Admiralty E. 1, 7, 14; *Anderson, Carr* [below].

'*A foreign or colonial port,* if it was part of *the high seas in the above sense,* would be as much within the jurisdiction of the admiralty as any other part of the high seas. The jurisdiction, however, is necessarily limited in its application; it can only be exercised over persons or ships when they come to this country. An artificial basin or dock excavated out of land, but into which water from the high seas could be made to flow, would not, I apprehend, be in any sense part of the high seas whether such basin or dock were in this country or in any other': *per* Lindley L.J., *The Mecca,* 1895, P. 107.

By s. 1 of 57-8 V. 60, Merchant Shipping A. 1894: 'A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British ships), namely: (a) Natural-born British subjects; (b) Persons naturalised by or in pursuance of an Act of Parliament of the United Kingdom or by or in pursuance of an Act or ordinance of the proper legislative authority in a British possession; (c) Persons made denizens by letters of denization; and (c) Bodies corporate established under and subject to the laws of some part of Her Majesty's dominions and having their principal place of business in those dominions: Provided that any person who either—(i) being a natural-born British subject, has taken the oath of allegiance to a foreign sovereign or state, or has otherwise become a citizen or subject of a foreign state; or (ii) has been naturalised or made a denizen as aforesaid: shall not be qualified to be owner of a British ship unless, after taking the said oath or becoming a citizen or subject of a foreign state, or on or after being naturalised or made denizen as aforesaid, he has taken the oath of allegiance to Her Majesty . . . and is, during the time he is owner of the ship, either resident in Her Majesty's dominions or partner in a firm actually carrying on business in Her Majesty's dominions.'

British ship] What is sufficient evidence to prove that a ship is a British ship, see *Leary* v. *Lloyd,* 29 L. J. M. C. 194; 3 E. & E. 178, 1860; *Bjornsen,* L. & C. 545; 10 Cox C. C. 74, 1865: c. q. because the ship was not British; *Seberg,* L. R. 1 C. C. R. 264; 39 L. J. M. C. 133, 1870; and *Armstrong,* 13 Cox C. C. 184, 1875. In *Seberg,* the court said where the ship was not proved to be registered British 'there is nothing in the Merchant Shipping Acts to take away the criminal jurisdiction of the [assize] court.' In *Armstrong,* a floating but dismantled British ship, used as a depôt on the Bonny River, Africa, was held to be within the admiralty jurisdiction in a trial for murder, although the crime was only begun on board, the deceased having been thrown over alive and not seen again.

British ship abroad, &c.—foreign ship] By 57-8 V. 60, s. 686 (1): 'Where any person being a British subject is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions which would have had cognisance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as

if it had been so committed. (2) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849.' The s. is applied to the Wireless Telegraphy A., 4 E. 7, 24, and to the Aliens A., 5 E. 7, 13, 7 (2).

In *Lopez, Sattler,* D. & B. C. C. 525, 539; 7 Cox C. C. 431, 1858, fourteen judged decided on a (rpd.) s. replaced by s. 686, that defendant is 'found,' however brought, within the jurisdiction: *Lopez,* a foreigner, wounded another member of the crew of a British ship (also a foreigner) on the outward voyage; he was brought back in irons and tried at Exeter. *Sattler,* a foreigner, committed larceny at St. Ives, fled to Hamburg, with which there was no extradition treaty, and was surrendered by the police there to an English detective who had no warrant; on the high seas he shot the officer, and was convicted of murder at the Central Criminal Court—'he acted out of revenge,' the jury found, 'and not with a view of escaping.' The C. for C. C. R. thought that he was 'found' within that court's jurisdiction. Cf. *Garrett, ex parte Scharfe.*

Even before this A. it was decided that even when a British ship is within foreign dominions, if it be where great ships go, it is in effect on the high seas, and the admiralty has jurisdiction. Larceny on an English ship lying in a Chinese river twenty odd miles from the sea, was held to be within the jurisdiction of the Central Criminal Court by all the judges, without any evidence whether the tide flowed at the place. *T. Allen,* 1 Moo. C. C. 494; 7 C. & P. 664, 1837; *Anderson,* L. R. 1 C. C. R. 161; 38 L. J. M. C. 12; 11 Cox C. C. 198, 1868, where one American citizen killed another, both serving aboard, on the Garonne, a river 'where the tide ebbs and flows and where great ships go.' It was held that all seamen, whatever their nationality, serving on board British ships, are under British law. Byles J. thought this ship was 'a floating [British] island'—the expression of Holroyd J. in *Forbes* v. *Cochrane.*

But it was pointed out, in *Carr and Wilson,* 10 Q. B. D. 76; 52 L. J. M. C. 12; 15 Cox C. C. 129, 1882, C. C. R., that the decision did not depend on the fact of *service,* which did not affect the point, the true principle being 'that a person who comes on board a British ship *where English law is reigning* . . . becomes amenable to its jurisdiction': *per* L. Coleridge C.J. So *Coke,* 7 R. 5 *a: protectio trahit subjectionem et subjectio protectionem.* In *Carr and Wilson,* some bonds were stolen from a British ship moored to the quay at Rotterdam, within the ebb and flow of the tide, below bridges, and where great ships go; the (felonious) receivers were held to be rightly tried in this country, as the felony took place within the jurisdiction of the admiralty. The question, therefore, was *whether English law was reigning,* and it was held that the ship being moored to the quay and having its flag down was nothing to the point so long as it was afloat, though it might be different if it was in dry dock (and the crew discharged). Nor did it matter if the actual thief was not a British subject: if he had been caught aboard after the ship sailed he could have been tried here. It was admitted that if the theft had been on foreign territory the receivers could not be tried here, a similar case to this against the same defendant *Carr* being cited—see Cox C. C.—in which, the theft being in France, Denman J. directed an acquittal: 1877; but now see *Receiving.*

'*Ship to which he does not belong*'] *Piggott,* 2 Nationality, 144,

infers from these words 'that British subjects on foreign vessels to *which they do belong* are not within the . . . section.'

Seamen, &c. under quasi-*admiralty jurisdiction*] By 57-8 V. 60, 687: 'All offences against property or person, committed in or at any place, either ashore or afloat, out of her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner, and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the admiralty of England'; the rest of the s. on costs is superseded: see *Costs*.

Military, &c. persons] See under *Military*.

International law] No inference can be drawn from foreign territory to a foreign private ship, for the theory that in law a foreign private ship is part of the foreign country is 'an inadmissible fiction,' for, if it were, the sovereignty of the owning state would continue in foreign territorial waters, which it is admitted, it does not. If any one on board infringes the local laws, the ship can even be pursued into the open seas and brought back by the offended state. *Hall*, Internl. Law, 7th ed., Pt. 2, ch. 4, p. 212; ch. 6, p. 262; whence it also appears that foreign private vessels lying in ports, do in fact, 'enjoy a varying amount of immunity from the local jurisdiction by the practice of most and perhaps of all states,' and that there is probably a *concurrent* jurisdiction of both states.

Foreigners on foreign ships—Admiralty jurisdiction] At any rate, it is clear that foreign subjects on foreign vessels on the high seas are not subject to our jurisdiction. *Keyn* (The Franconia), 2 Ex. D. 63; 46 L. J. M. C. 17, 63; 13 Cox C. C. 403, 1876: C. C. R. It was sought by six judges to extend the jurisdiction of the admiralty beyond the rivers, &c., to three miles below low water mark, but seven held against them that there was no jurisdiction in this country to try a foreigner for manslaughter committed on a foreign ship within (or without) the three-mile limit.

Territorial Waters Jurisdiction A. 1878] But by 41-2 V. 73, 2, an offence committed either by a British or foreign subject 'on the open sea, within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship'—that is, 'any part of the open sea within one marine league [three nautical miles] of the coast measured from low water mark' (s. 7); 'territorial waters' means 'such part of the sea adjacent to the coast of the United Kingdom,' &c. 'as is deemed by international law to be within the territorial sovereignty of Her Majesty.' But only within *that* area this A. removes the difficulty felt in *J. Lewis*, D. & B. C. C. 182; 26 L. J. M. C. 104; 7 Cox C. C. 277, 1857: manslaughter of a foreigner, who died at Liverpool, by a foreigner on a foreign ship *on the high seas:* c. q. Nor does it seem that such a case was intended to be or is within 24-5 V. 100, 10. In this A. 'United Kingdom' includes *all* adjacent islands (Channel, Man, &c.). *Quære,* whether any offence

is triable under this A. 'except an offence committed on a 'ship' as defined' therein: 9 *Halsbury,* 276 *e.* In the case of a foreigner the certificate of the secretary of state or the governor of a colony to the effect that it is expedient that proceedings should be instituted must first be obtained.

Vessels of war] 'There is now a great preponderance of authority in favour of the view that a vessel of war in foreign waters is to be regarded as not subject to the territorial jurisdiction,' *Hall,* above, p. 204, so that offences on board these are offences against the municipal law of the country to which the ship belongs, and in this country would be cognisable by the court of admiralty. But everyone on board must respect the local laws: *ib.* If, for instance, one of the subjects of the local state committed a crime on another *aboard,* the captain ought to surrender him.

Summary] 'The criminal jurisdiction of the Admiralty of England attaches: 1. In the case of piracy . . . [see that title]; 2. To all British ships, public or private, on the high seas, outside the territorial waters of any state; and 3. To all vessels, British or foreign, within British territorial waters, including all ports, havens and rivers below bridges where great ships go. To some extent the jurisdiction is concurrent with that of the common law courts in the case of waters which are within the body of a county; and 4. To all British public vessels in foreign territorial waters. The jurisdiction is probably exclusive of the jurisdiction of the state to which the waters belong; and 5. To all British vessels, public or private, within foreign territorial waters. This jurisdiction is concurrent with or perhaps subordinate to the jurisdiction of the state to which the waters belong.' 1 Russ. Cri. 31. It seems impossible to reconcile the statements in 4 and 5 about the jurisdiction over public ships. The doubt expressed in 'probably' in 4 arises from the implied view of Best J. in *Forbes* v. *Cochrane,* 2 B. & C. 467, 1824—that if slaves took refuge on a British warship within waters in which slavery was legal, they would not thereby gain their freedom. But he does not say so—the waters here were not such—and later he said (at 471), 'If the right sought to be enforced is inconsistent with either of these ['the law of nature and the revealed law of God'], the English municipal courts cannot recognise it'—nor can it, the comity of nations, 'where it violates the law of our own country.' Contrast the admitted right of the Chilean Government in *Leslie,* 1860. Probably the only limitation in the case of public ships is that expressed by *Hall,* above. It is clear that the jurisdiction on a British ship extends to foreigners.

3. *Admiralty offences—where tried*] By 4-5 W. 4, 36 (Central Criminal Court A.), 22: 'it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery, to be named in and appointed by the commissions to be issued under the authority of this Act or any two or more of them to inquire of, hear, and determine any offence or offences committed, or alleged to have been committed on the high seas, and other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate [*now,* any prison appointed by the Home Secretary in its place: 44-5 V. 64] of any person or persons committed to or detained therein for any offence or offences alleged to have been done and committed upon the high seas aforesaid within

the jurisdiction of the admiralty of England.' ('This enactment made it unnecessary to hold the Admiralty Sessions . . . theretofore . . . held at the Old Bailey': 1 Russ. Cri. 38 *k*.)

A more general provision was subsequently made by 7-8 V. 2 (Admiralty Offences A.), 1: 'her Majesty's judges of assize or others her Majesty's commissioners . . . shall have severally and jointly all the powers which by any Act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the admiralty of England . . . and to deliver the gaol in every county and franchise within the limits of their several commissions of any person committed or imprisoned therein for any offence alleged to have been committed upon the high seas and other places within the jurisdiction of the admiralty of England.' S. 2: 'In all indictments preferred before the said justices and commissioners under this Act the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had: and all material facts which in other indictments would be averred to have taken place in the county where the trial is had, shall in indictments preferred under this Act be averred to have taken place 'on the high seas.''

By 24-5 V. 96, 115: 'All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence, or for being an accessory to any such offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed 'on the high seas'; provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces.'

Thus, practically the whole of the admiralty criminal jurisdiction has been gradually transferred to the ordinary criminal courts. Defendants, speaking generally, are tried by the appropriate court which has jurisdiction over the spot where they are landed: *e.g. Dudley,* 1884, was committed at Falmouth to the Devon and Cornwall Winter Assizes, and tried at Exeter under a s. with which s. 686 is identical.

C. 97, 72; c. 98, 50; c. 99, 36; and c. 100, 68—all of 24-5 V.—contain the provisions of s. 115. 'The enactments appear not to extend to attempts to commit the offences': 1 Russ. Cri. 41 (*b*).

The defendant having stolen goods in a British ship on the high seas was afterwards apprehended and tried in the borough of Southampton, it was held, under s. 115, rightly. *Peel,* L. & C. 231; 32 L. J. M. C. 65; 9 Cox C. C. 220, 1862.

Accessory] By 24-5 V. 94, 9: 'Where any person shall, within the jurisdiction of the admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been com-

mitted in the county or place in which such person shall be indicted, and his offence shall be averred,' &c. exactly as in s. 115, above.

Colonial admiralty jurisdiction] See 12-3 V. 96, 23-4 V. 122 and 53-4 V. 27.

Homicide—offences partly at sea, partly on land] By 24-5 V. 100, 10: 'Where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county, or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been committed in that county or place.'

In 1785, however, standing on the shore and, from about 200 yards, firing at and killing a man in a cutter struck on a sandbank about a hundred yards at sea, was an offence committed entirely within the jurisdiction of the admiralty: *Coombe,* 1 Lea. C. C. 388, which, perhaps, however, only decided that the admiralty has jurisdiction, not that the common law has not; and, perhaps, according to Hawkins, this was a case of *piracy:* P. C. 1, 37, 17; and see *East,* P. C. 367 and the comments of Halsbury C. and L. Herschell, *Badische Anilin, &c.* v. *Basle Chemical Works,* 1898, A. C. 204, 209. This seems to be the only recorded admiralty case in which defendant was on land at the time of the offence: judges have laboured to support this decision, *e.g.* Cockburn C.J. and Denman J. in *Keyn,* at 234 and 103, 2 Ex. D.

4. *Offences in India*] See *India.*

Abroad—Foreign Jurisdiction A.] Criminal acts committed by a British subject abroad 'are usually left to the courts of the local sovereign, who is in general much more interested in their due punishment than is the country of the criminal. But there are few states which refuse to take cognisance of any criminal act done by their subjects when in foreign territory; the principle of concurrent jurisdiction is maintained; and certain crimes, ordinarily of a kind more or less affecting the state, can be punished on the return of the criminal to the jurisdiction. Though Great Britain has acted to a very limited extent upon the principle, and has not had frequent occasion to give effect to it of late years, the liability of a subject to be made answerable for crimes committed out of the jurisdiction has been affirmed by statute for more than three centuries and a half.' *Hall,* Foreign Power and Jurisdiction of the British Crown, 1894, Pt. 1, ch. 1, p. 12; citing 35 H. 8, 2, treason, still in force, and 33 H. 8, 23 (rpd. 9 G. 4, 31, 1, and 74, 125); and *Governor Wall,* 28 St. Tr. 51, 1802, under 33 H. 8; and *Azzopardi,* 2 Moo. C. C. 288; 1 Cox C. C. 28, 1843, murder, under 9 G. 4, 31, 7, a consolidating A. (rpd. 24-5 V. 95, 1). The Foreign Jurisdiction Acts were consolidated by 53-4 V. 37. By s. 1, the crown may exercise any jurisdiction it has 'within a foreign country in the same and as ample a manner as if' it 'had acquired that

jurisdiction by the cession or *conquest* of territory.' Under this A. and an Order in Council an Afghan, enlisted in an Indian regiment stationed at Canton, in China, who murdered a native fellow-soldier there, was tried at Hong Kong. *Ibrahim* v. *R.* The O. in C. included in 'British subject' one who 'enjoys His Majesty's protection in China,' and on this the P. C. insisted.

Among 'the more important cases' enumerated by Mr. Pitt-Cobbett, 1 Leading Cases, 219, 1909, 'in which extra-territorial criminal jurisdiction has been conferred by statute' are 'offences committed by British subjects in *countries without regular government* and coming within the terms of the Foreign Jurisdiction A. 1890 and the Orders in Council . . . thereunder' [May 9, 1891]. He adds that the list of such offences in *Stephen,* Dig. Cr. Proc. 1-5, is 'complete' (*i.e.* in 1883).

For acts done abroad either being an offence, or having an effect, here, see *Oliphant,* and *Index* 'Abroad.'

Conspiracy here—overt act abroad] *Kohn,* a Prussian ship's carpenter, was indicted for conspiring at Ramsgate with certain other Prussians to scuttle a Prussian ship, which was done. He confessed to the scuttling. The question left to the jury by Willes J. was, whether it was 'agreed and consented to by and between him and any other person at Ramsgate, that the ship should be destroyed *whether at sea or in port,*' and it was distinctly laid down that the offence of conspiracy would be complete 'if the conspiracy was in this country, although the overt acts were abroad' (which must here include the high seas, as, in fact, 'the principal offence . . . casting away the vessel' was committed there; for which, as it was not piracy, defendant could not be indicted here): acquittal. *Kohn,* 4 F. & F. 68, 1864; see *Most,* 1881. Stephen J. (7th ed. of this work, p. 244) thought (in view of the alternative in italics above) *Kohn* did 'not expressly decide . . . whether a conspiracy in England to injure on the high seas is a crime when all the parties are foreigners, but upon principle' it 'ought to be criminal'; but Willes J. certainly did not say, 'if you find conspiracy to scuttle on the high seas, you must acquit,' as he ought to have done if the law in that case was different from that 'in port.'

Homicide abroad] By 24-5 V. 100, 9: 'Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of her Majesty or not, every offence committed by any subject of her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such persons might have been tried before the passing of this Act.'

Extradition] This subject is not within the scope of this work, but

see 33-4 V. 52 (s. 27 partly rpd. S. L. R. 1883); 36-7 V. 60, and 88, 28; 44-5 V. 69 (ss. 40, 41, and sched. rpd. S. L. R. 1894), and 58-9 V. 33: *Ex parte Bouvier,* 42 L. J. Q. B. 17; 12 Cox C. C. 303, 1872; *Weil,* 9 Q. B. D. 701, 1882; *Re Castioni,* 1891, 1 Q. B. 149; 60 L. J. M. C. 22; *Re Bellencontre,* 1891, 2 Q. B. 122; 60 L. J. M. C. 83; *Re Meunier; Re Arton,* 1896, 1 Q. B. 108, 509; 18 Cox C. C. 277; 65 L. J. M. C. 23, 50; *Re Galwey,* 1896, 1 Q. B. 230; 65 L. J. M. C. 38; *Spilsbury,* 19 Cox C. C. 160, 1898, 303 (v. *R.*, 1898: Judicial Committee); *Ex parte Siletti,* 20 Cox C. C. 353, 1902; *Ex parte Percival,* 23 T. L. R. 238, 1907; *Ex parte Moser,* 25 Cox C. C. 69, 1915.

In a case of this class, Loreburn C. is reported to have said, 'every question affecting public liberty should, if possible, be heard in public, with the safeguard of publicity' (*ex parte Lapierre:* the *Times,* Aug. 7, 1906; *Law Journal,* Aug. 11, 1906). A judge should not grant a *habeas corpus* while extradition proceedings are *sub judice* in another court: *U. S. A.* v. *Gaynor,* 1905, A. C. 128.

Larceny in one part of the United Kingdom—proceeds in another] 'The primary meaning of the 'United Kingdom' is Great Britain and Ireland . . . but the phrase does not include the Channel Islands or the Isle of Man.' *Stroud's Jud. Dict.,* where see the cases cited; but contrast 41-2 V. 73, 7.

By 6-7 G. 5, 50, 39 (2): 'Every person who steals or otherwise feloniously takes any property in any one part of the United Kingdom may be dealt with, indicted, tried, and punished in any other part of the United Kingdom where he has the property in his possession, in the same manner as if he had actually stolen or taken it in that part; (3) Every person who receives in any one part of the United Kingdom any property stolen or otherwise feloniously taken in any other part of the United Kingdom, may be dealt with, indicted, and punished for such offence in that part of the United Kingdom where he so receives the property, in the same manner as if it had been originally stolen or taken in that part.'

5. *The Central Criminal Court*] By 4-5 W. 4, 36, 2, the jurisdiction of the Central Criminal Court extends over *all* offences committed within the city of London and county of Middlesex, and those parts of the counties of Essex, Kent, and Surrey, within the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead St. Mary, Woodford, and Chingford, in Essex; Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part of St. Paul Deptford which is within the county of Kent, the liberty of Kidbrook and the hamlet of Mottingham, in Kent; and the borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, that part of St. Paul Deptford which is within the county of Surrey, Tooting, Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbledon, the Clink liberty, and the district of Lambeth palace, in Surrey.

By s. 3, 'the district situated within the limits of the jurisdiction hereinbefore established shall be deemed . . . one county for all purposes of venue, local description, trial, judgment, and execution not herein specially provided for; and in all indictments and presentments . . . the venue laid in the margin shall be . . . 'Central Criminal Court, to wit,'' and all offences and material facts (which

would otherwise be laid or averred in the geographical county) are to be laid and averred, &c. within the jurisdiction of the said court; see also 9-10 V. c. 24, 3 (rpd.). By 51-2 V. 41 (Local Government A. 1888), 89 (1), 4-5 W. 36 is to be construed as if the county of London were throughout mentioned therein as well as the county of Middlesex.

Home counties] Under 39-40 V. 57 (and so under the other Assizes Acts, above), the jurisdiction of the court may be extended 'to any neighbouring county or part of a county,' *i.e.* neighbouring to 'the Central Criminal Court district,' 'with such modifications and exceptions (if any) as to her Majesty may seem fit.' *Neighbouring* here has been interpreted as 'the home counties' (*Encycl. Laws of Eng.:* C. C. C.), but, it seems, that this is a merely popular phrase with varying meanings or applications. Since 1876 cases from Berks, Herts and Sussex have, in fact, been tried at the Central Criminal Court:* but from Berks not since 1877, and Surrey since 1898, and the use of the A. has now wholly been abandoned. For an instance of an Order in Council conferring jurisdiction on that court in these counties and 'such parts of the counties of Essex, Kent and Surrey as are not included in the Central Criminal Court District,' see *London Gazette,* Oct. 27, 1876 (vol. 2, pt. 2), p. 5664. Thus Berks, which does not touch Middlesex, has been considered as neighbouring to the 'C. C. C. district,' while Bucks, which does, never has (cf. *Millar,* 1837); neither were on the 'Home' Circuit which in 1845 included Herts, Essex, Sussex, Kent and Surrey (*Report of Circuit Regulation Commission,* p. 126).

Where an indictment for misdemeanour was preferred at the Central Criminal Court, and the marginal venue was 'Central Criminal Court, to wit,' and in the body the facts were stated to have taken place 'at the parish of St. Mary, Lambeth, Surrey, within the jurisdiction of the said court,' and the indictment was removed by *certiorari,* it was held that the trial must be at the assizes for Surrey. *Connop,* 4 A. & E. 942, 1836. See also, for the venue of this court, *Gregory,* 7 Q. B. 274; 1 Cox C. C. 198; 14 L. J. M. C. 82, 1845.

An indictment for misdemeanour at the Central Criminal Court had in the margin the words, 'Central Criminal Court,' and stated that M.A., 'late of the parish of *St. Stephen, Coleman-street,* in the city of *London,* and within the jurisdiction of the said Court,' 'at the parish aforesaid, and within the jurisdiction,' &c., did—alleging the offence without further statement of venue. It was removed by *certiorari* into the Q. B. and tried in London, and there was a conviction. On motion in arrest of judgment, *semble,* that the venue assigned to the material fact appeared sufficiently to be in the city of London; and it was held, assuming this to be otherwise, that the defect was only want of a proper or perfect venue, and was cured by (rpd.) 7 G. 4, 64, 20, for the indictment showed jurisdiction in the court at *nisi prius* to try in London. 'This Court has jurisdiction over any indictment removed into it, let the venue be where it will.' *Albert,* 5 Q. B. 37, 1843. Where not one of the five† counties in which the jurisdiction of the C. C. C. existed was mentioned in the indictment, and the material facts were laid only as having taken place 'within the jurisdiction of the said court,' and the defendant, having removed it by *certiorari,* was tried at *nisi prius* in Middlesex and found guilty; the Q. B. arrested judgment, the description of place not being made

* Information kindly supplied by the officials of that court.

† *Sic, per* L. Denman C.J.; including the county of the City of London.

sufficient by s. 3, above, in cases not tried at the C. C. C., and the defect not being cured by (rpd.) s. 20 above, 'the *nisi prius* Court not appearing 'by the indictment,' to have had jurisdiction over the offence. The court refused, after verdict, to enter a suggestion [allegation] of a trial in Middlesex, *nunc pro tunc*. And, *semble*, such an application would not be granted at any period. An indictment preferred in the C. C. C. should, with a view to the possibility of its removal, contain, besides the statutory venue, a venue of the county where the offence really took place. And if that has not been done, it should be made a condition of the removal by *certiorari* that the defendant consent to the insertion.' *Stowell*, 5 Q. B. 44, 1843; and see also *Gregory*, above; *Hunt*, 10 Q. B. 925; 17 L. J. M. C. 14; 2 Cox C. C. 264, 1847; and *Smythies*, 1 Den. C. C. R. 498; 19 L. J. M. C. 31, 1849. On an indictment found at the C. C. C. for perjury committed in London, within its jurisdiction, afterwards removed by *certiorari* into the Q. B., Middlesex was specified in the *certiorari* as the county of trial, and the jury were taken from that county; it was held that the Q. B. had a discretion to name in the *certiorari* the county or jurisdiction—provided it be within the jurisdiction of the C. C. C.—in which the trial was to take place, and that by the jurors summoned thence the same issues—here one count was for perjury in Middlesex, and one for it in London—could be tried as would have been in the C. C. C. *Castro*, L. R. 9 Q. B. 350; 30 L. T. 320, 1874; 28 L. T. 342, 1873; 43 L. J. Q. B. 105; 12 Cox C. C. 454: under 9-10 V. 24, 3.

'*Palmer's*' *A.*] By 'Palmer's Act,' 19-20 V. 16, 1, 3, the K. B. has power to order cases where 'it is expedient to the ends of justice' indictments found or to be preferred for felonies or misdemeanours committed out of the jurisdiction of the C. C. C., to be tried at that Court. In *Moross*, committed for trial (for rape, &c.) on the ground of 'enormous excitement in the city and county,' the Q. B. D. thought it better that the trial should be at the C. C. C. rather than at Newcastle or even in either of the adjoining counties, Northumberland and Durham, though this delayed the trial for six weeks—on condition that defendant paid all the *extra* costs and gave 100*l.* as security for them: 7 T. L. R. 50, 1891. By 46-7 V. 51, 50, indictments under it or the Corrupt Practices Prevention Acts (enumerated in *Index*) may, if they are in or removed into the High Court at the instance of the Attorney-General, be tried there, or, if with a special jury, at the Royal Courts of Justice. Offences under the Official Secrets A. 1911, 1-2 G. 5, 28 (and the Census Acts, 63-4 V. 4 & 6), if alleged to have been committed out of the United Kingdom, may by s. 10 (2) also be tried there. For other cases, see Index, *Venue*.

Procedure] is by motion to the K. B. D. for an order *nisi* during the sittings: in vacation (when there is no Div. Ct. sitting) to a judge at chambers for a summons: *Short*, Cr. Off. Pr. R. 19.

6. *Indictments A.* 1915] R. 2 is: 'The commencement of the indictment shall be in the following form:

THE KING *v.* A. B.

'Court OF TRIAL [*e.g.* Central Criminal Court [*or*] In the High Court of Justice, King's Bench Division, [*or*] Durham County Assizes held at Durham, [*or*] Hants Quarter Sessions held at Winchester].'

Apart from statute, the Q. B. D. has inherent power to change the place of trial (though, perhaps, not technically the *venue: Chitty*, 1 Cr. L. 201). At any rate, removal into the High Court does not *ipso facto* change the venue.

7. *Change of venue—not merely for convenience*] Only when it is alleged that a fair and impartial trial cannot be had in the county where the venue is laid, will the K. B. D., on an affidavit stating that fact, generally consider whether the trial may be had in an adjacent county 'usually on the same circuit': *Short*, p. 100. Good ground must be stated in the affidavit for the belief that a fair trial cannot be had. *Harris*, 3 Burr. 1330; 1 W. Bl. 378, 1762. In *Clerk* v. *R.*, 9 H. L. Cas. 184, 1861, the H. L.—after the trial—assumed that a suggestion that a trial (*quo warranto*) 'may be more *conveniently* had in' Middlesex than in the county of Lancaster meant more *fairly*. In *Casey*, 13 Cox C. C. 614, 1877: libel, the Irish Q. B. refused to entertain a suggestion that a fair trial could not be had in Dublin because defendant could not afford to pay the fares of his witnesses (from Cork) and appear to have thought that the *venue* in a criminal case cannot be changed, and that the *place of trial* ought not to be changed merely on the ground of 'convenience': so *Dunn*, 11 Jur. 287, 1847; but in two subsequent murders that court changed the venue on the ground that an impartial trial could not be had. *McEneany*, 14 *ib.* 87, 1878; *Walter*, *ib.* 579, 1881—in both cases, not without dissent; in the former defendant's solicitor swore that there was strong prejudice against him in the venue county, and that many persons qualified as jurors there had expressed their belief in his guilt: in the latter, a 'Land League' case, the Crown urged successfully in two counties that an impartial trial could not be had, but only obtained a change to a third on terms, one of which was to pay the accused's costs incurred by the change.

It seems that the court is slow in any case to grant a change, and *Short*, Cr. O. Pr. p. 106, note, says that it 'will require stronger grounds to be shown in felony,' but in *Holden*, 5 B. & Ad. 347; 2 Nev. & M. 167, 1833, Denman C.J. said that even in the case of misdemeanour, 'the circumstances have almost amounted to a necessity.' There—a capital felony—one reason for refusing was that Suffolk was 'a great county,' and that the alleged prejudice would have time—nearly a year between trial and committal—to die down; the defendants were in fact acquitted in Suffolk. In *Sheldon*, 32 L. T. N. S. 27, 1875, it appeared to be necessary in a trial for perjury that there should be a view of premises in question, which, however, were in Warwickshire and not in Worcestershire, in which the bill was found; it had been removed into the Q. B. and was to be tried on the civil side at the assizes. Cockburn C.J., Blackburn and Mellor JJ.—apparently on the authority of *Clerk* v. *R.* above—ordered the trial to take place at Warwick Assizes: acquittal.

The application must be made before the trial; after verdict the C. C. A. will not, as a rule, hear it: *E. Wilson, &c.*, 1911.

C. APPREHENSION.

See *Suspects.*

For *Violence* and *Breaking in* in arrest, see under *Murder* and *Riots.*

Authority] 'The constable hath as good authority in his place as the Chief Justice of England in his': *per* Coke C.J., 1616: 1 Rolle's Rep. 238. That authority is discussed under *Tooley,* 1709. It extends to calling on any private person to assist him in arresting (and, perhaps, generally in the execution of his duty) when there is a reasonable necessity: *Sherlock,* L. R. 1 C. C. R. 20; 35 L. J. M. C. 92; 10 Cox C. C. 170, 1866.

1. *Arrest defined*] See *Fresh pursuit* under *Murder.*

By private persons—common law] At common law all private persons are justified, without a warrant, in apprehending and detaining until they can be carried before a magistrate all persons found committing or attempting to commit a felony or to escape after the attempt: *per* the judges. *Hunt; Howarth,* 1 Moo. C. C. 93, 207, 1825, 1828; or under a statute. In both these cases the crime took place in the night; but in neither was that fact the ground of the decision, though in the former it is alluded to apparently with the view of emphasising the duty of a private person who, in the daytime, would share it with many others. The authorities in 1 Russ. Cri 727, do not mention the night. See 1 Hale, 439.

But on mere suspicion of felony, or of lesser offences, a private person has at common law no right to apprehend. Fost. 318. Whether or not a private person may arrest one *indicted* for felony does not appear to be well settled. 2 Hale, P. C. 84; Dalton, c. 170, s. 5; 1 East, P. C. 300; 1 Russ. Cri. 729.

The view that at common law every private person may arrest any suspicious night walker, and detain him till he give a good account of himself, *e.g.* Hawk. P. C. 2, 12, 20; 13, 6, would be an authority even more general than that of a peace officer, and it is not law. Russ. Cri. 6th ed. 75-6.

Where a breach of the peace is actually committing, any private person, after proper warning, and calling on the parties to desist, may interfere to prevent it, even though no felony be committed or attempted. Fost. 272, 311; 1 Russ. Cri. 727.

Statutes] By 4-5 G. 5, 58, 27: 'Where at common law or under' *any* A. 'there is power to arrest a person without a warrant, a warrant for his arrest may be issued.'

By 14-15 V. 19, 11: 'It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.'

No warrant] By 24-5 V. 96, 103, incorporated in Public Stores A. 1875: 'Any person found committing any offence punishable either upon indictment or upon summary conviction, by virtue of this [Larceny] Act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person and forthwith taken, together with such (*sic*) property, if any, before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence punishable either upon indictment or upon summary conviction, by virtue of this Act, shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorised and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.' Ss. 41 and 42 of 6-7 G. 50 virtually reproduce this s. and s. 104, p. 233, in respect of offences under that A. (except threatening to publish with intent to extort under s. 31).

By 24-5 V. 97, 61: 'Any person found committing any offence against this [Injuries to Property] Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace to be dealt with according to law.'

By 24-5 V. 99, 31: 'It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence against this [Coinage] Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed, as soon as reasonably may be, before a justice of the peace, or some other proper officer, to be dealt with according to law.'

For other statutes, see below and *Poachers* under *Game*.

Search warrant] See s. 103, above. S. 10 of the Crim. L. Amendment A. 1885, gives drastic powers to holders of warrants to search for females 'unlawfully detained for immoral purposes.' S. 42 (1), (2) of the Larceny A. 1916, empowers any justice to issue warrants and any 'chief officer of police' (defined s. 46, 1) 'to authorise a constable, &c. to search for and seize property believed to be stolen on premises occupied by any one who within twelve months has been convicted of receiving stolen property or of harbouring thieves or who has ever been convicted of any offence involving fraud or dishonesty and punishable with penal servitude or imprisonment.' The warrant may be granted not in view of any specific theft, but on suspicion of the premises being 'generally a receptacle for stolen goods.' So, *mutatis mutandis*, by 50-1 V. 28, 12 (2), (3), a justice may warrant a constable to seize goods offending against that, the Merchandise Marks A. 1887. See also ss. 23, 49, and 123 of the Bankruptcy A. 1914; 39-40 V. 36, 205 (customs officers to search suspected premises, breaking in, if necessary); and 61-2 V. 39, 1 (2):

men living in, &c. prostitute's house; and for a list of such warrants, *Atkinson's* Magistrate's Annual Practice, 1914, p. 229.

By peace officer without warrant at common law—felony] The power of a peace officer [see *Tooley*, 1709] to apprehend and detain offenders is much greater than that of private persons. For they may exercise all the powers of the latter, and their right to apprehend persons indicted for felony is undoubted. East, P. C. 298, 300. And they may, which private persons cannot, apprehend persons *on a reasonable suspicion* of felony. *Samuel* v. *Payne*, Dougl. 359, 1780; East, 301; 2 Hale, P. C. 83, 84, 89, 92. Although no felony has been committed: *Beckwith* v. *Philby*, 6 B. & C. 635, 1827; East, *ib.* But see *Dadson*, 1850.

What is a reasonable suspicion of felony cannot, of course, be stated with precision. But it has always been considered that a charge of felony by a person not manifestly unworthy of credit, is sufficient to justify the apprehension. East, P. C. 302. The peace officer should 'inform himself as well as he can of the circumstances, and the relation of the party should appear credible.'

Hue and cry] See *Rescue* under *Murder*.

Misdemeanour] In cases of misdemeanours the warrant *must* be there, whether accused asks for it or not, and produced if required. See *Codd* v. *Cabe*, 1 Ex. D. 352; 45 L. J. M. C. 101; 13 Cox C. C. 202, 1876: 'unless (a) the statute creating the misdemeanour expressly gives' the constable 'this power, or (b) a breach of the peace is taking place or is about to take place and the arrest is necessary to prevent it': *Police Code* by the *Commissioner of Police for the Metropolis*, 1912, p. 3, where 'breach of the peace' includes any misdemeanour.

Breach of peace] is there defined: 'any violation of that quiet, peace and security which is guaranteed by the laws for the personal comfort of every individual.' There seems to be no better definition in any law book: but many instances are given in a learned note (*q*), 9 Halsbury, 297; *ib.* p. 468. *Affray* and *Duels* are treated under *Breach of the Peace*. Whether a peace officer is warranted in arresting a person after a mere breach of the peace has been committed, is a point which has occasioned some doubt. There are, indeed, some authorities to the effect that the officer may arrest a person on the charge of another, though the affray is over, for the purpose of bringing him before a justice, 'to find surety of the peace for appearance.' 2 Hale, P. C. 90; *Handcock* v. *Sandham*, 1785; *Williams* v. *Dempsey*, 1787, cited East, P. C. 306 *n.* But the better opinion was always said to be the other way. East, P. C. 305; Hawk. 2, 12, 20; cf. Russ. Cri. 725. See *Timothy* v. *Simpson*, 1 C. M. & R. 757, 1835: he may arrest if there is immediate danger of a renewal; *Carey*, 14 Cox C. C. 214, 1879. And it was so expressly decided in *Walker*, 1 D. & P. C. C. 358; 6 Cox C. C. 371; 23 L. J. M. C. 123, 1854; there defendant had assaulted a police constable, who went away, and after two hours' time returned and took him into custody; held an unlawful apprehension: c. q. Pollock C.B. said, 'The assault for which the prisoner might have been apprehended was committed some time before, and there was no continued pursuit of the prisoner, and the interference of the prosecutor, was not for the purpose of preventing an affray nor

of arresting a person whom he had seen committing an assault.' The apprehension was so disconnected from the offence as to render it unlawful, and there was no danger of a renewal. A police constable having been struck by defendant went for assistance, and after an interval of an hour returned with three other constables, when he found defendant at home and the door closed; after another interval the constables forced the door open and endeavoured to apprehend him; he resisted and wounded the prosecutor, but was at last apprehended. Held, that as there was no danger of any renewal of the original disturbance, and as the facts did not constitute such a fresh pursuit as to justify the breaking in, the arrest was illegal. *Marsden,* L. R. 1 C. C. R. 131; 37 L. J. M. C. 80; 11 Cox C. C. 90, 1868: c. q. Cf. *Higgs,* 1869, and *Cumpton.*

In *Light,* D. & B. C. C. 332; 27 L. J. M. C. 1; 7 Cox C. C. 389, 1857, defendant was convicted of assaulting a constable in the execution of his duty. The constable, whilst standing outside defendant's house, saw him take up a shovel, and hold it in a threatening attitude over his wife's head, and heard him at the same time say, 'If it was not for the policeman outside, I would split your head open.' About twenty minutes after, he left the house, saying that he would leave his wife altogether, and he was then taken into custody by the policeman, who had no warrant; he assaulted the constable. Held, that he was justified in the apprehension, especially in view of the recency of the threat—'an assault in point of law.' See also *Baynes* v. *Brewster,* 11 L. J. M. C. 5, 1841.

A warrant of commitment, issued by county justices of Worcestershire, and served in the city of Worcester (whither defendant had not been pursued from the county), without being backed by a justice for the borough, was held to be defective; c. for assault q. *Cumpton,* 5 Q. B. D. 341; 49 L. J. M. C. 41, 1880: C. C. R.

By the Metropolitan Police A. 10 G. 4, 44, 7: 'It shall be lawful for any man belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs.'

By the Metropolitan Police A. 2-3 V. 47, 65: 'It shall be lawful for any constable belonging to the metropolitan police force to take into custody, without warrant, any person who, within the limits of the metropolitan police district, shall be charged by any other person with committing any aggravated assault, in every case in which such constable shall have good reason to believe that such assault has been committed, although not within view of such constable, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender.' See also ss. 54, 63, 64, and 66, in some of which the 'view' is not necessary.

By the Town Police Clauses A. 10-1 V. 89, 15: 'Any person found committing any offence punishable either upon indictment, or as a misdemeanour upon summary conviction, by virtue of this or the special Act [*i.e.* for any particular town or district, s. 2], may be taken into custody, without a warrant, by any of the said constables, or may be apprehended by the owner of the property on or with respect to which the offence is committed, or by his servant or by any person authorised by him, and may be detained until he can be delivered into the custody of a constable; and the person so arrested shall be taken, as soon as conveniently may be, before some justice to be examined and dealt with according to law: provided always, that no person arrested under the

powers of this or the special Act shall be detained in custody by any constable or other officer, without the order of some justice, longer than shall be necessary for bringing him before a justice, or than forty hours at the utmost.'

By peace officer without warrant—statute] See for special cases under *Betting, Gaming,* and *Military, &c. Offences,* and *Trebeck* v. *Croudace,* 34 T. L. R. 57, 1917: C. A. By 24-5 V. 96, 104: 'Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law': reproduced almost verbatim, 6-7 G. 5, 50, 41 (3).

Similar provisions are contained in 24-5 V. 97, 57, and 24-5 V. 100, 66.

Evidence] A policeman acting under these ss. may be asked generally whether he had cause to suspect a person whom he had arrested, in order to show that the arrest was in execution of the constable's duty, but he cannot be asked in chief what were the particular grounds upon which his suspicion was founded when they did not form part of the transaction itself: defendant may, if he likes, ask him his grounds. *Turberfield,* L. & C. 495; 34 L. J. M. C.; 10 Cox C. C. 1; 11 L. T. 385, 1864.

By 34-5 V. 112, 5, a constable may apprehend without warrant a convict on licence who appears to him to be getting his living by dishonest means, or who is charged with any offence under s. 7, extended by 54-5 V. 69, 6, to certain similar cases, *i.e.* if within seven years of the expiration of the last of more than one term for convictions on indictment there is reasonable ground to suspect him of intending to commit crime: in some of the cases mentioned the constable must be authorised to arrest without warrant by his superior officer.

By 39-40 V. 36, 199, offenders against the Customs A. may, during three years after the offence, be 'detained.'

By 52-3 V. 18, 6, any peace officer may arrest without warrant any person whom he shall find committing any offence against that, the Indecent Advertisements, A.

By 54-5 V. 69, 2: 'Any constable may take into custody without warrant any holder of a licence under the Penal Servitude Acts [see *Index*], or any person under the supervision of the police in pursuance of the Prevention of Crimes Act, 1871, whom he reasonably suspects of having committed any offence, and may take him before a court of summary jurisdiction to be dealt with according to law.'

By 2-3 G. 5, 20, 1, the same power is given to a constable when there is 'good cause' to suspect any offence against 48-9 V. 69, 2.

Offences against children] So for certain offences by 8 E. 7, 67, 19.

Lunatics] By the Lunacy A. 53-4 V. 5, 15, constables, relieving officers and overseers 'shall immediately apprehend' persons 'wandering at large' and 'deemed to be lunatics.'

'*Defectives*' *escaping*] By 3-4 G. 5, 28, 42: also any person authorised in writing.

For the re-capture of escaped criminal lunatics, see 47-8 V. 64, 11.

Withdrawal of warrant] Where it is clear that it has been granted for what is not a criminal offence, the K. B. D. probably has power to *mandamus* its withdrawal: *per* L. Alverstone C.J. and Darling J., *Crossman,* 21 Cox C. C. 605; 72 J. P. 250; 24 T. L. R. 517; 98 L.T. 760, 1908.

Evading arrest] See *Hampson,* 1915: c. q. because the judge insisted on defendant's attempt as evidence of guilt.

Illegal arrest—homicide] See *Homicide,* &c., and *Sattler,* whence it appears that the homicide must be due to and not merely coincident with the illegal arrest, to found a legal excuse.

A Danish vessel, bound for America from Denmark, by arrangement with the British Government for the purpose of visitation and search, put into a British port, where Russian subjects on board were arrested for an offence on English territory. It was conceded that they could not have been arrested on the high seas, but the K. B. D. held that the arrest was legal: *Garrett, ex parte Scharfe, &c.,* 1917, 2 K. B. 99; 86 L. J. K. B. 894; 81 J. P. 145; 33 T. L. R. 188, 305. The principle seems to be that of *Sattler.*

Things found on arrested person] See that title.

Rewards for apprehension for certain offences] See *Costs.*

Statements made on arrest] See *Gardner* and *Hancox.*

Special constables] who are servants (not of the King, but) of a railway company, and arrest for felony without reasonable grounds, render their employers liable in an action for false imprisonment: *Lambert* v. *G. E. Ry.,* 1909, 2 K. B. 776; 79 L. J. K. B. 32; 73 J. P. 445; 22 Cox C. C. 165; 25 T. L. R. 734; 101 L. T. 405: C. A. The governing enactments are: 1-2 W. 4, 41; 4-5 G. 5, 61, the S. C. Acts, 1831 and 1914; and 45-6 V. 50, 196.

2. IDENTIFICATION.

is essentially a question for a jury: *Laycock,* 6 Cr. A. R. 212, 1911; but see *Gilling,* 1916.

During trial] See *De Berenger.*

By one witness] may not be sufficient: *Witton,* 6 Cr. A. R. 149, 1911: c. q.

By photograph] See Index, *Witness,* and *Morrison,* below.

By handwriting] In *G. H. Williams,* the C. C. A. was not satisfied with this alone; nor in *T. Rickard,* 1918: c. q.

By finger-prints] Such evidence alone may be sufficient: *Castleton,* 3 Cr. A. R. 7, 1909. The court may itself examine them: *F. Bacon,* 11 Cr. A. R. 90, 1915.

By voice] For an instance, see *Keating,* 2 Cr. A. R. 61, 1909.

Duty of police] In *Dickman,* Alverstone L.C.J. said that it was elicited from one witness in cross-examination, 'that when he went down for the purpose of seeing if he could identify Dickman he was first invited by somebody, possibly on behalf of the police, to look through a window, and on doing so did see, sitting alone, the' appellant. 'We need hardly say that we deprecate in the strongest manner any attempt to point out beforehand to a person coming for the purpose of seeing if he could identify another, the person to be identified, and we hope that instances of this being done are extremely rare. I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so.'

In *Bundy,* 5 Cr. A. R. 270, 1910, there was the following cross-examination: 'When you picked' appellant 'out, you had seen him before?'—'Yes, I saw his back.' 'But you did not see his back at the police-station?'—'No.' 'Then how came you to pick out this man?'—'Because he very much resembled the man' the police 'had suspicion of' and witness 'afterwards admitted the detective had told him of their suspicions of the appellant': c. q.; 'it was an extremely improper thing to do': *per* Pickford J. So *T. Finch,* 12 Cr. A. R. 77, 1916, on the authority of *Bundy:* failure to point out that appellant had not been identified in some cases.

In *Morrison,* 6 Cr. A. R. 170, 1911, the C. C. A. approved of the judge telling the jury that they must be satisfied that certain witnesses

had not made an honest mistake 'arising from the fact that before they picked out the prisoner at the police-station, they had had the means, if they had chosen to use it, from the descriptions and photographs in the newspapers, of knowing what was the personal description of the man they were going to identify': they thought it was 'monstrous' that anyone's photograph should be published 'simply because he is accused of a crime,' and added, 'if we thought that any of the jury had been misled because the witnesses were in fact identifying a photograph when they were purporting to identify a man, we should not hesitate to allow this appeal.'

When two boys were taken to a guard-tent where there was only one other person beside the appellant, and a police-sergeant asked, 'Is that the man?' Alverstone C.J. said: 'That is not a satisfactory way of identification, whether the persons identifying were young or old. It is not right to point out and ask questions in this way. The usual and proper way in such cases is to place the suspected man with a sufficient number of others and to have the identifying person pick out a man without assistance . . . [The trial judge] told the jury that they must ask themselves if the identification was sufficient. We do not think this a sufficient direction. He should have pointed out that the boys, having both failed earlier to identify, had only acquiesced in a suggestion rather than positively identified': *T. Chapman,* 7 Cr. A. R. 55, 1911: c. q. So in *G. H. Williams,* 8 Cr. A. R. 84, 1912, where appellant was alone when identified. Though the conviction was not quashed, the same condemnation was repeated in *Cartwright,* 10 Cr. A. R. 221, 1914.

Evidence of identification—extent of] See *Christie,* 1914. Where there were six counts for larceny and one for receiving, the issue being identification, and fourteen persons identifying defendant, the jury ought to have been directed that if they were satisfied with the defence on some counts, they might acquit on all: *Finch,* 1916: c. q.

In prison] A Lords' committee appointed to report on the case of *Gregg,* under sentence of death for treason, reported that two persons sent by them to the prison had made affidavits that he had been previously acquitted of counterfeiting coin (while a woman of his name was convicted and 'burnt' for it), and that he denied it: they sent to search the Newgate books: 14 St. Tr. 1386, 1708.

D. PRACTICE.

a. Preliminary.

I.

Arrest] See *Apprehension.*

1. *Parties*] The 'parties' in a criminal proceeding are the crown, and 'it seems that the King himself cannot sit in judgment upon any indictment, because he is one of the parties to the suit': 3 Hawk. 2, 1, 2. 'When the grand jury or the magistrate has allowed the proceedings to affect the accused, the proceeding is not the private prosecutor's. His name never, as far as I can trace, appears on the record; . . . the King can control the whole proceedings; he can deprive the private prosecutor of any voice in them by taking over the prosecution. . . . If the accused formally pleads, the replication where there is a private prosecutor runs: 'The King's Coroner, or Clerk of Arraigns, or Clerk of Assize . . . who for our Lord the King in this behalf prosecutes, &c. . . .': *per* Scrutton J., in *Re Boaler,* below. Thus 'prosecutor' used of the person (chiefly) affected by the crime, though a convenient word, is strictly inaccurate, as the crown is invariably the prosecutor. See *Trial,* below, and cf. 46-7 V. 51, 53 (1): the director of public prosecutions not to be deemed a private prosecutor.

But (at any rate, in the Criminal Ev. A. 1898) 'prosecutor' means a living person: *Biggin,* 14 Cr. A. R. 87, 1919: c. q. See *Addenda.*

Information] 'An information is an allegation that a misdemeanour has been committed, made by the Attorney-General or other person filing it in court. Criminal informations in the High Court may be resorted to in the case of indictable *misdemeanours,* but not in the case of *treason* or *felony.* They are of two kinds: (1) *ex-officio,* filed by the Attorney-General, as of right; (2) filed by the King's Coroner and Attorney [viz., the Master of the Crown Office] under special order of the High Court (K. B. D.), giving leave to file it, which is made on an application in accordance with the Crown Office Rules, 1906, rr. 35-39: 2 Russ. Cri. 923. Informations are tried before a petty jury in the K. B. D. or assizes on the civil side; prosecutor or defendant may have a special jury. The A.-G. of the Duchy of Lancaster may not file an *ex-officio* information. This process 'is the more appropriate mode of prosecuting such misdemeanours as peculiarly tend to disturb or endanger the government or to affront the sovereign in the discharge of the royal functions, delay being thereby avoided in the prosecution of such offences (see 4 Bl. Comm. ch. 23, s. 3)': 7 Encyc. Laws E. 201, 203. Information not *ex-officio,* it appears, *ib.*, is appropriate on the 'relation of a private subject' for misdemeanours 'which on account of their magnitude or pernicious example, deserve the most public animadversion' (Bl.). This power is 'in modern times used very sparingly—usually only in cases of libels on private individuals when attended with circumstances of aggravation, and illegal acts committed by magistrates or inferior public officers,

from corrupt or vindictive motives and not merely from ignorance or mistake' (208).

The origin of the limitation of this procedure seems to be that 'great inconvenience having been felt from compelling persons in low circumstances to shew cause against informations in the King's Bench, and after conviction to travel to Westminster from perhaps a very remote part of the country, and consequently at great expense and loss of time, to receive judgment, the court came to a resolution not to grant any informations against such persons, however fit the subject might be in other respects for such mode of prosecution': *Chitty*, 2 Prac. of the Law, P. 4, c. 5, p. 364, 1834, who adds: 'The jurisdiction to grant leave to file a criminal information in the Crown Office is one of the highest and perhaps most delicate and discreet branches of jurisdiction, somewhat in the nature of the ancient Court of Honour; and accordingly a criminal information is granted or refused not according to any strict legal rule, but depending on the question whether the party applying has in all respects acted as a gentleman, and therefore deserves the protection of the court, or whether the other party has acted malignantly and without provocation.'

Indictment—a record] *Per* Holt C.J., in *L. Preston*, at 659, where the authority of what is alleged as a statute, 46 E. 3, 1372, is properly denied, though it is clearly accepted as such in Coke's preface to 3 R. at vi. Exactly the same point was taken in *A. Sidney*, 1683, at 836 and 900, and simply overruled. The document is proved at 1 Stat. of the Realm, 394, to be merely a petition. Cf. Index, *Records*.

Indictment—statutes] By 19-20 V. 54, 1 (as amended), it is 'lawful for the foreman of every grand jury empanelled in England and Wales, and he is hereby authorised and required to administer an oath to all persons whomsoever who shall appear before such grand jury to give evidence in support of any bill of indictment, and all such persons attending before any grand jury to give evidence may be sworn and examined upon oath by such grand jury touching the matters in question.' By s. 3, 'foreman' includes 'any member of such grand jury who may for the time being act on behalf of such foreman in the examination of witnesses. . . .'

The Vexatious Indictments A. 1859, 22-3 V. 17] By s. 1, 'No Bill of indictment for . . . perjury, subornation of perjury [rpd. as regards these two offences in England by Perjury A. 1911, but re-enacted s. 11], conspiracy, obtaining money or other property by false pretences, keeping a gambling-house, keeping a disorderly house, and any indecent assault, shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment, . . . if charged to have been committed in England or Ireland, be preferred by the direction or with the consent in writing' of a judge of one of the superior courts of law, or of the attorney- or solicitor-general, 'or (in the case of an indictment for perjury) by the direction of any court, judge, or 'public Functionary,' authorised by 14-5 V. 100 [*i.e.* s. 19 rpd. in England: see above] so to direct': extended by 32-3 V. 62, 18 (fraudulent

debtors in England); 35-6 V. 57, 18 (in Ireland); 44-5 V. 60, 6 (libel); 48-9 V. 69, 17 (sexual offences); 50-1 V. 28, 13 (merchandise marks); 6 E. 7, 34, 2 (2) (corruption); 8 E. 7, 45, 4 (1) (incest); 8 E. 7, 67, 35 (offences against children); 1-2 G. 5, 6, 11 (perjury); 4-5 G. 5, 59, 164 (3) (bankruptcy misdemeanours); 5-6 G. 5, 34, 1 (4) (war felonies).

S. 2. Where any charge or complaint shall be made before any one or more of her Majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then, in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice and he is hereby required to take the recognisance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognisance, information, and depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.

22-3 V. 17 is amended by the Criminal Law Amendment A. 1867, 30-1 V. 35.

S. 1. The said provisions of the said first section of the said Act shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may . . . be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law; and nothing in the said Act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred. . . .

S. 4. All the provisions of the said Act 11 & 12 V. c. 42, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognisance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read, and shall have operation as part of this Act.

S. 6. [*Recital of* 11-12 V. 42, 17]. Whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition, in accordance with the provisions of the said Act, of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken,

and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

S. 7. Whenever a prisoner in actual custody shall have served or shall have received notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement: and such gaoler shall convey the prisoner accordingly. . . . [words repealed by 56-7 V. 14, S. L. R. 1].

S. 10. Where recognisances shall have been entered into for the appearance of any person to take his trial for any offence at any court of criminal jurisdiction, and a bill of indictment shall be found against him, and such person shall be then in the prison belonging to the jurisdiction of such court, under warrant of commitment, or under sentence for some other offence, it shall be lawful for the court, by order in writing, to direct the governor of the said prison to bring up the body of such person in order that he may be arraigned upon such indictment without writ of habeas corpus, and the said governor shall thereupon obey such order.'

No committal for trial] By 8 E. 7, 41, 1 (5): 'Any person having by law a right to present a bill of indictment to a grand jury in a case where no person has been committed for trial, and proposing to do so at any assizes or quarter sessions, shall give notice of his intention to do so to the proper officer more than five days before the commission day or day appointed for holding the court of quarter sessions, as the case may be.' Where there has been no committal, the court is more cautious on certain points: *O'Callaghan*. Where the justices dismiss for want of evidence, the prosecutor is entitled to require them to take his recognisance to prosecute: *L. Mayor of London, &c.* v. *Stubbs*, 16 Cox C. C. 77; 50 J. P. 711; 54 L. T. 646, 1866. But the charges must be exactly the same as those dismissed: *Bode*, Times Newspaper, Oct. 23, 1906.

The Vexatious Actions A. 1896] does not refer to criminal proceedings: *In re Boaler*, 1915, 1 K. B. 21; 83 L. J. K. B. 1629; 111 L. T. 497; 24 Cox C. C. 335; 30 T. L. R. 580; 58 S. J. 634: C. A. confirming K. B. D.

*Grand jury procedure**] On receiving a precept from 'the King or of two or more justices of peace . . . the sheriff is to return twenty-

* **1.** *Suspension of Grand Juries.*—(1) No precept for the summoning of a grand jury or grand jurors shall be issued nor shall any grand jury be summoned, and any such precept or summons in existence at the date of the commencement of this Act shall be void and of no effect, so far as it relates to grand juries or grand jurors.

(2) In any case where a person has been committed for trial, or where the consent or direction in writing of a judge of the High Court or of the Attorney-General or Solicitor-General for the presentment of an indictment against any person has been given, but in no other case, an indictment against that person may be presented in the appropriate court without having been found by a grand jury, but in other respects as heretofore; and where an indictment is so presented it shall be proceeded with in like manner as if a true bill had been found and presented in the court by a grand jury, and the statute and common law relating to such proceedings shall apply accordingly:

Provided that where an indictment is so authorised to be presented in any court it shall be lawful for that court to authorise the addition of other counts to the indictment or the presentment in the court of any further indictment against the same person, if such counts or indictment are in the opinion of that court founded on facts or evidence disclosed in any examination or deposition taken before a justice of the peace in the presence of the accused.

(3) Where a person is bound by recognizance to prosecute a person who is not committed for trial the recognizance shall require him to apply to a judge of the High Court or the Attorney-General or Solicitor-General for consent to present an indictment, and in the event of such consent not being obtained the recognizance shall be void, and where at the commencement of this Act a person has been bound by such a recognizance the recognizance shall have effect as if it contained such a requirement as aforesaid.

(4) The First Schedule to the Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), shall apply to all indictments presented in a court in pursuance of this Act, except that the words "presentment of the grand jury" required by Rule 2 in the said Schedule shall be omitted.

(5) Where the form of any recognizance or other instrument (statutory or otherwise) relating to procedure as to indictable offences contains a reference to a grand jury, such reference shall be omitted, and the rule committee established by the Indictments Act, 1915, shall make rules for making such variations in such forms and instruments, and for such other purposes as they think expedient for carrying this Act into effect.

(6) For the purposes of this section, the expression "appropriate court" means the court to which the accused is committed for trial (that is to say, the court specified in the recognizance entered into by the prosecutor or witnesses before the committing justices) or which is specified in the consent or direction given by a judge of the High Court or the Attorney-General or Solicitor-General as the case may be.

2.—(3) This Act shall come into operation on the second day of April nineteen hundred and seventeen, but shall not apply to indictments found by a grand jury before that date or the procedure on the trial of indictments so found.

(4) This Act shall remain in force only during the continuance of the present war and for a period of six months after the termination thereof.

four or more out of the whole county, namely, a considerable number out of every hundred, out of which the grand inquest . . . are taken and sworn *ad inquirendum pro d. rege et corpore comitatus*': 2 Hale P. C. 154 (they ought to be freeholders: *ib.;* but this is not so now: *Stephen,* Proc. Cr. L. 187). Hence a grand jury may make any statement it likes, *e.g.* may *allege* a previous conviction in an indictment.

The grand jury are not usually very strict about evidence, as they only require that a *primâ facie* case should be established; they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. Thus, in *Hunter* (forgery), 1829, the grand jury complained to the judge that the deed alleged to be forged had not been produced to them, though defendant, who had it, had had proper notice: Park J. allowed them to receive secondary evidence of it. But as they may insist on the same strictness of proof as must be observed at the trial, it may be prudent in all cases to be provided, at the time the bill is preferred, with the same evidence which is intended afterwards to support the indictment. In *Hunter,* above, they were entitled to see certain other deeds a witness refused to produce. See, however, *Gerrans.* A grand jury has nothing to do with venue.

Refusing evidence] is 'unprovided for': *Rendle,* 11 Cox C. C. 209, 1861; prosecutrix in rape refusing could not be committed for contempt nor her deposition read: no bill.

Contempt] of a grand jury is not indictable: *Skinner,* Lofft, 55, 1772.

Defendant cannot give evidence on his own behalf before the grand jury. *Rhodes,* 1899; *Saunders,* 63 J. P. 24, 1898: C. C. R. They cannot ignore a bill on the ground of his insanity: *Hodges,* 8 C. & P. 195, 1838; same jury as ignored, found the bill.

When the grand jury found a bill preferred against A. and B. for murder, against A. for murder, and B. for manslaughter, it was held that the finding against A. was good, and that against B. a nullity, and directed a fresh bill to be preferred for the manslaughter. *Bubb,* 4 Cox C. C. 455, 1851; this practice is, apparently, convenient: 1 East P. C. 347, 350. And so, *Bacon's Abridgement,* Indictment D., generally they 'may . . . find part of a bill true and part false, and that against the direction of the court': 'the safest way is to deliver them a new' bill against the same person, and this course is frequently adopted in practice. Cf. *North-Eastern Ry. Co.,* 19 Cox C. C. 682, 1901. After bill found, the judge ought not to inquire whether the witnesses were properly sworn before going before the jury [the practice before 1856]; and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill on their own knowledge only, 'and were anciently in the habit of doing so.' *Russell,* Carr. & M. 247, 1842.

If the bill be not found, 'a fresh bill may afterwards be preferred to a subsequent grand jury': 4 Bl. Comm. 301.

Bill preferred more than once] But if the grand jury have ignored a bill, they cannot find another bill at the same assizes or sessions, against the same person for precisely the same offence, and if such other bill be sent before them they should take no notice of it. *Humphreys,* C. & M. 601, 1842; but it was done in *Newton,* 1843, where Wightman J. expressly declined to accept that view, though later he assented to it in *Austin,* 4 Cox C. C. 385, 1850.

In *The Justices of Hertfordshire,* 1911, 1 K. B. 612; 80 L. J. K. B. 437; 22 Cox C. C. 378; 75 J. P. 91; 104 L. T. 312; 27 T. L. R. 326, justices, after defendant, offered his choice of summary or jury trial, had elected for the former, still committed him to Q. S., at which a bill was found, refused to quash the indictment, but declined to proceed with the trial. The K. B. D. made a rule absolute 'to enter continuances and to try this indictment.'

Indictment and inquisition] Where there are two indictments (*sic*) for the same act (*e.g.* by coroner's inquisition and the grand jury), defendant ought to be tried on both at once: *Culliford,* 1 Salk. 382, 1705; 2 Hale P. C. 239. Where not guilty of murder was found, but the coroner's inquest 'which stood untraversed found the special matter . . . the party confessed the indictment by the coroner, and had his pardon of course': *Pretty,* 1 Hale P. C. 477, 1665. Procedure is the same when a coroner's jury in the City of London finds arson: 51-2 V. xxxviii. 6.

Where a coroner's jury found manslaughter, but the grand jury ignored the bill, Byles J. is reported (probably wrongly) to have said, 'In no case could he permit a trial to take place on the coroner's inquisition, where the grand jury had thrown out a bill for the same offence, for to do so would be to constitute the petty jury a court of appeal against the grand jury.' *Hutchinson,* 1864. *Sed quære;* cf. *Maynard,* 1812, and *Tancock,* 1876. Still, a conviction for murder or manslaughter without an indictment seems to be nowadays unknown; in *Paine,* 1880, there was no magisterial inquiry: *Kenny,* Outlines C. L. 453 *n.*; but there was a charge of murder on the coroner's inquisition *and* indictment: *Times,* Feb. 17 & 24.

Where a bill for murder was found against the judge's advice, he directed an acquittal: *Kersey.*

The consent in writing of the judge may be given *ex parte: Bray,* 32 L. J. M. C. 11; 3 B. & S. 255; 26 J. P. 723, 1862. The preferable course is to apply to a magistrate, *per* Blackburn J.: *ib.* The *fiat* of the attorney-general need not be produced or proved at the trial. *Dexter.* Where a person, charged with an offence punishable summarily, elects to be tried by a jury, he may be committed to take his trial as if charged with an indictable offence, and if the Vexatious Indictments A. applies to the offence charged in the summons, then by 30-1 V. 35, an indictment for a different offence may be presented, or counts may be added for offences other than that for which he was committed for trial, provided the depositions in the opinion of the court justify the new charges. *Brown,* 1895, 1 Q. B. 119; 18 Cox C. C. 81; 64 L. J. M. C. 1: C. C. R. Since the suspension of grand juries by 7 G. 5, 4, under s. 1 (2), additional counts may be added *before* presentment without leave: *J. Knowles,* 13 Cr. A. R. 147, 1918.

The indictment need not state that the provisions of the A. have been complied with. *Knowlden,* 5 B. & S. 532; 33 L. J. M. C. 219; 9 Cox C. C. 483, 1864.

The Indictments A. 1915] S. 7 regulates its effect on the V. I. A. above; the net result is that some counts in the same indictment may be subject to the V. I. A., and some not.

Counts improperly added] If a count be improperly added without the authority of the court, the proper course is for the judge at the

trial to quash it. Of two counts for obtaining goods by false pretences, one was laid on the 26th, the other on the 29th September. Defendant had been committed on the offence of the 26th, but not on that of the 29th. He moved to have the indictment or its second count quashed, which was refused. Evidence was admitted on both counts and a *separate* conviction and sentence passed on each. The C. for C. C. R. held that the second count should have been quashed, and that as the evidence relating to it was inadmissible on the trial of the first, the conviction on that was also bad. *Fuidge,* L. & C. 390; 33 L. J. M. C. 74; 9 Cox C. C. 430, 1864: c. q. Since 30-1 V. 35, it would seem that the consent to add new counts must not be general so as to authorise the prosecution to add any number of counts, nor must the consent include counts founded on facts and evidence not disclosed below. *Bradlaugh,* 15 Cox C. C. 156; 47 J. P. 71; 31 W. R. 229; 47 L. T. 477, 1882: Q. B. D. An *attempt* to obtain money or other property by false pretences is not within the A. *Burton,* 13 Cox C. C. 71; 32 L. T. 539, 1875: C. C. R.

*Previous conviction—felony—averment**] For the Prevention of Crimes A. 1871, see *Previous Conviction,* also Index. The Indictments A. only touches this point by Rule 11, and by repealing part of 7-8 G. 4, 28, 11 (now only important as cited under *Forgery*). 24-5 V. 96, 116, provides the usual practice and, in effect, that in the case of 'habitual criminals' and 'drunkards.' That in any case it is immaterial which offence is first stated, *Hilton,* Bell, 20; 28 L. J. M. C. 28, 1858: C. C. R., is no longer law; 'the previous conviction should not be mentioned even by accident' out of its order: 2 Russ. Cri. 1960 (*q*).

Misdemeanours] In *Deane,* 46 L. J. M. C. 155, 1877; 13 Cox C. C. 386, 1877: C. C. R., an averment of a previous conviction of *felony* was inserted in an indictment for false pretences (misdemeanour) without objection being taken, but the C. for C. C. R., in *Garland,* Ir. Rep. 3 C. L. 383; 11 Cox C. C. 224, 1869, not cited to the English court, expressly held to the contrary: c. q. as they had not power to amend the indictment; they did not deal with the words (now rpd.) of s. 116 of 24-5 V. 96: 'In any indictment for any offence under this Act'—this was under (rpd.) s. 88—'committed after a previous conviction . . . for any felony, misdemeanour or offence . . . punishable' summarily, &c. . . .; but in *Deane* the attention of the court was called to the s. See *Index.*

Copy of indictment] See *Indictment,* R. 13, which virtually repeals 7-8 W. 3, 3, 1, whereby a charge (*5s.*) was authorised. On an acquittal or conviction of felony, a copy of the indictment has for a long time been regularly obtained without an order from the court. *Brangan,* 1 Lea. 1742; *JJ. of Middlesex,* 1834; but R. 13, perhaps, only contemplates the copy being wanted for the purposes of defence.

In misdemeanours defendant is entitled to a copy of the record as of right, without application to the court. *Morrison* v. *Kelly,* 1 W. Blackst. 385, 1762; *Evans* v. *Phillips,* 1763, 2 Selw. N. P., 2nd ed., 1062; 2 Phill. Ev. 162, 10th ed.

See further, 2 Russ. Cri. 2146 *n.*

* Not a count.

Particulars] See s. 3 (1) of the Ind. A. and Rule 4 (4) thereunder, and under *Conspiracy*. Those offences in which the right of the accused to particulars has been recognised, and in which they are most commonly required, are barratry, nuisance, offences relating to highways, conspiracy and embezzlement. See under those respective titles and *Association, &c.*, under *Habitual Criminals*.

It seems that the proper course is for defendant to apply to prosecutor in the first instance for particulars: and, if they are refused, to apply to the court or a judge, on affidavit, that he is unable to understand the precise charge intended. *Bootyman*, 5 C. & P. 300, 1832; *Hodgson*, 3 C. & P. 422, 1828. The application may be made to the judge at the assizes: *Hodgson*.

If particulars have been delivered, the prosecutor will not be allowed to go into other charges than those contained therein. If particulars have been ordered, but not delivered, it seems that the prosecutor cannot be precluded from giving evidence on that head. *Esdaile*, 1 F. & F. 213, 1858: conspiracy. The proper course is to apply to put off the trial.

Fiat of A.-G. necessary for prosecution] in the following cases enumerated 2 Russ. Cri. 1923; fraud by a trustee: 6-7 G. 5, 50, 21; fraudulent concealment of documents of title: 22-3 V. 35, 24; offences under 46-7 V. 3, 7, Explosives A.; under 1-2 G. 5, 28, 8, Official Secrets A.; 53-4 V. 5, 327, Lunacy A.; 63-4 V. 51, 2 (1) (a); Moneylenders A.; 52-3 V. 69, 4 (1), Public Bodies Corrupt Practices A.; 6 E. 7, 34, 2 (1), Prevention of Corruption A.; and

Of Director of Public Prosecutions] under 8 E. 7, 59, 10 (4), Prevention of Crime A.; 8 E. 7, 45, 6, Incest A.

II.

Jurisdiction—House of Lords] So far as *status* is concerned (see *Jurisdiction*), sovereigns *regnant* are not within the jurisdiction; see the protest of *Mary Queen of Scots*, 1 St. Tr. 1169, 1586. 'The immunities of diplomatic agents are in outline the same as those of sovereigns,' but in grave cases there is a limited power of arrest: *Hall*, Internat. L. P. 2, c. 4. See also 7 An. 12. All peers whatsoever must be tried by the House of Lords (see *Certiorari*, below) for treason, felony or misprison of either, and so must all peeresses (not including the widow of a peer married to a commoner, unless a peeress in her own right), but not bishops: 1 Blacks. 401; 9 Halsbury, 270, which latter see for the University Chancellors' courts. Plea and punishment on such a trial are assimilated to those on a commoner's trial by 4-5 V. 22.

For courts-martial, see *Mutiny*.

Corporations] 'A corporation aggregate may be made liable in its corporate capacity for a crime for the punishment of which a fine may be awarded, if the corporation fails to perform a duty imposed by common law, charter or statute, or commits by its servants or agents acting in the course of their employment, an offence which does not involve criminal intent': 9 Halsbury, 235. 'An incorporated company can be guilty of . . . treason, felony, criminal maintenance': *Metropolitan Bank* v. *Pooley*, 10 A. C. 210, 1885 [*per* Selborne C.]: 5 *ib.* 311.

By 52-3 V. 63, 2 (1): 'In . . . every enactment relating to an offence punishable on indictment or on summary conviction . . . the expression 'person' shall, unless the contrary intention appears, include a body corporate.' This is sometimes expressly provided, *e.g.* by s. 3 (1) of Merchandise Marks A. 1887. 'A corporation may be indicted for libel or for nuisance (*per* L. Blackburn, *Pharm. Soc.* v. *London & Prov., &c. Assoc.*, 5 App. C. 870, 1880); and wherever a duty is imposed by statute in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a corporation may be indicted, whether the statute refers in terms to corporations or not: *Tyler and Internat. Comm. Co.*, 1891, 2 Q. B. 592-3: C. A. This is so whether the breach of duty is a nonfeasance (*Birmingham, &c. Rail. Co.*, 3 Q. B. 232, 1843) or misfeasance (*Great North of Eng. Rly. Co.*, 9 Q. B. 315, 1846); . . . a corporation may be fined . . . [criminal] proceedings cannot be taken against it at Q. S., and an indictment there found against a corporation may be removed into the K. B. D. by *certiorari*': 8 Halsbury, 391. In respect of nuisance, '*e.g.* the non-repair of a highway,' it must be remembered 'such acts are not crimes in any accurate sense of the word': *N.* (now Lord) *Lindley, Capacity of Corporations*, 2 Papers, Jurid. Socy. 35, 1857.

So far as *power* is concerned, the only distinction to which it is necessary here to advert is that relating to

Quarter sessions] Their jurisdiction is now regulated by 5-6 V. 38, 1, as amended, which enacts that 'neither the justices of the peace acting in and for any county, riding, division or liberty, nor the recorder of any borough, shall at any session of the peace, or at any adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by' penal servitude for life, 'or for any of the following offences: that is to say, 1, misprision of treason; 2, offences against the Queen's title, prerogative, person, or government, or against either House of Parliament; 3, offences subject to the penalties of præmunire;* 4, blasphemy and offences against religion; 5, administering or taking unlawful oaths'; [6, 7, 8, *false swearing*, &c., and *forgery*, are still withdrawn from Q. S.;] '9, unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze or fern; 10, bigamy and offences against the laws relating to marriage; 11, abduction of women and girls; 12, endeavouring to conceal the birth of a child; . . . 14, composing, printing, or publishing blasphemous, seditious, or defamatory libels; 15, bribery; 16, unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person; 17, stealing, or fraudulently taking, or injuring, or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein; 18, stealing, or fraudulently destroying, or concealing wills, or testamentary papers, or any document or written instrument, being, or containing evidence of the title to any real estate, or an interest in lands, tenements or hereditaments.' Burglary can be tried at quarter sessions, 6-7

* Now obsolete. See Sweet's and Wharton's Lexicons, *ad verbum*.

G. 5, 50, 38, when 'owing to the absence of any circumstances which make the case a grave or difficult one,' the committing justice 'thinks it expedient in the interest of justice,' *e.g.* to avoid delay or expense: *ib.*; but offences against ss. 20-22 of that A. cannot be tried at Q. S. By 24-5 V. 96, 87, misdemeanours in ss. 82-4 are not triable at any Q. S., nor any indictment under 48-9 V. 69.

The Assizes Relief A. 1889] By 52-3 V. 12, the general rule is that cases triable at Q. S. must be committed thither, but 'the High Court of Justice' may 'by order direct' a trial at assizes, &c. (s. 1). A *prisoner* must be tried 'at that court' which is fixed for his trial; if not, 'on his application,' the next assize judge must try him or discharge him, unless there are 'special reasons' for not doing so (in which case he may admit him to bail), viz.: the removal of the indictment into another court, 'the impossibility of producing the witnesses for the prosecution at' *that* court of Q. S., 'or other special reasons' (s. 3).

Bills found at Q. S., but not triable there, may be transmitted to assizes, *Allum,* 2 Cox C. C. 62 (rape), 1846, by order of the sessions, or on *certiorari* granted by the judge of assize (s. 5 of 52-3 V. 12, above), as those against corporations, above; *counts* on which juries have disagreed at Q. S. may be transmitted for trial at assizes: see *Grimwood; Holmen,* 13 Cr. A. R. 184, 1918.

If the court have not jurisdiction, the defendant may take advantage either by a plea to the jurisdiction, or, if it appear on the record, by demurrer, or, by motion, to quash in arrest of judgment, as in *Hewitt,* R. & R. 158, 1809: see *Quashing,* below. But the objection may also be taken under the general issue: 1 *Chitty,* Cr. L. 438; and this is by far the most usual course; or on appeal, as in *T. Evans,* 1915, 2 K. B. 762; 79 J. P. 415; 84 L. J. K. B. 1603; 25 Cox C. C. 72; 11 Cr. A. R. 178, where a sentence by Q. S. was quashed because they had adjudged appellant 'an incorrigible rogue' without jurisdiction to do so. Objection on this ground may be taken at any time: *J. A. Thompson,* 1914.

In *Smith* v. *R.,* 18 L. J. M. C. 207, 212; 13 Q. B. 738; 13 Jur. 850; 3 New Sess. Cas. 564, 1849, it was held that the jurisdiction of Q. S. is not suspended by the coming of the judges of assize into the same county under their usual commissions. But Coleridge J. said that though this was the strict law, yet 'it would be highly inconvenient and improper, generally speaking,' for the magistrates of a county to hold their sessions concurrently with the assizes, even in a different part of the county; of course, we cannot anticipate that they should hold them concurrently at the same place,' though 'there may be an obvious distinction between a recorder' and them.

In what sense it is not an inferior court, see *Campbell* v. *R.*: 'it is in each case a continuing court from session to session': *ib.* Ex. Ch.; 'a court of oyer and terminer': *ib.*

Trial at bar] is 'in cases of great importance and difficulty': 3 Bl. Com. 352. Three or four judges sit. See generally, *Short, &c.,* C. O. Practice R. 150 and foll., where it is said: 'The King, in virtue of his prerogative, may try his cause at bar. The Crown has a right to a trial at bar in all cases where it is a party, or where it has any privity of interest, or where it has any right to interfere in the litigation between subjects.' The application for such a trial must be made by motion for an order *nisi,* except by the Attorney-General for the Crown, who is entitled to an absolute order.

Certiorari] Any proceeding in a criminal court may be removed by a writ of *certiorari* into the K. B., which writ is issued by that court. It is demandable as of right by the crown: *Eaton,* 2 T. R. 89, 1787; and issues, as of course, where the attorney-general or other officer of the crown applies for it, either as prosecutor, or as representing the defence, 'the right of the crown' being in question': *ib.; Clace, Inhabs. of,* or *Lewis,* 4 Burr. 2458, 1769; and this, even though the *certiorari* is expressly taken away by statute; for, unless named, the crown is not bound.

The granting of the writ for the purpose of removing indictments into the K. B. D. is regulated by rules 12-18 of the Crown Office Rules, 1908: *Short,* Cr. Prac. 1908, whence (p. 15) it appears, under R. 14, 'the writ is granted on like conditions to a prosecutor or a defendant, with the exception that the attorney-general acting on behalf of the crown, and the prosecutor of an indictment against a body corporate not authorised to appear by solicitor in the court in which the indictment is found, are entitled to the writ as a matter of course.'

Corporations—appearance] A corporation cannot appear to an indictment at assizes or sessions: *ib.;* Index, *Corporation;* and p. 246. In the K. B. D. it may appear by solicitor (or in person).

R. 13 is: 'No indictment, except indictments against bodies corporate not authorised to appear by solicitor in the court in which the indictment is preferred, shall be removed into the K. B. D., either at the instance of the prosecutor or of the defendant (other than the A.-G. acting on behalf of the crown), unless it be made to appear to a court or a judge by the party applying that [i] a fair and impartial trial cannot be had in the court below; or that [ii] some question of law of more than usual difficulty and importance is likely to arise upon the trial; or that [iii a] a view of the premises in respect whereof any indictment is preferred, or [b] a special jury may be required for a satisfactory trial of the same.'

Jeffs and Lang, 9 Jur. 580, 1845, were indicted at the Central Criminal Court for conspiracy to defraud the revenue: on motion to remove into the Q. B. on the ground that i. there ought to be a special jury, and as the law officers would conduct the prosecution, defendants were entitled to the assistance of a Q.C.; ii. the charges related to matters four years old; iii. defendant J. 'was of good repute, and it would be disgraceful and prejudicial to him to stand at the bar of a criminal court'; iv. 'the prosecution was preferred out of malice.' Coleridge J. refused the writ on all these grounds, but granted it on the ground of the crown's statement: 'this is no ordinary prosecution,' it 'will as a matter of course be' conducted by the law officers, and, therefore, defendant ought not to be deprived of a special jury, 'counsel of eminence,' 'or the benefit which may result from a removal' . . . if the prerogative of the crown be not interfered with.'

Treason, felony, &c.] It is only *exceptionally* that indictments for felony are removed into the K. B. D.: *Short,* C. O. Prac. 17, *e.g. Thomas,* 4 M. & S. 442, 1815—exceptional circumstances; *Palmer,* 5 E. & B. 1024, 1856—both on the allegation that a fair trial could not be had at assizes; both were cases of murders, and the coroner's inquisitions, as well as the indictments—three of each, in *Palmer* the latter *not at the time found,* and one private prosecutor opposing, though the A.-G. consented—were removed. For other instances, see *ib.* pp. 18-20. The writ may be issued before indictment found: *Palmer,* above; or

at any time before jury sworn: *ib.* p. 16; only very exceptionally after verdict and before judgment—a thing much discouraged: *ib.*

Special jury] cannot be had in treason or felony: *Short,* C. O. R. 20. It has been held that the mere necessity for a special jury was not alone sufficient ground for granting the writ: *Green,* 1 Wil. Wod. & Hod. 35, New Term Rep. 1838; but the reverse was held even in misdemeanour: *Short,* C. O. Prac. 20. A much stronger case of difficulty would have to be made out now than formerly: *ib.* 19; and cf. *Wartnaby,* 2 Ad. & E. 435, 1835; *Dutchess of Kingston,* Cowp. 283, 1775. The rule has been granted on the ground of a reasonable probability of partiality for instance, in cases where the charge had been made the subject of much public discussion: *Lever,* 1 Wil. Wol. & Hod. New Term Rep. 35, 1838—see *Venue;* but cf. *Mead,* 3 D. & R. 301, 1823, where the person accused or interested is a person of influence in the court below; *Reban* v. *Trevor,* 4 Jur. 292, 1840; *Grover,* 8 Dowl. P. C. 325, 1840, defendant a magistrate; *Jones,* 2 Har. & W. 293, 1836; but cf. *Knatchbull,* 1 Salk. 150, 1704; and *Thornbury, ib.,* where the prosecutor or his attorney is sheriff or undersheriff; *Webb,* 2 Str. 1068, 1737. The affidavit on which the application must be made by the defendant should state the particular facts relied on very explicitly. *Green* and *Eaton,* above; *Jowle,* 5 Ad. & E. 539, 1836, difficult points of law.

The effect of the writ is to remove all proceedings described therein, which have taken place between the *teste* (*i.e.* writ) and return. *Battams,* 1 East, 298, 1801; 4 Hawk. 2, 27, 73. Where there are several defendants in misdemeanour, all should concur in the application. *Hunt,* 2 Chit. Rep. 130, 1820 (apparently, in the interests of the defendants): it is not necessary: *Short,* C. O. Prac. 20.

Costs] By C. O. Rule 14, if the defendant remove an indictment by *certiorari* he will, if convicted, be liable for costs of the prosecution 'subsequent to removal,' on the counts (only) on which he is convicted. *Hawdon,* 11 Ad. & E. 143, 1839; *Oastler,* L. R. 9 Q. B. 132; 43 L. J. M. C. 89; 12 Cox C. C. 578, 1874. By R. 15, the same of the prosecutor, except the A.-G. or solicitor of a corporation (as in R. 14 above) in case of an acquittal. Where an indictment of several counts had been removed to the High Court by *certiorari,* and defendant was acquitted on some counts, but convicted on others, it was held that she was not entitled to be paid by the prosecutor the costs in respect of the former counts: *Bayard,* 1892, 2 Q. B. 181; 17 Cox C. C. 572. See *Short,* C. O. P. 134.

See *Wilks,* 5 E. & B. 690, 1855; *Jewell,* 7 E. & B. 140, 1857: costs; *Mayor of Manchester, ib.* 453, 1857: corporation.

Venue—order not writ] For removal of trials to and from the Central Criminal Court, see *Venue;* and of indictments from the county of a city to the county, p. 216.

As by 36-7 V. 66, 16, the jurisdiction of courts created by commissions of assize, of oyer and terminer, and of gaol delivery, or any such commissions, is vested in the High Court of Justice, *certiorari* is no longer required to bring up the records of such courts to the High Court: an order is enough, as in *Dudley,* 1884.

In the case of a peer, &c., after indictment found in the usual way, it is removed by *certiorari* into

The House of Lords] *i.e.* the members are the jury and (in one case—

below—theoretically) the judges. In *Earl Russell,* 1901, A. C. 446, the Recorder of the Central Criminal Court, where the indictment was found, 'wrote to the Lord Chancellor informing him of the fact, and adding that 'in accordance with the practice hitherto pursued,' he had enlarged the recognisance of the witnesses until the pleasure of the House of Lords is signified'; later, the Lord Chancellor moved that the bill be removed before this House, and that a writ of *certiorari* be issued under the Great Seal for that purpose': *Journals,* June 27, July 2, 1901.

Trial takes place during the sitting of Parliament 'before the King in Parliament'; if Parliament is not sitting, 'in the court of the Lord High Steward.' In either case a peer, almost invariably the Lord Chancellor is appointed Lord High Steward with a commission to try the case; when the hearing is 'before the King in Parliament' the L. H. Steward is the president of the court, 'standing in relation to the other peers as the chairman of Q. S. to the other justices of the bench': they are equally judges of law and fact. In his own court he is the judge of law, the peers only of fact: *Anson,* The Constitution, 1908, v. i. p. 233; v. ii. pt. ii. p. 274.

Incidents of trial] The chief differences in the incidents of the trial from those at assizes are the number of the jury, viz. all the peers entitled to sit and vote, the verdict is that of a majority, provided that there must be twelve for conviction, there are no challenges: *E. of Essex,* 1 St. Tr. 1335, 1600; and no appeal: 7 E. 7, 23, 20, 2, where the words 'person claiming the privilege of peerage' are difficult. Perhaps they mean that an indictment against a person *bonâ fide* claiming the privilege cannot be tried until the claim is decided. In *Knowles* (or *Knollys*), 'commonly called the Earl of Banbury,' 12 St. Tr. 1167, 1692: murder, as the House of Lords did not admit his peerage and the K. B. did, he was not tried at all.

Privilege of peerage] cannot be waived by the individual peer: 3 Co. Inst. 30; *E. of Cardigan,* 4 St. Tr. N. S. 609, note, 1841; *Lord Graves,* 310 Hansard, 245, Jan. 31, 1887, where on indictment *certiorari*ed from Central Criminal Court into Q. B., defendant had pleaded to it, and Coleridge L.C.J. had allowed him to waive his peerage expressly that a verdict of not guilty might be taken; strong dissent was expressed in the H. L., Halsbury C. saying that 'privilege' in this connection 'was a misnomer': a statute—Magna Carta—prohibited any other trial than that by peers.

III.

Impeachment] is not within the scope of this work, but as 'the forms of a criminal trial are to be followed': *Anson,* Constitution, v. i. p. 364, such cases are sometimes cited for the rules of evidence: *e.g. L. Melville* (agency). 'I conceive,' said Sjt. Maynard, in *L. Stafford,* 7 St. Tr. 1519: 1680, 'an impeachment of the House of Commons is more than an indictment' when defendant objected that there was no indictment.

On the impeachment of *Warren Hastings,* the Lords decided that the managers must complete *all* their charges before the defence was opened, Thurlow C. saying, 'the same rules of evidence, the same attention to the laws which obtained in the courts below would, he was confident, be preserved by their lordships': 27 Parl. Hist. 62, Feb. 21, 1788. Thurlow was understood by the protesting peers,

including L. Loughborough C.J.: reason 7, *ib.*, as so positively laying down the law.

IV.

Arraignment] A person indicted for felony must in all cases appear in person and be arraigned, but this does not apply to misdemeanours in the K. B. D. 1 Chitt. C. L. 411, 414; 4 Bl. C. 375. The latter states that the trial of 'misdemeanour . . . does usually happen in his absence, after he has once appeared.' Cf. *Macmichael.* On an indictment or information for a crime *less than felony,* the defendant may, by favour of the court, appear by attorney, and this he may do as well before plea pleaded as afterwards unto conviction. *Bacon,* 1 Lev. 146; 1 Keb. 809, 1665. In all cases of felony defendant must take his place within the dock. *Douglas,* Carr. & M. 193, 1841; and see also *Zulueta,* 1 C. & K. 215, 1843; except by very special indulgence to defendant's ill-health, *Horne Tooke,* at 7 and 12, that he may be near his counsel. Where, however, defendant feigned to be a lunatic, and was very violent and noisy, Wills J. ordered him to be removed, and, although he had no counsel, the trial (for burglary) proceeded, and verdict and sentence were given in his absence: *Berry,* Northampton Assizes, Nov. 17, 1897; *Stephen,* Dig. Crim. Proc., Art. 302, p. 194; and another case, *Law Journal,* Sept. 22, 1906, p. 612; cf. *Streek, &c.*

Illness of defendant] If he cannot remain at the bar, the jury may be discharged, and when he is well enough either the same jury is resworn or another is sworn; witnesses may be resworn or, by consent, (only) their evidence read over to them and sworn to as a whole; even in a misdemeanour, Park J. would not continue the trial merely with the consent of defendant's counsel: *Streek,* 2 C. & P. 413, 1826; *Stevenson,* 2 Lea. 546, 1791.

Insanity] manifesting itself during the trial: the procedure was once the same as in illness: 1 Hale, 35, 'after the recovery of his understanding'; and *Kinloch,* 18 St. Tr. 41, 1746: *per* Foster J.; but see below.

Otherwise nothing can be transacted out of defendant's hearing (except peers giving their verdict: 3 Inst. 30, and judgment in the K. B. D.); *Lilburne,* 4 St. Tr. 1381, 1649, complained that the attorney-general spoke 'with' Thorp J. in 'hugger-mugger, privately or whisperingly.' *Smellie,* 14 Cr. A. R. 128, 1919.

Deaf or dumb] The arraignment consists of two parts; the reading the statement and the particulars of the offence in the indictment to defendant, and the asking him whether he is guilty or not guilty. If he on his arraignment refuse to or do not answer, it becomes a question whether it is of malice, or whether he is mute by the visitation of God. See *Witnesses, Incompetency.* The court will in such case direct a jury to be impannelled, who are immediately returned, *Jones,* 1 Lea. 102, 1773, from amongst the bystanders, 1 *Chitty,* Crim. L. 424. Defendant's counsel may address the jury and call witnesses, for the affirmative of the issue is upon him. *Roberts,* Carr. C. L. 57, 1816, defendant found insane, see below. Where a verdict of *mute by the visitation of God* is returned, the court will order the trial to proceed, if defendant is competent in intellect, and can be made to understand the nature of the proceedings against himself. Thus where it appeared that one who was found mute, had been in the habit of communicating by means of signs, and a woman was called who stated that he was

capable of understanding her by means of signs, he was arraigned, tried, convicted, and received sentence. *Jones,* above; 1 Russ. Cri. 62 *n.* The essential thing is that the judge should be satisfied that defendant can follow the proceedings: *Lee Kun,* 1916, 1 K. B. 337; 11 Cr. A. R. 293; 60 S. J. 158. So where one who was found mute, could read and write, the indictment was handed to him with the usual questions written on paper. After he had pleaded, and stated in writing that he had no objection to any of the jury, the trial proceeded. The judge's note of the evidence was handed to him after the examination of each witness, and he was asked in writing if he had any question to put; he was informed of his acquittal in the same way. *Thompson,* 2 Lew. C. C. 137, 1827. So the jury having found that defendant was mute by visitation of God, and then, being sworn to try whether he was of sound mind, found that he was, his counsel was allowed to plead not guilty for him as it was misdemeanour, and the trial proceeded in the usual manner and the evidence was not interpreted to him. *Whitfield,* 3 C. & K. 121, 1850.

But where defendant is deaf and dumb, and cannot be made to comprehend the nature of the proceedings and the details of the evidence, the proper course is, after the jury have found him mute by the visitation of God, to re-swear the jury to inquire whether he is able to plead to the indictment; and if that be found in the negative, then to swear them again, to inquire if he be sane or not.

Insane] By 39-40 G. 3, 94, 2, if anyone indicted appears insane, he may (1) on his arraignment, be found to be insane by a jury impannelled 'for that purpose, so that' he cannot be tried on the indictment, 'or (2) if upon the trial . . . such person shall appear to the jury charged with' the 'indictment to be insane,' and in all cases of insanity so found, it shall be lawful for his Majesty to give such order 'for the safe custody of such person . . . during his [the crown's] pleasure.' The question is whether he has sufficient understanding at the *moment,* and it is immaterial to show that at other times insanity has shown itself: *per* Brett L.J., *Keary,* 14 Cox C. C. 143, 1878. The s. applies to misdemeanours as well as to felonies. *Little,* R. & Ry. 430, 1821.

When a jury is impannelled to try sanity under this s., the prosecution must begin and call witnesses to prove sanity, for 'this' is not 'so much an issue joined as a preliminary inquiry for the information of the court': *per* Vaughan Williams J., *Davies,* 3 C. & K. 328, 1853; cf. *Roberts,* 1816.

'There are three points to be inquired into. 1st. Whether the prisoner is mute of malice or not. 2ndly. Whether he can plead to the indictment or not. 3rdly. Whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence': *per* Alderson B., *Pritchard,* 7 C. & P. 303, 1836. Cf. *Dyson, ib.* 305 *n.,* 1831; *Berry,* 1 Q. B. D. 447; 45 L. J. M. C. 123; 13 Cox C. C. 189, 1876: C .C. R.; if the jury find that he cannot follow the proceedings, he is within 39-40 G. 3, 94, 2, although they do not find him 'insane' in terms. *Gov. of Stafford Prison, ex parte Emery,* 1909, 2 K. B. 81; 22 Cox C. C. 143; 78 L. J. K. B. 629; 73 J. P. 284; 25 T. L. R. 440; 100 L. T. 993: K. B. D., where defendant was 'stone deaf' and could neither read nor write; there was no means of communicating with him.

Mute of malice] If he stands 'mute *of malice,* or will not answer

directly to the indictment, or information,' by 7-8 G. 4, 28, 2, it is lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of 'not guilty' on behalf of such person, which is to have the same effect as if he had so pleaded. And where defendant, in murder, remained mute of malice, Erle J. refused to assign counsel for the defence, as he had no authority to do so and defendant's assent could not in the circumstances be given. *Yscuado,* 6 Cox C. C. 386, 1854: evidence interpreted at end of each examination.

Refusing to plead] Where defendant refused to plead, on the ground that he had already pleaded to an indictment for the same offence (which had been tried before a court not having jurisdiction), it was held that the court might order a plea of 'not guilty' to be entered under the above. *Bitton,* 6 C. & P. 92, 1883.

Demeanour at trial] Where on an arraignment in the Q. B., defendant failed to plead, and showed symptoms of insanity, an inquest was forthwith taken to try whether he was insane or not, and the atorney-general having opened, called witnesses, it was held, 1st, that the jury might form their own judgment of the present state of defendant's mind from what they saw, and therefore find him insane without any medical evidence; 2ndly, that on him showing these strong symptoms it became unnecessary to ask him whether he would cross-examine the witnesses, or would offer any remarks or evidence, &c. *Goode,* 7 A. & E. 536, 1837.

See further, Index, *Insanity.*

There is no appeal from the finding of the preliminary inquest: of sanity, *Jefferson,* 1 Cr. A. R. 95; 72 J. P. 407; 24 T. L. R. 877, 1908, where, however, the C. C. A., under 7 E. 7, 23, 5 (4), substituted a verdict of 'guilty but insane'; of insanity, *Larkins,* 6 Cr. A. R. 194, 1911.

Foreigners, interpretation to, and of] In *Lee Kun* (murder), the C. C. A. laid down as a general rule that when a defendant, insufficiently acquainted with English, is represented by counsel, unless he distinctly dispenses with a translation of any part, the whole of the evidence (at least) must be translated to him; the judge must be satisfied in every case that defendant 'substantially' understands the case against him—especially any addition or alteration of the evidence before commital. If he is undefended, the evidence must be translated to him, and it is the duty of the court to see that this is done: cf. *Witnesses, Examination.*

V.

Bail] 'The Court of King's Bench might and still may bail in any case whatsoever, even in high treason or murder, for the court is held in law *coram ipso rege*': *Hale,* 2 P. C. 129, citing 4 Co. Inst.; 2 Co. Inst. 186; 'or any judge thereof in . . . vacation, except only' in the case of 'such persons as are committed by either house of parliament, so long as the session lasts, or such as are committed for contempt by any of the . . . superior courts of justice': 4 Bl. Comm. 209.

By 31 C. 2, s. 2, Habeas Corpus A.: 'if any person . . . shall be or stand committed or detained as aforesaid for any crime unlesse for treason or fellony plainely expressed in the warrant of committment in the vacation time and out of terme,' he not being a person 'convict or in execution' or 'any one in his behalfe,' may 'by legall process . . . appeale or complaine to the lord chancellour or lord-keeper or any one of his Majestyes justices,' any one of whom is 'hereby

authorized and required' on reading certain documents 'to award and grant an *habeas corpus* under the seale of such court whereof he shall then be one of the judges,' and the custodian shall thereupon bring up the prisoner with the return of the writ 'and thereupon within two dayes after the partie shall be brought before' the judge or judges, he or they 'shall discharge the prisoner from his imprisonment, takeing his recognizance with one or more . . . sureties in any summe according to their discretions haveing reguard to the quality of the prisoner and nature of the offence for his appearance' to take his trial, 'unless it shall appeare . . . that the party soe committed is detained upon a legall processe order or warrant out of some court that hath jurisdiction of criminall matters or by some warrant . . . for such matters or offences for the which by the law the prisoner is not baileable.' Thus it seems that in misdemeanour the K. B. must grant bail if there are sufficient sureties.

S. 6 (otherwise 7): 'if any person . . . shall be committed for high treason or fellony plainely and specially expressed in the warrant of committment [and] upon his prayer or petition in open court the first weeke of the terme or first day of the sessions of oyer and terminer or generall gaole delivery to be brought to his triall shall not be indicted sometime in the next terme sessions of, &c. . . . after such committment it shall and may be lawfull to and for the judges of the Court of King's Bench and justices of oyer, &c. . . . and they are hereby required upon motion to them made in open court the last day of the terme sessions or gaole-delivery either by the prisoner or any one in his behalfe to sett at liberty the prisoner upon baile unlesse it appeare to the judges and justices upon oath made that the witnesses for the King could not be produced the same terme sessions or generall gaole-delivery; and (2) and if any person . . . committed as aforesaid upon his prayer or petition in open court the first weeke of the terme or first day of the sessions of, &c. . . . to be brought to his tryall shall not be indicted and tryed the second terme sessions of, &c. . . . or upon his tryall shall be acquitted he shall be discharged from his imprisonment.' A judge at chambers has this jurisdiction: *Short, &c.*, C. O. Prac. 280; and applications in felony or misdemeanour 'shall be in the first instance' made there: *ib.* 284; C. O. R. 111; and may be *ex parte*. But the general rule is not to bail in felony.

After verdict] Where defendants had been acquitted of murder and were then indicted for assault with intent to commit a felony on the deceased, Coleridge J. thought that they ought not to be bailed, as it was 'not a common law misdemeanour' till the C. C. R. had decided a point of law—though they were on bail till trial. *Bird,* 1851.

See further under *Adjournment,* &c. below.

VI.

Postponing the trial] By 14-5 V. 100, 27: 'No person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognisances of the prosecutor and witnesses accordingly, in which case

the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognisance for that purpose.' Thus, the old *traverse* (= postponement: O. French *traverser*, to deny) is abolished, and misdemeanours are put on the same footing as felonies in this respect.

Absence of witness] The trial may be postponed where it appears by affidavit that a necessary witness for defendant is ill. *Hunter*, 3 C. & P. 591, 1829. Other grounds are that a witness is unavoidably absent, or is kept out of the way by the contrivance or at the instigation of defendant—unless it appear that the requirements of justice can be satisfied by reading the witness's depositions. See *Stokes* and other cases for *discharge of jury* on postponement.

Where the C. C. A. thought that there should have been an adjournment below in order to call witnesses, it granted leave to appeal and heard the witnesses: *J. A. Gray*, 1 Cr. A. R. 154, 225, 1908; so where defendant, a foreigner, tried three days after the offence, had no time to call his evidence for an *alibi*: *Malvisi*, 2 Cr. A. R. 192, 251, 1909: c. q.

If, in felony, the prosecution wishes to put off the trial on this ground, if the absentee has not made a deposition, the judge will require an affidavit stating the points which he is expected to prove, in order to judge whether he is 'material' or not. *Savage*, 1 C. & K. 75, 1843. An affidavit of a surgeon, that the witness's unweaned child is afflicted with an inflammation, &c., and could neither be brought to the assize town nor separated from the mother without danger to life, is a sufficient ground. *Ib.* Where defendant's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes, was absent, and that on cross-examination this witness could give material evidence for the defence, this was held a sufficient ground for postponing the trial, without showing that the defence had at all endeavoured to procure his attendance, as they might reasonably expect that a witness bound over would appear. *Macarthy*, Carr. & M. 625, 1842. In *Palmer*, 6 C. & P. 652, 1834, the judges at the C. C. C. postponed until the next session the presentment of a bill for murder, on the affidavit of the attorney for the prosecution, that a 'material' witness was too ill to attend, and they refused to refer to his deposition when it was stated that he did not depose to material facts. When, after the close of the defence, there was an adjournment to call witnesses (to prove ownership, in a receiving case), counsel having taken the point that it was not properly proved, but he was allowed to deal with their evidence, the C. C. A. thought the judge had a discretion to adjourn: *W. Jackson*, 14 Cr. A. R. 41, 1919.

In general, a trial will not be postponed before a bill is found and plea pleaded. *Heeson* and *Bolam*, 1839. But where the prosecution desired to try *Doran*, 10 Cr. A. R. 67, 1914, with other persons not yet committed, a successful application to postpone his trial till the next sessions, *in case* a bill—there being none at the time—should be found against *him*, was approved by the C. C. A. In *Chapman*, 1838, the trial was postponed after bill found because a material witness, taken ill or worse before the grand jury, could not, according to two surgeons sent by the court, give evidence. Abinger C.B. (below) said that he could not grant bail *after* bill found in murder, though if the postponement had been made *before*, he might have done so: the discretion in such a case had never been exercised. But where there was an affidavit

that the attendance of witnesses from a workhouse in which small-pox had broken out, was necessary, Baggallay L.J. did not require any bill to be sent up, but postponed the trial to the next assizes, admitting defendant—who seems to have made no objection to this course—to bail. *Taylor,* 15 Cox C. C. 8, 1882. The C. C. A. regretted that Q. S. had not postponed a trial when counsel, who was defending from the dock but had a good reason for being absent, made the application: *W. Morse,* 4 Cr. A. R. 51, 1910.

Miscellaneous grounds] In *Johnson,* 1847, Alderson B. refused to postpone the trial of a murder, on the ground that an opportunity might be therefore afforded of investigating the evidence and the characters of certain persons not before the magistrate, who were to be called to prove previous attempts by defendant on the life of the deceased; but a trial for murder was postponed on an affidavit of a medical man that a witness was unable to travel, although he was not before the magistrate, and although the trial had been fixed for a particular day. *Lawrence,* 4 F. & F. 901, 1866.

Local feeling] Where, in a murder committed in Newcastle-upon-Tyne, which had created great excitement, several local journals down to the time of the assizes had published paragraphs, implying or tending to show the guilt of an accused person, and it appeared that the jurors at such assizes were chosen from within fifteen miles round Newcastle, where such papers chiefly circulated, but that at the summer assizes they would be taken from the more distant parts of the county (the indictment had been removed from the county of the town of Newcastle, a grand jury of which had found it, into the county of Northumberland), Alderson and Parke BB. postponed the trial until the following assizes, the latter being chiefly moved by the prospect of the trial being 'before persons living in the midst of this excitement,' and saying, 'The publication of the evidence given before the coroner was, in itself, highly improper, and might have been made the ground of indictment against the publisher.' Alderson B. said, 'I yield to the peculiar circumstances of the case, wishing it to be understood that I am by no means disposed to encourage a precedent of this sort.' *Bolam,* 2 Moo. & R. 192, 1839. See also *Jolliffe,* 1791.

Costs] Where defendant applies to postpone the trial, he may be admitted to bail, but never on condition that he pay the costs of the prosecutor, a matter which is not considered till the trial. *Hunter,* 1829. Nor does he receive them when the prosecution postpones: *Crowe,* see below; in such case, the court in its discretion will either detain defendant in custody, or admit him to bail, or discharge him on his own recognisance. *Beardmore,* 7 C. & P. 497, 1836; *Parish, ib.* 792, 1837; *Osborne, ib.* 799, 1837; see also *Crowe,* 4 C. & P. 251, 1829; whence it may be gathered that where defendant is suspected of colluding with the absent witness, the terms imposed on him, in case of a postponement, are heavier.

At the spring assizes a bill was found against A. for shooting B. The trial was postponed till the summer, on the ground that B. (who shortly afterwards died) was too ill to attend. At those assizes a bill was found against A. for the murder, and an application was made by the prosecution to put off the trial until the following spring on account of the illness of a material witness. Williams J. granted the application, which was opposed, and held that A. was not entitled to his discharge under 31 Car. 2, 2,

saying: 'Who can prevent such an occurrence as this?' That A. 'is a human law and must be humanly interpreted . . . his trial must be subject to human contingency.' *Bowen,* 9 C. & P. 509, 1840; see *Chapman,* 1838.

Adjournment at common law] The application should be made before defendant is given in charge to the jury (below), as it is very doubtful whether, if the adjournment of the trial involves a discharge of the jury, it would be granted. It seems that, after that stage in felony, a judge has no authority at common law to adjourn the trial till another day *on account of the absence* of witnesses, but only to keep the jury in the box (or locked up) the same day. *Foster,* 3 C. & K. 201, 1848; *Parr,* 2 F. & F. 861, 1862; but see now 60 V. 18.

Adjournment for convenience—from day to day] For a long time criminal trials were concluded within the day, but in *Stone,* 1796, 'The court having sat on the first day [of the two] of the trial from nine o'clock in the morning till ten o'clock at night without any interruption or refreshment, and the attorney-general stating that his evidence would occupy four hours more, and some of the jury being very much exhausted and incapable, as they declared, of keeping up their attention much longer, the court adjourned till 9 o'clock the next morning: Lord Kenyon observing 'that necessity justified what it compelled': 6 T. R. 530; 25 St. Tr. 1295, 1796, where it appears from a note that 'cases of such extraordinary length' were only known in 'modern times,' and other instances are given. In *Sheares,* 27 St. Tr. 364, 1798; treason, Curran, for defendant, was refused an adjournment 'after a sitting of sixteen hours, with only twenty minutes' interval,' as the A.-G. would not consent, though L. Carleton C.J. said that he was 'as much exhausted' as any one else; the trial duly proceeded, the verdict being delivered 'near eight o'clock' the next morning, sentences being postponed till 3 p.m. Cf. *Langhorn,* at 497, 1679, and *Hardy,* 1794, at 414.

The *necessity* of adjournment—in long cases—was defended by Eyre L.C.J. in *Horne Tooke,* at 130, 1794; the court sat from 9 a.m. to 9 p.m., with the interval of a quarter of an hour.

VII.

Pleas] There are several pleas in criminal cases, but the only ones that are at all likely to occur in ordinary practice are those 'in bar, *guilty,*' the three *special* pleas, *autrefois acquit, autrefois convict* and *pardon* (for a fourth, *justification,* see *Libel*), and the *general* issue of *not guilty.* 'A plea in bar means a substantial defence, and a *general* plea in bar raises the 'general issue' and traverses . . . the whole indictment by alleging that the defendant is 'not guilty'': *Kenny,* Outlines, 468. See generally, 1 Russ. Cri. 38. Pleas *in abatement* 'are founded either on some defect apparent on the face of the indictment, without reference to any extrinsic fact, or are founded upon some matter of fact, extrinsic of the record which renders the indictment insufficient.' 1 *Chitty,* Crim. L. 445: *e.g.* in *C. Knollys* or *the Earl of Banbury,* 1692, Holt C.J. ruled that as he was indicted by the former name, it was a misnomer, 'and the indictment must be abated': *Skinner,* 527.

Pleas to the jurisdiction] The objection that the court has no jurisdiction to try the indictment may be simply stated in this form: cf. *Britton,* 1833; or, in abatement, by a peer: *E. of Banbury,* above;

or by demurrer or motion in arrest of judgment or to quash the indictment or under 'not guilty'—the two latter forms being the commonest. Even before the Indictments A. Prof. Kenny observed that the two pleas of *jurisdiction* and *abatement* 'have been rendered obsolete by the powers now given to the courts to amend indictments': Outlines, 468.

Guilty] A plea of guilty does not necessarily admit the truth of the facts contained in the depositions. It is simply an admission that defendant is guilty of the offence charged in the indictment and nothing more: *per* Hawkins J., *Riley*, 1896. See *Guilty*, in Index.

By 4-5 G. 5, 58, 39 (1): 'Where a prisoner is arraigned on an indictment for any offence, and can lawfully be convicted on such indictment of some other offence not charged in such indictment, he may plead not guilty of the offence charged in the indictment, but guilty of such other offence.' If the 'other offence' is known to the prosecution, in all probability it could, since the Indictments A., be charged in a count.

Withdrawal of plea] Where one defendant of three *jointly* indicted for conspiracy pleaded guilty and the other two not guilty, and the latter were acquitted, the former had a right to withdraw his plea and to be acquitted. *Plummer*, 1902, 2 K. B. 339; 71 L. J. K. B. 805; 66 J. P. 647; 20 Cox C. C. 269: C. C. R. But it will require a very strong case and exceptional circumstances to induce the C. C. A. to allow an appeal against *conviction* after a plea of guilty: *Lucas*, 1 Cr. A. R. 62, 1908; but it did so in *Verney*, 2 Cr. A. R. 107, 1909: c. q., where the confession was false. Cf. *Admissions*.

The C. C. A. has heard appeals after plea of guilty in the following cases—all of alleged *mistake: Baker*, 7 Cr. A. R. 217; 28 T. L. R. 333, 1912: defendant said, 'guilty of having' coining moulds 'in possession'; this was mistaken for a plea of guilty, but it appeared that there was a defence: c. q., but defendant remained in custody to plead again to indictment. *Ingleson*, below. *Rhodes*, 11 Cr. A. R. 33, 1914, larceny: appellant said his plea was taken as guilty by mistake, but, on the facts, the court was not satisfied of this statement: appeal dismissed. *Golathan*, 11 Cr. A. R. 79; 84 L. J. K. B. 758; 112 L. T. 1048; 79 J. P. 270; 31 T. L. R. 177, 1915: entering a house by night with intent to steal; entering admitted, but not the intent; plea entered for full offence: c. q.: no other order. In *L. Alexander*, 7 Cr. A. R. 110; 23 Cox C. C. 138; 76 J. P. 215; 28 T. L. R. 200; 107 L. T. 240, 1912: abduction: defendant, during the course of the trial, after certain remarks by the judge on the law, pleaded guilty; the law having been misstated, c. q. In *H. Taylor*, 11 Cr. A. R. 198, 1915, where defendant pleaded guilty, but despite his counsel's protest Q. S. entered a plea of not guilty, and the verdict was that he was insane, the C. C. A. declined to interfere.

Duty of court] The court must be satisfied that the plea is to the *legal* offence; when defendant pleaded guilty to stealing and receiving horses, but at the same time handed in a statement to the effect that he did not know they were stolen, it was held that a plea of not guilty should have been entered: c. q., but a *venire de novo* ordered at assizes, as they preceded sessions: *Ingleson*, 1915, 1 K. B. 512; 84 L. J. K. B. 280; 112 L. T. 313; 11 Cr. A. R. 21. Cf. *Baker*, above.

Evidence after plea of guilty] In *Babington, Savage, &c.*, 1 St. Tr. 1130, 1586, Popham A.-G. said: 'Albeit there were now nothing further to be done but to proceed to judgment upon' defendant's 'own confession, yet forasmuch as' the crown 'desired that the hearers should be satisfied, and all the world know how justly he was to be condemned, they crave licence to give such evidence as would sufficiently and fully prove the indictment,' which was granted. Cf. *Hamilton*, 7 St. Tr. N. S. 1131, 1849.

Special pleas] By 14-15 V. 100, 28: 'In any plea of autrefois convict or autrefois acquit, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment.' They may be pleaded orally. See *Birchenough*, 1836, and 8 E. 7, 67, 15. If the plea fails, defendant will be allowed—*in favorem vitæ aut libertatis*—to plead over in felony, but not in misdemeanours, for the plea is a plea in *bar*. *Taylor*, 3 B. & C. 502, 1824; cf. 1 Chitt. Crim. Law, 457. See below, and *Charlesworth*, 1861, where also see the case of a jury discharged without verdict.

The onus of proof lies on defendant. By 14-15 V. 99, 13, it is enough for him to produce a certified copy of the record. Where the record had not been made up, the court postponed the case in order that it might be done: *Bowman*, 6 C. & P. 101, 1833; and ultimately the K. B. granted a *mandamus* for that purpose. *JJ. of Middlesex*, 5 B. & Ad. 1113, 1834. When the second indictment is tried *under the same commission* as the first, see *Horne Tooke* and *Parry*, 1837, where a plea of *autrefois acquit* stated that the felonies, &c. in a second indictment were the same as those in the first: replication that they were not the same: issue: defendants' counsel began, put in and read first indictment and minutes of acquittal written over their names therein: no other evidence was given: verdict for defendants: fourteen judges, including the trial judge, held that the evidence was sufficient, and that if in fact there were two felonies, there was nothing to prevent a fresh indictment for the second. An acquittal for conspiracy to commit an offence is not a bar to a charge of aiding, &c. it: *Kupferberg*. These pleas are good in a case like *Culliford*.

The jury have to try these pleas as a matter of fact: *Tancock*. In *autrefois acquit* it is necessary to prove that there could have been a conviction on the first indictment of the offence charged in the second. This appears by the record, but as was pointed out by Parke B. in *Bird*, 2 Den. C. C. 94, 1851, at 198; 5 Cox C. C. at 89, something more is necessary; because, 'as the language of an indictment describing any offence is in general not material as to the date or place, or many other circumstances if in the same county, the indictment would be equally descriptive of many offences of a similar character—and an acquittal of the offence charged on one indictment, describing it in proper terms sufficient in point of law, would be an acquittal of every offence of the same sort, in the same county, and against the same person; but in order to constitute a good plea of *autrefois acquit*, the plea must state, and it must be proved that the offence charged in the former indictment was the same identical offence with that charged in the indictment pleaded to. This being clearly the rule, there would not be much difficulty in applying it to an ordinary charge of felony—larceny, for instance, of the goods of A. B., or an ordinary charge of assault upon A. B. The prisoner charged on such an indictment, would have to satisfy the court, first, that the former indictment, on

which an acquittal took place, was sufficient in point of law, so that he was in jeopardy upon it; and secondly, that in that indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences. To prove the identity of the offence may not always be easy. If more or less evidence is gone into on the first trial the difficulty is little; if none is offered and the acquittal takes place, it is still an acquittal, entitling the prisoner to an exemption from any subsequent trial for the same identical offence. In such a case there is more difficulty in showing what the offence charged was, but it may be proved by the testimony of witnesses, who were subpœnaed to go, and did go, before the grand jury, by the proof of what they then swore, or perhaps by a grand juryman himself, or by the evidence of the prosecutor, or by proof how the case was opened by the counsel for him; in short, by any evidence which would show what crime was the subject of the inquiry, and would identify the charge, and limit and confine the generality of the indictment to a particular case.' There a man and his wife had been acquitted of a murder on an indictment containing six counts, one alleging divers beatings, but the medical evidence proved that these assaults did not produce or conduce to death, which was due to two blows on the head, by whom inflicted there was no evidence to show. They were again indicted for the assaults, &c., and pleaded *autrefois acquit*, averring the identity of the assaults in the two indictments. R. Gurney Q.C. directed the jury that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death, they should convict; they did, and eight judges held the conviction right and six wrong.

Common law and statutory bars] They took into consideration (rpd.) 1 V. 85, 11, and the question was whether defendants could have been *lawfully convicted*, on the first charge, of the second—now the settled test whether this plea is good: 2 Russ. Cri. 1984. The point arises on other later statutes which provide that on an indictment for one crime, there may be a conviction for another (similar). Several such sections are set out and instances will be found under specific crimes. In most of the ss. mentioned it is provided that the accused shall not be liable to be tried again for the offence for which, though not indicted, he might have been convicted. And the wide choice of verdicts which in effect the Indictments A. 1915 permits, tends to diminish the need for this plea. As 2 Russ. Cri. 1985, says: 'Under the present practice the substance rather than the form of the charge in the two indictments is considered'—a remark borne out by the cases in the C. C. A. below.

Mr. Greaves's note, *ib.* is: 'Where a prisoner is indicted for a compound offence as burglary, robbery, murder, and altogether acquitted, it would seem that such acquittal is a good bar to every felony included in the compound offence; thus an acquittal on a burglary charging a stealing of goods would be a good bar to an indictment for stealing the same goods, for on the indictment for burglary he might have been acquitted of the burglary and convicted of the larceny only . . . and burglary may be where there is no larceny, and larceny may be where there is no burglary.'

'*In jeopardy*'] Still, the question when defendant is entitled to plead either of these pleas is sometimes one of difficulty. A judgment reversed by a court of error is the same as no judgment, and in that case, therefore, the plea was not available. *Vaux*, 4 Co. 44 *a*, 1590:

discharged on bad indictment; retried and 'hanged': no 'jeopardy' if conviction or acquittal unlawful; *Drury,* 3 C. & K. 193; 18 L. J. M. C. 189; 3 Cox C. C. 544, 1849. Until reversed, however, judgment on an erroneous record is good. *Ib.* In this case, Coleridge J. gave an elaborate considered judgment. And in *Charlesworth,* 1861, the court appears to take the same view. A jury discharged without a verdict is not an acquittal: *Davison,* 1860.

A prisoner was not considered to have been in 'jeopardy'—a phrase much considered in *Charlesworth;* see also *Banks,* below—where the prosecution failed by reason of a defect in the indictment, *e.g.* ownership wrongly laid, which might have been amended. *Green,* D. & B. 113, 1856. But where a magistrate dismissed a summons because he thought he had no jurisdiction, though in fact he had, the plea of *a. a.* was good. *Haynes* v. *Davis,* 24 Cox C. C. 533, 1914.

In *Walker,* 2 M. & R. 446, 1843, it was held that a defendant who had been convicted summarily of a common assault before justices could plead *autrefois convict* to an indictment for feloniously stabbing under (rpd.) 9 G. 4, 31, the circumstances out of which both charges arose being the same. So *Grimwood,* 60 J. P. 809, 1896, when on four counts for (1) inflicting grievous bodily harm, (2) unlawful wounding, (3) assault occasioning actual bodily harm, (4) common assaults, a Q. S. jury found only the last, and the Recorder remitted the other three, on which they disagreed, to assizes, where *a. a.* was pleaded. Pollock B. held the plea good, saying, 'The court might have refused to take the verdict, but it could not accept it as a partial verdict,' citing *Elrington* (which followed *Walker*), 31 L. J. M. C. 14; 9 Cox C. C. 86; 1 B. & S. 688, 1861: Q. B. justices had dismissed the common assault. On the other hand, in *Vandercomb,* Lea. 708; East, P. C. 519, 1796, it was held that defendant, indicted for burglary in breaking and entering a house with intent to steal, cannot plead in bar an acquittal of burglary in the same house on the same occasion, by a breaking and entering it *and* stealing there. So a conviction for assault is no bar to an indictment for manslaughter, on subsequent death, either at common law or under 24-5 V. 100, 45. *Morris,* L. R. 1 C. C. R. 90; 36 L. J. M. C. 84; 10 Cox C. C. 480, 1867; *Friel,* 17 Cox C. C. 325, 1890.

Murder—manslaughter] An acquittal for murder is a good plea to indictment for manslaughter (for there might have been a conviction on it), and an acquittal or conviction for manslaughter is a bar to an indictment for murder. *Holtcroft,* 4 Co. 46 *b,* 1579—it is not clear whether he was indicted for murder or manslaughter—'if a man commits murder, and is indicted and convicted or acquitted of manslaughter, he shall never answer to any indictment of the same death, for all is one and the same felony for one and the same death, although murder is in respect of the circumstance of the forethought malice more odious; and, therefore, in an indictment or appeal of murder, he may be found guilty of manslaughter.' *Banks,* 1911, below, is admittedly not conclusive of the question whether an acquittal of murder is a bar to trial of the manslaughter. Cf. Cro. Eliz. 276, 296: appeal of murder: jury not compellable to find manslaughter; 4 Co. 40 *a,* 1583: 'for they differ only in degree, and the fact is the same': 2 Hale, 246; *Fitzherbert's Justice* by *Crompton,* 111*b*-12 *pl.* 10; 2 Russ. Cri. 1987; *Tancock,* 13 Cox C. C. 217, 1876, where there had been a *bill* for murder ignored, but one for manslaughter returned, a conviction on it, and then a coroner's jury found murder; on this arraignment there

was a plea of *aut. conv.* (replication); a jury found, after evidence, identity of deceased and defendant respectively, whereupon Denman J. (in view of the facts) directed them to find the issue for defendant, but he 'certainly thought that the conviction for manslaughter was no bar to a trial for murder.' *Banks,* 1911, 2 K. B. 1095; 22 Cox C. C. 653; 81 L. J. K. B. 120; 75 J. P. 567; 27 T. L. R. 575; 106 L. T. 48; 6 Cr. A. R. 276, was indicted for manslaughter; he was committed with another (not charged on indictment) by the coroner to the same court for murder of the deceased; they both pleaded not guilty to the inquisition, and she to the indictment; no evidence was offered on the former, and they were acquitted; on the indictment he then pleaded *autrefois acquit,* but the jury found against him and convicted him. The C. C. A., in dismissing, pointed out that strictly after plea of not guilty, the other plea ought not to have been allowed, and 'as the plea has no merits, being a technical plea,' it 'may be met by an equally technical objection'; it was 'one of the highest technicality,' for 'if the prosecution had proceeded with . . . the manslaughter first, it is admitted that the point could never have arisen. Moreover, it was 'a grave question whether he was in peril.' 'It is doubtful whether in any circumstances double pleas can be allowed' except by statute: see above and below.

After a summary conviction under 8 Ed. 7, 67, 12, for neglect of a child, the child died, and the mother was then convicted of manslaughter of it; she did not plead *a. convict,* but appealed on the ground that under sub-s. 4, on the trial for manslaughter, she could have been convicted of the *wilful neglect,* and, therefore, had been in peril twice therefor, but the C. C. A. held that the jury, if satisfied of the manslaughter, were not entitled to find the lesser offence: *Tonks,* 11 Cr. A. R. 284; 60 S. J. 122; 32 T. L. R. 137; 25 Cox C. C. 228, 1915.

Generally] In *Champneys,* 2 M. & R. 26, 1837, it was held that an acquittal of an insolvent debtor for omitting certain goods from his schedule was no bar to a second indictment for the same offence in which the same goods and some others were specified; but said that, except in very peculiar circumstances, such a course ought not to be pursued. Defendants were indicted for larceny at common law, and in a second count for feloniously receiving, and were acquitted on the ground that the goods were fixtures. On a second indictment under 24-5 V. 96, 31 (rpd.), *ib.,* for stealing the fixtures, it was held that they were not entitled to plead *autrefois acquit,* as they had not been in peril on the first. *O'Brien,* 15 Cox C. C. 29, 1882: C. C. R. So an acquittal under 24-5 V. 97, 35, and 24-5 V. 100, 32, for the felony of obstructing a railway with intent to endanger the safety of the passengers, &c., was held to be no bar to a subsequent indictment, under ss. 36, 34 of the same statutes respectively, on the same facts, for the misdemeanour of endangering the safety of the passengers, &c. *Gilmore,* 15 Cox C. C. 85, 1882. Since 14-15 V. 100, 10, rpd. (repealing 7 W. 4 and 1 V. 85, 11), on an indictment for assault, acquittal on a previous charge of felony cannot be pleaded. Thus where a man had been acquitted of rape and also of an assault with intent to ravish, he was convicted of a common assault. *Dungey,* 4 F. & F. 99, 1864: see now under *Rape.* A conviction of sodomy *quashed* is not a bar to trial for indecency: *W. Barron,* 1914, 2 K. B. 570; 83 L. J. K. B. 786; 78 J. P. 311; 30 T. L. R. 422; 10 Cr. A. R. 81, approving *De Salvi,* 10 Cox C. C. 481 *n.,* 1857, where it was laid down that 'acquittal of the whole offence is not an acquittal of every part of it': *per* Pollock C.B. The quashing

of a conviction by the C. C. A. is equivalent to an acquittal, and the trial judge ought to have entertained [tried?] the plea: *ib.* A conviction for larceny is no bar to proceedings under 35-6 V. 93, 33, for knowingly pawning the stolen goods. *Pickford* v. *Corsi,* 19 Cox C. C. 712, 1901. Where an offence is triable in more than one county an acquittal in one county would be a good bar to a second indictment in another; but where the offence is triable in one county only, an acquittal in the wrong county would be no bar. 4 Hawk. P. C. 2, 35, 3, 4. An acquittal of murder before a court of competent jurisdiction, in a foreign country, is a good bar to an indictment for the same murder in this. *Hutchinson,* 3 Keb. 785, 1678, explained in *Beak* v. *Tyrwhitt,* 3 Mod. 194, 1688; *Roche,* 1 Lea. 134, 1775; and so generally, 'it does not matter whether the trial was summary,' citing *Wemyss* v. *Hopkins,* L. R. 10 Q. B. 378; 44 L. J. M. C. 101, 1875: c. q.: *per* Blackburn J. 'nor whether the court is an English court or one of the King's dominions or of a foreign country': 2 Russ. Cri. 1984. So of a foreign court-martial under a treaty: *Aughet,* 13 Cr. A. R. 101, 1918, where it was not decided whether the fact that a defence not open here was available there made any difference. But a distinct offence, simultaneous with another (on which there has been an acquittal or conviction quashed)—here wounding, with a sexual offence—does not support the plea: *Norton,* 5 Cr. A. R. 197, 1910; though it would perhaps be otherwise if the wounding had been essential to the commission of the other offence.

Pardon] A pardon must be specially pleaded, unless it be by statute, otherwise it is waived. 4 Hawk. P. C. 2, 37, 59; 1 Chitty, Cr. L. 467.

Formerly a pardon could only be pleaded if it was under the great seal; as in *Bullock* v. *Dodds,* 2 B. & Ald. 258, 1819; but now by 7-8 G. 4, 28, 13, where the sovereign by warrant under the sign manual, countersigned by one of the principal secretaries of state, grants a free or conditional pardon to a felon, the discharge of such offender out of custody in the case of a free pardon and the performance of the condition in the case of a conditional pardon, has the effect of a pardon under the great seal. Cf. *Harrod,* 2 C. & K. 294, 1846.

An accused peer may plead his pardon in the court in which the indictment against him is found: 2 *Anson* on the Constitution, Pt. ii. c. x. s. iv. 1; this Edmund de la Pole, Earl of Suffolk, seems to have done in 1498 when indicted for murder in the K. B.

General issue, i.e. 'not guilty'] See above. The word 'general' is illustrated by Sir Christopher Hatton's and Anderson C.J.'s (commissioners') reply to *Babington, Savage, &c.* at 1130 and 1135: 'either confess it generally or deny it generally,' but the *rule* has long been abolished. By 7-8 G. 4, 28, 1: 'If any person not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without any further form, be deemed to have put himself upon the country for trial; and the court shall in the usual manner order a jury for the trial of such person accordingly.' The plea is oral, except to misdemeanour in the K. B. D.: *Short,* C. O. Practice, 101.

For an instance of what may be put in under this plea, see *Skeen,* 1859.

Pleading over—demurrer] Demurrers may now be considered obsolete in criminal law: *Short,* C. O. Prac. 102, 1908; and see s. 8 (3)

of the Indictments A. 1915, which deals with 'other criminal pleading.' For the old law, see *Birmingham and Gloucester Railway Co.*, 3 Q. B. 223, 1842; 9 C. & P. 469, 1840; *Purchase,* C. & M. 617, 1842 (demurrer allowed); *Duffy,* 4 Cox C. C. 24, 1849, and the cases collected in 1 Den. C. C. 293, *a.* *Duffy* is said (*ib.* 570 *n.*) to be overruled.

Double pleas] If the defendant plead a special plea in misdemeanour, the judgment is final: this is implied by Holt C.J., *Goddard,* 2 L. Raym. 920, 1704. 'A defendant cannot in general plead and demur to the same indictment or information for misdemeanour, or plead more than one plea or demurrer, except' in libel: *Short,* C. O. Prac. 105. But in treason and felony it is not so. *Ib.*: 'regularly in all cases of felony or treason where a man pleads a special matter, tho he conclude his plea with *not guilty* to the felony, or doth not conclude it so, yet, if his plea be tried or found or ruled against him, he shall be put to his plea of *not guilty* and be tried for the felony, for tho a man shall lose his land in some cases for mispleading, yet he shall not lose his life for mispleading': Stamf. P. C. Lib. II. cap. 34, fol. 98 *b;* 2 Hale, P. C. 239, 257. Perhaps in misdemeanour the defendant might plead over by leave of the court. Huddleston B. permitted it in *Gilmore,* 1802. *Strahan,* 7 Cox C. C. 85, 1855, whence it appears that in strict (common) law double pleas are never a matter of right, and the C. C. A. seems to have so thought in *Banks,* 1911. See *Plea,* above.

VIII.

Joinder of charges—election] At one time it was thought to be in the interest of the crown to include as many charges against as many defendants as possible in one indictment; thus, Kelyng J. says, in *Messenger, &c.,* 1669, where there were four indictments for treason, and eight defendants: 'I told them they had not done well to make so many several indictments, for by that means the King's evidence would be broken, whereas if all had been put into one indictment the evidence as to the main design would have been intire against all, and then the assembling in severall places to the same intent had made the matter more foul, and would have been aptly given in evidence against them all to the same jury, and the several acts which each of them did would have come in better': Rep. 71.

Treason] That more than one treason may still be alleged in the same indictment appears from 7-8 W. 3, 3, 4: 'if two or more distinct treasons of divers heads or kinds shall be alleged in one bill of indictment'; and from *Mitchel,* 6 St. Tr. N. S. at 619-20, 1848, which, however, was tried under 11-2 V. 12, where it was also held good. The Indictments A. does not deal with treason.

Felony] Otherwise the practice is now governed by that A., ss. 4 and 5 (3). Thus, while the former s. deprives much of the old learning on this subject of its value, the adoption by the latter of the old doctrine of 'election' preserves the utility of some of the earlier cases on this point. That doctrine has been frequently applied by the judges. Thus, to join even two misdemeanours committed on separate days in one count seemed to Hawkins J. 'a little irregular,' and to be avoided. *Brown,* 1895. The same judge said in *King,* 1897, 'It has occurred to me more than once that it is a cruel thing to multiply the charges in one indictment,' and he gave instances of

such an abuse. 'In such a case it would not be unreasonable to ask the court to try each case [count or each set of counts] separately.' For other instances, see *Law Journal* newspaper, June 1, 1907, p. 359. In *Warren*, 1907, Bosanquet C.S. quashed embarrassing counts for misdemeanour as an abuse of the process of the court.

In an indictment for murder there ought not to be a count for a crime of violence: *J. Jones*, 13 Cr. A. R. 86, 1918: c. for latter q.

Trial] When under R. 3, Ind. A., charges are 'joined,' all the counts should be tried together: *Ailes*, 13 Cr. A. R. 173, 1918.

Compound felonies] Some charges have always involved more than one felony: see 2 Hale, P. C. 173; Mr. Greaves's note above; and Form 10 under the Ind. A. 1915, where three (or four) are included in one count.

Embarrassment—misjoinder in felonies] In practice, where a defendant was charged with several felonies in one indictment, and had pleaded, or the jury had been charged, the court had a discretion to quash the indictment—if he would be embarrassed in his defence; or if the fact was not found out till after the jury was charged, would compel the prosecutor to elect on which charge he would proceed. *Young*, 3 T. R. 98, 1789; 1 Lea. 505; 1 R. R. 660; 2 East P. C. 828, 833; East P. C. 935, cf. 515.

The only general rule that can be laid down to guide the judge's discretion is that of L. Ellenborough, cited above, in *Whiley*. Where the first count was for breaking and entering a shop and stealing therein, the second for receiving the stolen property, and the third for receiving bank-notes, proceeds of the larceny, and the judge made the prosecution elect, and the third count was withdrawn, the C. C. A. refused to interfere on the ground that the indictment was bad: *H. Elliott*, 1908, 2 K. B. 452; 21 Cox C. C. 666; 1 Cr. A. R. 15; 72 J. P. 285; 24 T. L. R. 645; 99 L. T. 200.

In *Rye*, 2 Cr. A. R. 155, 1909, the allegation was stealing various articles 'between Oct. 21 and Feb. 9,' no other date being alleged; most of the larcenies were on Feb. 9, and the rest between Oct. 21 and Oct. 31, but there was nothing to show more than three takings, and though the C. C. A. thought there ought strictly to have been one count for each date (Feb. 9 and Oct. 21-31), yet it summarily dismissed the appeal.

Even before the Indictments A. the C. C. A. would not interfere on a technical ground where there were no merits, though the indictment was bad, *i.e.* it applied the proviso to s. 4 of the Crim. Ap. A.: *J. Harris*, 5 Cr. A. R. 285, 1910, where no objection was taken at the trial—unlike *Edwards and Gilbert*, 1913, 1 K. B. 287; 82 L. J. K. B. 347; 23 Cox C. C. 380; 77 J. P. 135; 108 L. T. 815; 29 T. L. R. 181; 8 Cr. A. R. 128, which was decided on a s. now rpd., but is useful as illustrating the C. C. A.'s view of embarrassment. Appellants were indicted, with two others (who were acquitted), on one count against one appellant for stealing five sacks of wheat on Oct. 22, on another the same appellant and one of the acquitted men for stealing four sacks, &c. on Oct. 29, and on a third that the other appellant and the other acquitted man received four of the sacks—all being laid as the property of the same firm—well knowing, &c. The chairman refused to make the prosecution elect and declined to quash either of the larceny counts. 'Both the alleged receivers,' said the court,

'were embarrassed by the addition of the charges made against the defendant acquitted of the larceny'; it declined to hold that there had been no 'substantial miscarriage of justice,' and quashed the convictions, especially as the chairman below thought that appellants were unduly prejudiced.

But in *J. A. Thompson* (incest), 1914, 2 K. B. 99; 83 L. J. K. B. 643; 78 J. P. 212; 24 Cox C. C. 43; 110 L. T. 272; 30 T. L. R. 223; 9 Cr. A. R. 252, the court (five judges) followed *Harris;* one count alleged the offence 'on divers dates between January, 1909, and the 4th of October, 1910'; a second alleged the like 'on divers days between the 4th October, 1910, and the end of February, 1913'; at the trial the judge refused to quash on the ground of duplicity; general verdict; the court held that defendant had not in fact been embarrassed or prejudiced.

Now, by R. 5 (1), there may be *alternative* allegations in a count.

'*Duplicity*'] Where there were two counts for larceny of a postal packet in transmission under the P. O. A. 1908 (property of postmaster-general), and receiving the same, two similar offences under 24-5 V. 96 (property in the consignee), and two under (rpd.) 59-60 V. 52, for receiving here goods stolen abroad and unlawful possession thereof, the judge refused election; conviction on counts one and two; and appeal on the ground of embarrassing misjoinder, the C. C. A. said: 'The main proposition . . . is that there were in this case three distinct and separate felonies alleged in the counts,' reviewed the line of cases and denied that the judge is bound in law to quash or to put to election; the rule is 'one of practice and procedure devised . . for the purpose of protecting prisoners from embarrassment and oppression'; in order to exercise his discretion the essential thing for the judge is to determine 'whether the overt acts relied upon in support of the offences charged in the counts are in substance the same for each offence.' However, on the evidence the court thought that all four defendants ought not to have been convicted both of larceny and receiving, but as this informality did not affect the sentences no relief was given: *Grizzard, Lockett, &c.*, 1914, 2 K. B. 720; 83 L. J. K. B. 1193; 78 J. P. 196; 24 Cox C. C. 114; 110 L. T. 398; 30 T. L. R. 233; 9 Cr. A. R. 268.

The matter is within the discretion of the judge: *E. Curtis,* below; *Yousry.*

The prosecutor may be permitted to elect out of several indictments, one for a lesser offence, even though there are some on a capital charge: *The Bank Prosecutions,* where each of five counts charged the firing of a house of a different person, and it was opened that the five houses were in a row, and that one fire burnt them all; Erskine J. refused to put the prosecutor to his election, as it was 'all one transaction,' adding, 'I shall take care that as the case proceeds the prisoner is not tried for more than one felony.' *Trueman,* 8 C. & P. 727, 1839, a good illustration of L. Ellenborough's dictum in *Whiley.* So *Davis,* 3 F. & F. 19, 1862. Cf. *Brannon.*

The leading case, *Heywood,* L. & C. 451, 1864, is, since the Indictments A., of little importance.

Indictments and counts not elected for prosecution] Where there has been an election and an acquittal, there should be an acquittal on the indictments and counts not prosecuted, as is the practice of the C. C. C. After convictions, such non-elected indictments and counts are only exceptionally prosecuted: cf. *Britton,* 1833. The practice here mentioned is important technically in view of 11-12 V. 42, 3,

whereby any 'prosecutor' may obtain from the clerk of the court at 'the end of the sessions' a certificate that a person indicted has not duly 'already appeared and pleaded to such indictment,' and if he 'shall then be at large' he may be arrested (if necessary, on warrant) and committed for trial. If he is not at large, procedure is simpler.

'*Remaining on the file*'] The crown may formally declare its refusal to go on (*nolle prosequi*, which see), or may simply abstain from going on, in which case the indictment 'remains on the file.' In the latter case it seems that the defendant has no right to a trial on such indictment, and, therefore, not to an acquittal. But occasionally a defendant after conviction (and sentence) on one indictment has been allowed, on his application, to be arraigned on such indictment and, no prosecutor appearing, to be formally acquitted. *Boyle,* C. C. C. June, 1919, *cor.* Fulton, Recorder. In such a case the court must satisfy itself that the prosecution does not intend to proceed. In other cases such an application has been refused: *V. Woolf,* C. C. C., June, 1915, *cor.* Lush J. But the C. C. A. has no power to order an indictment to be taken off the file: *Laws,* 1 Cr. A. R. 8; 72 J. P. 271; 24 T. L. R. 630, 632, 1908.

Counts for receiving] By 24-5 V. 96, 92, 'In any indictment containing a charge of feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same or any part or parts thereof knowing the same to have been stolen,' and *vice versâ;* 'and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same or any part or parts thereof knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving the same or any part or parts thereof knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same or any part or parts thereof knowing the same to have been stolen. For earlier cases, see under *Receiving.*

Misdemeanours] The general rule—of avoiding embarrassment—has always been the same in misdemeanours, but naturally in practice there has been more latitude.

The C. C. A. strongly objects to complaint of misjoinder of misdemeanours being deferred to the appeal: *Stoddart,* 2 Cr. A. R. at 237; though it said, *ib.* 'It may well be that in a particular case it is undesirable that an investigation of more than one misdemeanour should proceed at the same time.' But in *E. Curtis,* 1913, it saw no objection to three charges of indecent assault on different persons on three different days. For old common law cases see, for instance, *Benfield,* 2 Burr. 984, 1780; *Young,* 31 T. R. 103, 1789; *Darley,* 4 East, 179, 1803; *Kingston,* 8 East, 46, 1806; and *Towle,* 2 Marsh. 466, 1816; and cf. *Judgment.*

In *Trevelli,* 15 Cox C. C. 289, 1882, there were eleven defendants charged in one indictment (of ninety-four counts, some against all jointly, some against several jointly, others against most of them in-

dividually, and alleging different days of commission of offences) with obtaining by false pretences and with conspiracy to defraud: cf. *Warren,* 1907. In *G. W. Norman,* 1915, 1 K. B. 341; 84 L. J. K. B. 440; 79 J. P. 221; 31 T. L. R. 173; 24 Cox C. C. 681; 11 Cr. A. R. 58, the C. C. A. disapproved of a trial on six counts charging the obtaining both chattels and credit by false pretences, and reduced the sentence to the maximum for the lesser charge; there ought to have been election.

Where two defendants were indicted for a conspiracy, and also for a libel, and at the close of prosecution there was evidence against both of the conspiracy, but no evidence against one of the libel, Coleridge J. put the prosecutor to his election before counsel opened the defence. *Murphy,* 1837. In conspiracy to defraud an insurance company, one set of counts alleged a fire on the 7th June, and another one on the 25th of November; the prosecution was made to elect, Martin B. 'prohibiting counsel in his opening speech from travelling into matters irrelevant to it.' *Barry,* 4 F. & F. 389, 1865. Cf. *Burch, ib.* 407, 1865. 'It is unusual to charge in the same indictment, misdemeanours of a different nature—as assault, false pretences, and libel.' *Saunders* on *Indictments,* 3rd ed. 1914, p. 28. A prosecutor cannot maintain two indictments against a bankrupt, one for concealing and embezzling his effects, the other for the same and not disclosing and not delivering his effects, both substantially for the same transaction, and he must elect to proceed with the one and abandon the other: *i.e.* the judge who had no power to quash either, as both were good, agreed with counsel before plea pleaded that he would not try the one unless the prosecution would 'abide by the event of it . . . both indictments ought not to hang over the defendant.' *Britton,* 1 Moo. & R. 297, 1833. But cf. *Leatham,* 1860, and *Handley,* 1833.

It has been said that it is not usual to put the prosecutor to his election immediately on the case being opened. *Wigglesworth,* 1834; *Hindmarch's* Suppl. to Deacon's Crim. L. 1583; but cf. *Britton,* above. And *semble,* that the election ought to be made before defendant is called on for his defence *at the latest. Ib.*

Defendants jointly charged] If an offence committed jointly is alleged, defendants may be indicted in one indictment or separate indictments; but there cannot be a joint indictment for perjury: *Philips,* 2 Stra. 921, 1731, where the court pointed out the special danger of joint indictments: 'the jury on the trial of all may apply evidence to all that is but evidence against one.' This was exemplified in *Rowan,* 5 Cr. A. R. 282, 1910: c. q. of one defendant on this ground. But the jury may find a different offence against each: *C. Connor,* 8 Cr. A. R. 152; 77 J. P. 247; 29 T. L. R. 212, 1913: four defendants, three verdicts. Where several defendants were indicted separately for separate but exactly similar common law forgeries, Crompton J. permitted them, the prosecution agreeing, to be tried together: *Hartshorn,* 6 Cox C. C. 395, 1853. The C. C. A. favoured separate trials on a joint indictment when it appeared that the defence of one defendant was incriminatory of another: *Lee and Parkes,* 13 Cr. A. R. 39, 1917; but as neither appellant obtained relief, the case is not very clear. It was commented on in *Gibbons and Proctor,* 13 Cr. A. R. 134, 1918, when the only rule the C. C. A. laid down was that the judge's discretion must be judicially exercised; 'it is not enough that counsel could have defended more easily' if there had been separate trials. See 1 Stark. Crim. Pl., ch. 2.

A joint indictment may contain counts against the individuals only as well as against all jointly: *Cox,* 18 Cox C. C. 672, 1897: C. C. R., which relied on *Kingston,* 1806 (highway case), where, however, of nine defendants, no count charged all and no one charged one separately, the ground for objection being clearly that there must be likely embarrassment to defendant; Lawrence J. thus stated the common law, 'though four for several offences may be indicted in the same indictment, it is as several indictments in law,' citing 2 Hale, 174. Hence, it is entirely within the judge's discretion whether there shall be a *separate* trial: *Ram,* 17 Cox C. C. 610, 1893. Where that discretion was not exercised, the C. C. A. thought that the jury were prejudiced against one co-defendant by evidence against another: c. q. *Dibble.*

Where one co-defendant gives evidence for another, the jury may accept it for and acquit the former and yet convict the latter: *Seddon,* 7 Cr. A. R. 207, 1912.. See *Trevelli* and under *Receiving.*

S. 5 (3) of the Indictments A., though dealing primarily with joinder of offences, seems, in the words 'for any other reason,' to permit joined defendants being tried separately.

The C. C. A. will not entertain an appeal on this ground unless the request for severance was made at the trial: *C. Baker,* 2 Cr. A. R. 249, 1909: rape.

IX.

Defective indictment] A judge may refuse to try an indictment clearly bad in point of law—a defendant has no right to be tried on a defective indictment: *Dunn,* 1843—and may discharge the jury—though the defendant does not move: *Deacon,* 1824; *Tremearne,* 1824; *Hepper,* 1825; Ry. & M. 27, 147, and 210; 1 C. & P. 608. Even when defendant waives the objection: *L. Huntingtower,* 1 Cox C. C. 47, 1843: error on variance in perjury: no evidence offered.

This is not technically quashing the indictment, but apparently a prevention of abuse of the process of the court. The Indictments A. has certainly not taken this power away, for s. 5 (2) clearly contemplates an indictment so defective as to be unamendable, in which case this power may be convenient. But the usual remedy is by

Quashing] This 'is purely matter of discretion, and the court may leave the defendant to *demur* or *seek a writ of error* (*Lynch*)' [below]: 7 Encyc. Laws Eng. 126, 1908 [now to appeal]. 'Where the court refuses to quash, the defendant, if he desires to reserve all rights, refuses to plead so as to prevent the curing of any defect, and a plea of not guilty is entered for him by the court.' By the common law, the time to move is undoubtedly before plea pleaded or jury sworn: *Rookwood,* 13 St. Tr. 161, 165, 174-5, 1696; cf. *Foster,* Cr. C. 231.

It is said that indictments for *Nuisance* (which see) are never quashed.

Indictments have been quashed because the facts stated in them did not amount to an offence punishable by law: *Burkett,* Andr. 230, 1738; *Sarmon,* 1 Burr. 516, 1758; *Wright, ib.* 543, 1758; *Philpott,* 1 C. & K. 112, 1843; or to an indictable offence: *Hall,* 1891. They may be quashed on motion. *Ib.* Thirteen out of thirty-three counts were quashed by Bosanquet C. Sgt. in *Boughton,* 1911.

Defendant moving] Where the motion is on the part of the defendant, the courts usually refuse to quash when it is preferred for some great crime, such as treason or felony, 'unless upon the clearest

and plainest ground,' leaving him to his [then] remedy 'by demurrer or motion in arrest of judgment or writ of error.' 1 Chitty, Crim. L. 300; Com. Dig. Indictment (H.); 'forgery, perjury, subornation, or any crime concerning the highways,' so of all crimes that are 'heinous': *Belton, Inhabs. of,* 1 Salk. 372, 1696; 1 Sid. 54, 1682; 'perjury, nuisance or the like': *Anon.,* 1 Vent. 370, 1685; and see *Johnson,* 1 Wils. 325, 1752; *Thomas,* 3 D. & R., K. B., 621, 1823. The reason of the practice holds good at the present day: *per* Alverstone C.J., *Lynch,* 1903, 1 K. B. 444; 72 L. J. K. B. 167; 20 Cox C. C. 468: high treason, trial at bar. They have also refused to quash indictments for cheating: *Orbell,* 6 Mod. 42, 1704; for selling flour by false weights: *Crooke,* 3 Burr. 1841, 1766; and for other minor offences. See also *Heane,* 10 Jur. N. S. 724; 4 B. & S. 947; 33 L. J. M. C. 115, 1864.

Prosecutor moving] But if the application was by the prosecution on the ground of error or defect, it might, it seems, have been made at any time before actual trial: *Webb,* 3 Burr. 1468; 1 W. Bl. 460, 1768. Before an application of *this kind* by the prosecution is granted a new bill for the same offence must have been preferred against defendant and found. *Wynn,* 2 East, 226, 1802. And when the court orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason thereof: *Webb;* that the second shall stand in the same order for trial as the first would have done: *Glen,* 3 B. & Ald. 373, 1820; *Webb;* and (particularly where there has been any unnecessary delay: *Webb*) that the name of the prosecutor be disclosed. *Glen.* A., indicted for perjury at the spring assizes, 1843, entered into a recognisance to try at the summer assizes, 1844. It being discovered that the indictment was defective, another indictment was prepared and found at the latter assizes, on which prosecutor wished to try. Wightman J. held that defendant was entitled to have the first indictment disposed of before he was tried on the second, and refused to allow counsel for the prosecution to enter a *nolle prosequi* without the A.-G.'s authority, but quashed the first indictment on prosecutor paying defendant his costs of the adjournment and the recognisance, and defendant proceeded to trial on the second without adjournment. *Dunn,* 2 Moo. C. C. 297; 1 C. & K. 730, 1843.

Nolle prosequi] The attorney-general never moves to quash the information or the indictment, because he alone may enter a *nolle prosequi,* which has the same effect. *Stratton,* 1 Doug. 239, 1779. The practice of entering a *nolle prosequi* dates from the end of the reign of Ch. 2; there is no precedent for indictments in that of Ch. 1, but many for informations: *per* Holt C.J., *Goddard* v. *Smith;* it is not an acquittal, and the A.-G. or a prosecutor may issue fresh process, but no such case was then (1705) known, and it was at least doubted by the Q. B. in *Allen,* 1 B. & S. 850; 31 L. J. M. C. 129; 9 Cox C. C. 120, 1862, where a modern form of the *fiat* may be found. The ancient form in Latin is given 4 Inst. 19-20: information in 1553 against thirty-nine members of the House of Commons departing without license. If the A.-G. abuses this power only Parliament can deal with him: *per* Cockburn C. J., *Allen.* It is clear that he is not *bound* to hear the prosecutor before giving his *fiat.* It does not appear why *statutory* authority is given to the A.-G. to enter a *nolle prosequi* for Customs prosecutions by 39-40 V. 36, 256. See also *Burnby,* 5 Q. B. 348, 1843. A *nolle prosequi* is an absolute bar to any further

proceedings whatever in the case, defendant having no right of trial; hence the defendant need not appear in court—as he must in the case of no evidence being offered against him.

It seems that it may be entered after verdict, as in *Leatham,* 1861, the S.-G. took this course on one count (bribery).

Other grounds] In addition to those mentioned above, 7 Encyc. Laws E. 125, adds: 'where the indictment is too vague and general (*Stroulger,* 17 Q. B. D. 327,' 1886: C. C. R.), where a majority held that an indictment was bad on this ground, but was cured by verdict; it might have been quashed before it—so *Goldsmith,* 1873. See now s. 5 (1) of the Indictments A.

Appeal] Now points of law on the indictment, whether taken at the trial or not, may be raised by appeal by virtue of s. 3 (a) of the Criminal Appeal A.—subject 'to the responsibility to the C. C. A. for not having taken the point below': see *Embarrassment,* above; *Rendle,* 1909; *Rye,* 1909; and *Stoddart,* 1909. *McCallum,* 11 Cr. A. R. 3, 1914, seems to be an instance of an indictment (false pretences, quashed by the C. C. A.) which, since the Indictments A. is hardly likely to recur in so faulty a form; there was no averment that the false name given by appellant was false. Even where every one of the six counts of an indictment was bad for duplicity, but were, on objection, amended, though the C. C. A. thought amendment should not have been allowed, it declined to quash the conviction on the ground that there was no miscarriage of justice: *M. Cohen,* 3 Cr. A. R. 180, 1909.

The C. C. A. will interpret an indictment where there has been a clerical error and objection has been taken below, and may hold it good for conviction on some charge: *Garland,* 1910, 1 K. B. 154; 74 J. P. 135; 102 L. T. 284; 26 T. L. R. 135; 79 L. J. K. B. 239; 3 Cr. A. R. 199; and so *Thompson,* 1914.

Procedure] The application to quash must be made to the court in which the bill is found, except when the record has previously been removed by *certiorari* to the House of Lords or to the K. B., when it must be made to the former or the latter. Q. S. has authority to quash an indictment found there before plea pleaded; and the Q. B. would not inquire on *certiorari* whether the indictment was properly quashed, the proper way of raising such a question being by writ of error. *Wilson,* 6 Q. B. 620, 1844.

Where the indictment had been found without jurisdiction, the court quashed it after plea pleaded—on affidavit; and would do so if the same was clear on the face of the indictment. *Heane* (perjury, removed from Central Criminal Court to Q. B.); and *Goldsmith,* L. R. 2 C. C. R. 74; 42 L. J. M. C. 94; 12 Cox C. C. 479, 1873, where objection was taken *at the close of the prosecution*—when the judge might have quashed—that the two counts for receiving property obtained by false pretences, on which there was a conviction, did not set out the false pretences: the C. for C. C. R. treated the objection as made after verdict in arrest of judgment, and held it, even if good on motion to quash, cured by verdict. Lush J. quashed an indictment for false pretences (as not amendable) after the close of the prosecution, because it did not contain the words 'with intent to defraud.' *James,* 12 Cox C. C. 127, 1871; cf. *Rushworth,* 1816. Where the indictment had, on the application of the defendant, been removed into the K. B., the

court refused to entertain a motion by him to quash after a forfeiture of his recognisance for not having carried the record down to trial. *Anon.*, 1 Salk. 380, 1704.

Amendment] The object of this power was stated in the preamble of rpd. 9 G. 4, 15, which gave the first trifling instalment of it, to be for remedy of 'great expence . . . and delay or failure of justice by reason of variances . . . in matters not material to the merits of the case.'

It was at first considered that this power ought to be very sparingly exercised: *Cooke,* 7 C. & P. 559, 1836; one objection being that the presentment on oath of the grand jury was thereby altered: *Hewins,* 9 C. & P. 786, 1841. The C. for C. C. R. would not allow one distinct statutory offence to be substituted in the indictment for another: *Benson,* 1908, 2 K. B. 270; 21 Cox C. C. 631: c. q.; but now the C. C. A. has in certain cases power to substitute a verdict: s. 5 (2) of Crim. Ap. A.

Statute] 14-5 V. 100 was repealed by the Indictments A., s. 5 (1) and (2) whereof now regulates the law; the combined effect of these sub-ss. seems to be that the court of trial could now properly make the amendment in *Benson*, above. Whether before the Cr. Ap. A. the amendment in *A. Allen*, 1910, would have been allowed, is doubtful.

The tendency of the later cases was to give the then governing statute, 14-5 V. 100, 'a wide construction': *Welton,* above; 2 Russ. Cri. 1974; cf. 1975; 'now . . . every amendment is to be made which is necessary for determining the real question in controversy between the parties': *per* the judges, *St. Losky* v. *Green,* 9 C. 13 N. S. 376, 1860; which is certainly the principle on which the C. C. A. acts.

Name, &c. of persons] Indictment Rule 7 supersedes many of the cases on the names and descriptions of persons, but the principles of some may still be useful. Thus, in *Frost,* D. & P. 474; 6 Cox C. C. 526; 24 L. J. M. C. 116, 1855, two Christian names of the occupier were omitted and could not be proved: c. q. Parke B. said: 'The court are never bound to amend in any case . . . but, after verdict [which stated that the identity of the occupier as alleged with the actual occupier was established by the evidence], the questions whether the court should have and could have amended are unimportant, since any amendment that is made ought to be made before the case is allowed to go to the jury.' Cf. *Murray,* 1906. Where proof of the name of the alleged deceased failed, amendment to 'a certain female child whose name is to the said proof unknown' was allowed: *Welton,* 1882: cf. *Averments, descriptive.* For other instances, see *Variances* in Index, and cf. *Who is the occupier?* under *Burglary. Barnes,* 1866 (L. J.), is an instance of an original indictment, which would have been good, being amended and held bad.

Stephen J. on objection by defence, amended 'a certain woman' into 'a woman to the jurors unknown,' although the next count alleged the woman's name. *Titley,* 14 Cox C. C. 502, 1880. But he quashed three counts as 'too general' in charging 'by divers artful, &c. tricks and means' an attempt 'to induce T. T. to commit an indictable misdemeanour, to break the law, &c.,' and refused to allow a fourth for inciting, endeavouring, &c. to persuade T. T. to unlawfully supply a noxious thing 'knowing that the same was intended to be unlawfully used with intent to procure the miscarriage of a woman' to be amended

by inserting the name of the person supplied, or for whom it was intended. *O'Callaghan*, 14 Cox C. C. 499, 1880, p. 240; but the chief ground of the refusal seems to have been that there had been no inquiry by a magistrate, and therefore the court ought not to go out of its way to assist the prosecution, as 'substantial injustice may be done by altering' the terms of the grand jury.

Dates] In *Dossi*, 13 Cr. A. R. 158, 1918, indecent assault on March 19, the verdict was 'with regard to March 19, not guilty. If the indictment covers other dates, guilty.' Q. S., on the motion of the prosecution, amended to 'on some day in March': verdict, guilty. The C. C. A. confirmed this verdict as good in law, time not being of the essence of the offence, citing 1 Inst. 318; 3 Inst. 230; *Syer*, 1589.

Clerical error] By a clerical error the *owner* was alleged to have known that his goods were stolen: conviction; motion in arrest of judgment; Q. S. amended. The C. for C. C. R. held that the indictment was bad on its face for not alleging *scienter*, Q. S. had no power to amend after verdict, defendant was entitled to move in arrest of judgment, and the conviction was bad. *Larkin*, D. & P. C. C. 365; 23 L. J. M. C. 125; 6 Cox C. C. 377, 1854. Cf. *Oliver*, 13 Cox C. C. 538, 1877: C. C. R. See *Judgment*, below.

Defects cured by verdict] 'If,' says *Blackstone*, 3 Comm. 394, 'a declaration or plea omits to state some particular circumstance, without proving of which, at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict . . . the verdict ascertains those facts, which before from the inaccuracy of the pleadings might be dubious; since the law will not suppose that a jury under the inspection of a judge would find a verdict for the plaintiff or defendant, unless he had proved those circumstances without which his general allegation is defective. Exceptions, therefore, that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer; or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceedings.' 7 G. 4, 64, 21, provides that certain irregularities—*e.g.* 'if any person has served upon the jury who has not been returned as a juror by the sheriff or other officer'—shall not avail to stay or reverse judgment after verdict. See *Heymann* v. *R.*, L. R. 8 Q. B. 102; 12 Cox C. C. 383, 1873; *Goldsmith*, 1873; *Aspinall; Bradlaugh* v. *R.; Knight*, 14 Cox C. C. 31, 1878: C. C. R.; *Kelleher, ib.* 48, C. C. R. Ir.; *Oliver*, 1877; *Stroulger; Mansell* v. *R.*, at 420 and 422.

Aliens] 'An alien shall be triable in the same manner as if he were a natural-born British subject': 4-5 G. 5, 17, 18, where 'alien' = not a *British subject* (which title see).

X.

Jury] The general rule for the composition of a jury is that the sheriff is to 'return a competent number of good and lawful men of the body of his county, qualified according to law': 6 G. 4, 50, 13, as amended. But see *Addenda*.

Statute] 6 G. 4, 50, 1: 'Every man, except as hereinafter excepted, between the ages of twenty-one years and sixty years, residing in

any county in England, who shall have in his own name or in trust for him, within the same county, ten pounds by the year above reprizes in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person, or who shall have within the same county twenty pounds by the year above reprizes in lands or tenements, held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives, or who being a householder, shall be rated or assessed to the poor-rate, or to the inhabited house-duty in the county of Middlesex, on a value of not less than thirty pounds, or in any other county on a value of not less than twenty pounds, or who shall occupy a house containing not less than fifteen windows, shall be qualified and shall be liable to serve on juries for the trial of all issues joined, in any of the King's courts of record at Westminster . . . and in all courts of assizes, nisi prius, oyer and terminer and gaol delivery, such issues being respectively triable in the county in which every man so qualified respectively shall reside, and shall also be qualified and liable to serve on grand juries in courts of sessions of the peace and on petty juries for the trial of all issues joined in such courts of session of the peace . . ." and so triable as above.

Wales] By 33-4 V. 77, 7 (amended 46-7 V. 39, Sched.), the qualification in Wales is the same as that in England.

Exemptions] By 45-6 V. 50, 186, every burgess of a borough having a separate court of quarter-sessions or a borough civil court is qualified and liable to serve on all juries in those courts unless exempted by law, but by the schedule of 33-4 V. 77, they are exempt from serving on the county sessions, and so are members of the town council, justices of the peace, the town clerk and treasurer for the time being, of the borough. Justices are also exempt from serving on juries within their jurisdiction. *Ib.* See also 25-6 V. 107. For full list of exemptions, see 18 Halsbury, 230. 'I believe that merely being at the bar [but not practising] will not do' for exemption: L. Ellenborough, *Watson,* 32 St. Tr. 25, 1817.

Aliens] By 33-4 V. 77, 8: 'Aliens having been domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, shall be qualified and shall be liable to serve on juries or inquests in England and Wales as if they had been natural-born subjects of the Queen: but save as aforesaid, no man not being a natural-born subject of the Queen shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever.'

Challenge] Challenges are either to the *array* ('the whole jury as it stands *arrayed* in the *panel* or little square *pane* of parchment on which the jurors' names are written.' *Burn's* Justice: *Jurors,* citing 1 Inst. 156-8) or to the *polls* ('persons or heads in the array,' *ib.*); they are also either *peremptory* or *for cause.*

Procedure] When defendants have pleaded the general issue, they are informed by the officer of the court that the persons whose names he is about to call will form the jury to try them, and that they are

at liberty to challenge any of them as they 'come to the book to be sworn, and *before* they are sworn,' *i.e.* begin to be sworn. The practice in getting a jury together is not very clearly defined, and probably differs considerably in different parts of the country. It is difficult to understand whether the rule laid down in *Vicars* v. *Langham*, Hob. 235, 1618, that there can be no challenge either to 'the panel,' *i.e.* the array, or to the polls until a full jury appear, is of perfectly general application. It is repeated, and no limits indicated, in *Edmonds*, 4 B. & Ald. 741; 23 R. R. 350, 1821; 3 Burn, Just. ed. 30, p. 90; and so cited by *Joy* on Confessions and Challenges in England and Ireland (1842), pp. 2, 10, 117. It is probably stated somewhat too broadly, and what is meant is, that before defendant is put to his challenges, he has a right to have the whole panel called over to see who does and who does not appear. Fost. Cr. Ca. 7, on *Townly*, 18 St. Tr. 330, 1746; *Frost*, 9 C. & P. 135; 4 St. Tr. N. S. 105, 110, 1839. However this may be, it is the constant practice in some counties to swear the first juryman who enters the box, without any further inquiry. In other places it is the practice to get a full jury into the box, and then to commence swearing them; then if any one is rejected, to call another in his place, and so on, *toties quoties*.

If there is a defect of jurors, and either party pray a *tales* (*i.e.* a supplement from *such* as can be readily found), he does not thereby lose his right to challenge: *Vicars* v. *Langham*, above; Bull. N. P. 307; but Hawkins doubts whether a *tales* can be prayed by the crown, on an indictment or information without a warrant from the attorney-general, 'or an express assignment from the court.' 4 P. C. 2, 41, 18. For an instance of a warrant of *tales de circumstantibus* (at Q. S.), see L. J. Newspaper, Oct. 26, 1918, p. 358. On the other hand, it is said by Blackstone J.: 'If by reason of challenges, or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes, till the number of twelve is sworn.' 4 Bl. Comm. 355. See *Dolby*, 2 B. & C. 104; 3 D. & R. 311; 1 L. J. (O. S.) K. B. 241; 24 R. R. 645 and 647, 1822 and 1823. But inasmuch as if the panel is exhausted, and no *tales* prayed, the court may, of its own accord, order the sheriff or other officer to return a fresh panel *instanter* (*Joy*, above, at 186; 1 Chitty, Crim. L. pp. 506-8), the point is not of very great importance. Moreover, it is provided for by 6 G. 4, 50, 37.

It seems that the formal delivery of the book into the hands of a juryman is the commencement of the oath: *Brandreth*, 32 St. Tr. 770, 1817; *Frost*, 1839. See also *Giorgetti*, 4 F. & F. 546, 1865; but if the juryman, of his own accord, takes the book into his hands, his doing so not being directed by the court, that does not take away the right of challenge. *Frost*, at 137. It is not absolutely necessary that the names should be called in the order in which they stand on the panel, but that order may be departed from if convenience requires it. *Mansell* v. *R.*, D. & B. C. C. 375, 1857.

The challenge to the array must, of course, be before *any* juryman is sworn.

To the array—principal] The learning on this subject has to be sought out of old books; and there is great difficulty in deriving from them any precise rules. It is, however, quite clear that any partiality in the sheriff, under-sheriff, or other officer who is concerned in the return of the jury, is a good cause of challenge to the array, and that this partiality will be assumed to exist if the sheriff or other officer be

of kindred or affinity to either party; or if any dispute be pending between the sheriff and either party which would be likely to influence the sheriff; or if the sheriff or other officer have been concerned for either party in the same matter, either as counsel, attorney, or the like. Co. Litt. 156 *a;* Bac. Abr. tit. Juries, E. 1. Or have been guilty of 'fraud or wilful misconduct': 39-40 V. 78, 17 (Juries, &c. Ireland A.).

There can be no challenge to the array on the ground of the partiality of the master of the crown office, in a case where he is the officer by whom the jury is to be nominated under a rule of court. *Edmonds,* 1821. The only remedy in such a case is to apply to the court to appoint another officer to nominate the jury.

Favour] A distinction is sometimes (Co. Litt.; Bac. E. 12, as above) made between challenges for *favour, i.e.* on a mere suggestion of bias which must be *tried,* and 'manifest' or 'principal challenges' on definite allegations, as above, which need not: 7 Encycl. Laws E.: 'Jury'; the latter, if proved, are 'absolutely fatal in law to the panel as returned.' But triers would probably now be appointed in all cases.

A challenge to the array should be in writing, so that it may be put upon the record, and the other party may plead or demur to it; and the cause of challenge must be stated specifically. *Edmonds,* above; 1 Chitty, Cr. L. 546-7. Cf. *Hughes,* 1 C. & K. 235, 1843. For forms of pleading, see *Mitchel,* 1848; *Smith O'Brien,* 7 St. Tr. N. S. 20, 1848.

When the opposite side pleads to the challenge, two triers are appointed by the court: either two coroners, two attorneys, or two of the jury, or indeed any two indifferent persons. For an instance of triers, see *Smith O'Brien,* two trials, and *Giorgetti,* at 553. If the array be quashed against the sheriff, a *venire facias* is then directed *instanter* to the coroner; if it be further quashed against the coroner, it is then awarded to two persons, called *elisors* ('*ab eligendo*'), chosen at the discretion of the court, and it cannot be afterwards quashed. Co. Litt. 158 *a.*

Triers] The cause pleaded must be made out, by witnesses, if there are any, before the triers. After pleas, the challenger addresses the triers, and may call witnesses; then the opponent addresses them, and may call witnesses, in which case the challenger has a reply. The judge then sums up to the triers, who give their decision. *Dolby,* 1 C. & K. 238, 1821; *Mitchel; Smith O'Brien,* above.

If a challenge to the array be found against the challenger, he may afterwards, notwithstanding, challenge to the polls.

To the polls] Challenges to the polls are either peremptory (*i.e.* without any cause shown) or for cause. At common law, the crown might challenge peremptorily any number of jurors; simply alleging *quod non boni sunt pro rege;* but by 33 E. 1, st. 4, 1305, rpd. but re-enacted in nearly the same words by 6 G. 4, 50, 29, this right is taken away, and the crown is bound to assign 'a cause certain' of its challenge, but not until the panel is exhausted.

A practice, however, which has continued uniformly from the time of E. 1 to the present, enables the prosecutor to exercise practically the right of peremptory challenge; because, when a name is called the juror will, on his request, be ordered to stand by; and it is only when the panel has been exhausted, that is, when it appears that, if the

jurors ordered to stand by are excluded, there will be a defect of jurors, that the prosecutor is compelled to show cause. *Mansell* v. *R.* When it appears that, in consequence of the peremptory challenges by the defendant, and of the number ordered to stand by, a full jury cannot be had, then the proper course is to call over the whole panel again, only omitting those that have been peremptorily challenged by the defendant. *Geach,* 9 Car. & P. 499, 1840. And even on the second reading over of the panel a juryman may be ordered to stand by at the request of the prosecutor, if it reasonably appears that sufficient jurymen may yet appear. *Mansell* v. *R.*

Treason, felony] Defendant has, in treason (sometimes) thirty-five (7-8 W. 3, 3, 2), in felony twenty peremptory challenges and no more: 6 G. 4, 50, 29; and the right exists whether the felony be capital or not. *Gray* v. *R.*, 11 Cl. & Fin. 427, 1844: H. L. When these are exhausted, defendant is in the position of the crown, above.

Misdemeanour] In cases of misdemeanour there is no right of peremptory challenge. 1 Chitty, Cr. L. 535. But defendant is generally allowed to object to jurors as they are called, without showing any cause, till the panel is exhausted; and that practice was approved by Williams J. in *Blakeman,* 3 C. & K. 97, 1850. If the panel be thus exhausted, the list must be gone through again, and then no challenge allowed except for cause.

Triers] If a juror be challenged for cause before any juror sworn, two triers are appointed by the court (generally from the jury returned: 7 Encyc. Laws E. 573); and if he be found indifferent and sworn, he and the two triers shall try the next challenge; and if the last be tried and found indifferent, then the first triers shall be discharged, and the two first jurors tried and found indifferent shall try the rest. Co. Litt. 158 *a;* 2 Hale, P. C. 275; Bac. Abr., tit. Juries, E. 12.

The trial proceeds in the same manner as a challenge to the array (*e.g. Dolby,* 1821). The juror challenged may be himself examined on any cause of unfitness which does 'not tend to infamy or disgrace.' Bac. *ib.;* cf. *Cook,* 1696.

Causes] A juror may be challenged 1. *propter defectum,* that he is not *liber et legalis homo;* 'hence it has been always clearly holden that aliens, minors or villeins cannot be jurors': Bac. *ib.* E. 2; or that he is not fit to serve from being over or under age, but see *Mulcahy* v. *R.*, L. R. 3 H. L. 306, 1868—being over age gives exemption but does not disqualify on challenge; or from some other personal defect; or, generally, that he is not qualified within the statute above.

2. *Propter affectum:* that he is not indifferent. The same circumstances which would support a challenge to the array for unindifferency in the sheriff would support a challenge to the poll in the case of a juryman. 1 Chitty, Cr. L. 542. It is no cause of challenge by the prosecutor that the juror is a client of defendant, who is an attorney: *Geach;* nor that the juror has visited defendant as a friend since he has been in custody. *Ib.* It is not allowable to ask a juryman if he has not previously to the trial expressed himself hostilely to defendant, in order to found a challenge, but such expressions must be proved by some other evidence. *Edmonds,* 1821; *Peter Cook,*

1696, at 333. And that they must amount to something more than an expression of opinion in order to constitute a good cause, that they must lead directly to the conclusion that the juryman is not likely to act impartially after he has heard the evidence seems to be suggested by *Joy* on Confessions, &c., p. 189. On a trial for a riot, it is ground for challenge by the prosecution that the juror is an inhabitant of the town where the riot took place, and that he took an active part in the matter which led to it: *per* Coleridge J., *Swain,* 2 Moo. & R. 112, 1838.

No juror on the coroner's inquest ought to be on the petty (or, perhaps, grand) jury on the same matter, nor grand juror on the petty: *Cook,* at 330; *Vaughan,* at 487; *Stone,* 25 St. Tr. 1156, 1796. Where several jurors had been on both, without the judge's knowledge, and both juries found murder, the judge mentioned the fact in his note of the case: *Snow,* 1776; 1 Lea. 152 *n.* Cf. *Witnesses, Competency.*

3. *Propter delictum: 'Infamy.'* By 33-4 V. 77, 10: 'No man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever.' This enacts the common law: Co. Litt. 158 *a;* 3 Bl. Comm. 363-4: 'if,' says Coke, 'he be attainted or convicted of treason or felony or for any offence to life or member or in attaint for a false verdict or for perjury as a witness or in a conspiracie at the suite of the King or in any suite (either for the King or any subject) be adjudged to the pillory, tumbrell or the like, or to be branded or to be stigmatique or to have any other corporall punishment whereby he becometh infamous (for it is a maxime in law *repellitur a sacramento infamis*), these and the like are principall causes of challenge. So it is if a man be outlawed . . .' So at 6 *b* of witnesses and jurors, where Mr. Butler's note is: 'but according to the modern cases it is the *infamy* of the *crime* and not of the *punishment* which disqualifies from being a witness'; 24-5 V. 96, 46, which defined the phrase narrowly, is rpd. It is certain that the crimes enumerated in s. 29 (3) of the Larceny A. 1916, are 'infamous,' but otherwise the phrase cannot be defined more exactly than it is by Coke. See *Clancey,* Fortesc. 208, 1696.

In *Johnson,* 1728, when a witness was objected to because he had been convicted for uttering false money, the K. B. overruled the objection because the offences mentioned in Co. Litt. 6 *b,* 'are chiefly such as bring scandal and contempt' on those who commit them; here 'the judgment is only that he shall be fined or imprisoned . . . and nothing of an infamous punishment': 1 Barnard. 124. In *Grant,* R. & M. 270, 1825, Abbott L.J. declined to reject a witness convicted of keeping a gaming-house.

4. *Propter honoris respectum: e.g.* a peer on a jury trying a commoner: Co. Litt. 156 *b;* 4 Hawk. 2, 43, 11.

Parol] 'Challenges to the polls are generally made by parol': 7 Encyc. Laws E., above; 1 Chitty, Cr. L. 546-7.

Challenges improperly decided] 'The improper disallowance of a challenge renders the subsequent proceedings before the jury absolutely void, and it is not within the province of the appellate court to con-

sider whether the person complaining has been prejudiced and to exercise a discretion as to granting a new trial': 18 Halsbury, 252, citing Abbott C.J. at 473 of *Edmonds,* 1821, whence it seems that in such a case the C. C. A. must hold the proceedings a mistrial.

Persons unqualified or unfit to serve] A juror who is not qualified may object to serve though not challenged: *L. Grey,* 9 St. Tr. 129, 1682; and, if on examination on oath he be found not to be so, he will be ordered to retire. *Cook,* 1696, at 313, 318. It is the *independent* duty of the judge to challenge 'any juror who from physical or mental infirmity, temporary or permanent, is incapable of duly attending to the evidence': 18 Halsb. *ib.*, citing *Mansell* v. *R.* (see all the judgments), and mentioning that in 1902 Wills J., in the middle of a case at assizes, discharged a juror who heard that his farm was on fire, and began the trial again. From *Mansell,* at 79, it appears that a juryman, on being called on a trial for murder, stating that he had conscientious objections to capital punishment, Bramwell B., on the prayer of the crown, ordered him to stand by, although defendant demanded that he should serve; both the Q. B. and the Exch. Ch. approved: the former saying, *per* L. Campbell C.J., that they by no means acquiesced in the authority of *Anon.,* Brownlow & Gold. 41, 1608, 'that a judge on the trial of a criminal case, has no authority, if there be no challenge' on either side, 'to excuse a juryman on the panel when he is called, or to order him to withdraw, although he is palpably unfit, by physical or mental infirmity, to do his duty.'

Irregularity in constituting jury] In *Mellor,* D. & B. C. C. 468; 7 Cox C. C. 454, 1858, there was a considerable difference of judicial opinion what the law was, where by mistake one person on the panel had been called and sworn and acted in the name of another (who did not go into the box), but the conviction (for murder) was affirmed by eight to six. The true rule of the C. C. A. is doubtless that laid down, 18 Halsbury, 254: in such a case 'the proceedings . . . *may* be set aside whether the mistake be discovered before or after verdict, but the court will be slow to interfere with a verdict in the absence of a substantial miscarriage of justice, even though either side has been deprived of the right of challenge.' The C. C. A., which has the 'jurisdiction and authority' of the C. for C. C. R., has ordered a *venire de novo, e.g.* in *Baker,* 1912, and in *Wakefield,* 13 Cr. A. R. 56, 1918, where a juror summoned was personated by an unqualified person not on the list. For the jurisdiction of the C. for C. C. R. where there has been irregularity in procedure, see *Mellor* and *Martin,* L. R. 1 C. C. R. 378; 41 L. J. M. C. 113; 12 Cox C. C. 204, 1872.

Effect of form accepted] The 1-2 V. 105, as amended 1-2 G. 5, 6, 17, is 'in all cases in which an oath may lawfully be and shall have been administered to any person as a juryman in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding.' See 1-2 G. 5, 6, 15, and below.

Giving defendant in charge] It is not necessary that, after defendant has had his challenges, that jury should try him, if he be not given

in charge; a fresh jury may be got together for the purpose, each defendant, of course, having the same right of challenge as before.

After the jury is constituted—even before defendant is given in charge—great strictness must be observed in preventing them hearing anything about the case except in the regular way: *per* Jefferies L.C.J., *A. Sidney,* at 837.

b. The Hearing.

Offering no evidence] If defendant appears, 'although no evidence is offered by the prosecutor, this is still a hearing' [or 'trial': 17 L. J. M. C. 69]: *Tunnicliffe* v. *Tedd,* 5 C. B. 560, 1848: Q. B. Unlike a *nolle prosequi,* this requires the leave of the court: see *Wood,* 1832: nuisance; hence defendant must be present.

i. PROSECUTION.

Opening the case—duty of prosecuting counsel] In *Vaughan,* 1696, three counsel opened; in *Layer,* two opened and six took part in examining witnesses for the crown, sometimes two at a time.

Where there is counsel for defendant in felony, the counsel for the prosecution ought always to open the case. *Gascoine,* 7 C. & P. 772, 1837. But sometimes he does not open it if defendant has no counsel: *Jackson, ib.* 773, 1837, unless there is some peculiarity in the circumstances: *Bowler, ib.* 1837—all *per* Parke B. Where there is no counsel for the prosecution there can be no opening, as a private prosecutor is never allowed personally to address the jury, because the prosecution is 'for the interests of the public, in the name of the King, and not to gratify the objects of an individual'—a point amplified admirably by Blackburn J., *Berens,* 1865. So *Gurney,* 11 Cox C. C. 414, 1869, where by consent the trial was adjourned so that counsel might be instructed. Counsel are privileged and trained to state nothing to the jury 'but what is fit for them to hear.' *Brice,* 2 B. & Ald. 606, 1819, viz. a mere outline or frame of the *evidence* he has.

'It used to be considered that the counsel for the prosecution was in a *quasi*-judicial position—to bring forward proofs of the prisoner's guilt, but with the responsibilty of doing so, not as mere counsel to try to get a verdict, but as an assistant of the court, fairly to bring out the facts. At *nisi prius* the cause is between party and party, and the advocate must use every fair means to get a verdict; but in criminal courts he is in a very different position, and should avoid all technical objections and *nisi prius* tricks in order that the issue may be tried on the merits': *per* Blackburn J., *Berens.*

Counsel for the prosecution strictly has a right to state the details of a conversation which one of the witnesses whom he intends to call had with defendant, but the correct practice is to state the general effect of it. *Deering,* 5 C. & P. 165; *Hartel,* 7 C. & P. 773, 1837; *Swatkins.* In a later case, however, Parke B. ruled that the fair course to defendant was to state what conversations it was intended to prove; *Orrell,* 7 C. & P. 774, 1 Moo. & R. 467, 1835; *Davis, ib.* 785, 1837; but as a general rule conversations would appear on the depositions. Parke B. seems to have thought that *confessions* ought not to be opened, as they may turn out to have been made in circumstances rendering them inadmissible, and counsel certainly ought not to open them unless he has satisfied himself that they are admissible. See *Thompson,* 1893.

Reference to persons not parties] For other restrictions on the

opening speech, see *Phips.* 29. Sometimes counsel suppresses the name of a third person whom the evidence will disparage but who is not entitled to be heard. So a clerk of assize reading defendant's confession omitted the names of persons implicated by it but not before the court; the judge in that case, however, insisted on the names being read, *Clewes,* 4 C. & P. 224, 1830, but the learned editors show that the clerk followed the usual practice, adding, 'and some judges have even directed witnesses, who came to prove verbal declarations, to omit the names of those (accused) persons.' Cf. *Booth,* 1910.

Sexual offences] In *Cargill,* which see, the C. C. A. said that counsel very commonly state matters which, though not actually relevant to the issue, go to aggravation of the punishment; in the case of the chastity of the prosecutrix, it being irrelevant, the Court seemed to disapprove.

Examination, &c. of witnesses—names] See that title and *Previous Conviction,* below; 'even at the trial the judge will sometimes allow a witness in the box not to publicly disclose his name': *Phips.* 194. Documents put in are 'evidence' within s. 2, below: 2 Russ. Cri. 1998 n.

Cross-examination] Defendants represented by counsel were sometimes formerly allowed to cross-examine the same witness as their counsel, *e.g. Layer,* 1722, at 187-9; but no such latitude is now allowed. Nor do two counsel cross-examine the same witness, as was there done, *e.g.* at 226 and elsewhere. 'Great latitude should be allowed' in cross-examination for the defence; 'care should be taken not to stop a cross-examination, which, although it may appear lengthy and wide of the point, may subsequently prove to be of value.' *Smallman,* 10 Cr. A. R. 3, 1914.

Of co-defendant or his witnesses] Even if a co-defendant gives no evidence on his own behalf, he may be cross-examined on his case: *H. Rowland,* 1910, 1 K. B. 458; 79 L. J. K. B. 327; 102 L. T. 112; 74 J. P. 144; 26 T. L. R. 202; 3 Cr. A. R. 277.

Of witnesses against defendant's character] When the questions are admissible care must be taken that they are not answered 'with more detail' than is necessary: *Farrington,* 1908.

View] A jury sometimes has a view of a place connected with or generally the scene of the alleged crime. In *Martin,* 1872, while deliberating, the jury asked for a view, as they could hardly decide without one. They were permitted to go with the defendant's representative, the witnesses and, no doubt, an officer of the court. It was stated that at their request the witnesses reproduced their positions, but the C. C. C. R. had no evidence of this and thought that the view was not irregular provided no evidence was given out of court.

Summing up by counsel] To *sum up* here means strictly to state the effect of evidence for the prosecution without reference to the defence, except in so far as it has been disclosed by cross-examination. By 28-9 V. 18, 2: 'If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution,

to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanour, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively [see below]; and after the conclusion of such opening, or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present.'

By s. 9, 'counsel' here means 'attorneys in all cases where attorneys are allowed by law or the practice of any court to appear as advocates,' *i.e.* at certain quarter sessions where no barrister is available: see for an instance, *G. Metcalfe,* 1913, and L. Campbell's *Autobiography,* September, 1812.

Witness to character only] After this A. it was held that witnesses to *character* (only) were not within it, and consequently, if the defence calls any, a *reply* is not let in: *Dowse,* 4 F. & F. 492, 1865. But even before the A. judges strongly disliked the exercise of the right (which, they could not deny, existed, there being no distinction in *principle* between evidence of *facts* and of *character*) in felony; in misdemeanour it had never been the practice to reply in such a case: *Stannard,* 7 C. & P. 673, 1837; for an instance, see *Metcalfe,* 1913. *Stannard* was almost immediately followed by the Judges' Resolutions of 1837, of which the 4th was: 'If the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do': cf. *Brooks,* 1 Cox C. C. 6, 1843.

Blackburn J. pointed out in *Berens,* 4 F. & F. 842; 10 Cox C. C. 226, 1865, that it is not a positive duty to sum up under this A. F. & F. headnote adds: where defendant calls no witnesses, they should not sum up 'unless they really, in their discretion, deem it to be necessary for the purposes of justice.' Counsel never sums up against an undefended person (even if he makes an unsworn statement) who calls no witnesses nor, sometimes, when he does.

Effect of the Criminal Evidence A. 1898—*when defendant is called*] Former procedure—which did not contemplate defendant giving evidence—was greatly modified by the capital innovation of this A. s. 3: if the only witness (to fact) for the defence is the defendant, 'he shall be called . . . immediately after the close of the evidence for the prosecution': s. 2. Counsel for the prosecution then sums up, and in doing so he may comment on defendant's evidence: *Gardner,* 1899, 1 Q. B. 150; 19 Cox C. C. 177; 68 L. J. Q. B. 42; 79 L. T. 358; 62 J. P. 743: C. C. R. But he cannot *reply* after the speech for the defence.

Legal objections] The C. C. A. is very slow to give effect to such

objections not taken at the time: *Farrington,* 1908; at any rate, when defendant is represented: *Davis, &c.,* 2 Cr. A. R. 136, 140, 1909; *Rose, ib.* 265; *Payne,* 3 Cr. A. R. 262, 1909; *T. Austin,* 1916; or if he defends himself with adequate skill: *H. Benson,* 3 Cr. A. R. 70, 1909. But this does not dispense the judge from stopping any irregularity in the reception of evidence or in procedure, or counteracting it when it has taken place: *Ellis,* 1910, which shows that there is some risk in delaying objections: *Norton,* 1910; and the court recognises that sometimes there is good ground for not so objecting: *Charlesworth,* 4 Cr. A. R. 169, 1910. And where a good point of law which should have been taken at the trial was not taken at all, c. q.: *Boughton,* 6 Cr. A. R. 1910. Cf. *Cross-examination* and *Stoddart,* 1909.

When a legal argument must necessarily involve evidence alleged to be inadmissible, the jury is sometimes asked to retire during the discussion, as in *Booth, &c.,* 5 Cr. A. R. 180, 1910; *Ballard,* 12 Cr. A. R. 2, 1916. This is the proper course: *A. Thompson,* 1917. Cf. *Clewes,* and see *Phips.* 166.

Evidence of insanity] If cross-examination has shown that the defence will be insanity and the prosecution is informed that no witness will be called to prove it, the prosecution is entitled, at the conclusion of its case, to call evidence of sanity: *Abramovitch,* 7 Cr. A. R. 145; 23 Cox C. C. 179; 76 J. P. 287, 1912. Otherwise, it seems, no general rule can be laid down at what stage of the trial *the crown* should, when it supposes that the defence will be insanity, proffer evidence of sanity: *O. Smith,* 6 Cr. A. R. 19, 1910, where Alverstone L.C.J. referred to a resolution of the judges that the crown ought not to give evidence of *insanity,* the *onus* being on the defence; there the trial judge had allowed medical but not other evidence to rebut the evidence of insanity, as was done in *Scholey,* 1909, where the medical evidence was rejected at the conclusion of the prosecution. The defence is not bound to give the prosecution notice that it will give medical evidence of insanity, and the crown should prove sanity *in reply* and not as part of its case: *G. O. Smith,* 8 Cr. A. R. 75, 1912; see *Mental Unsoundness.*

When defendant is not called] The *prosecution* may not at any time comment on defendant's or his or her spouse's silence: s. 1 *b.* When this rule was broken in respect of a wife, but the C. C. A. was satisfied that the jury were not affected by it, they took no notice of it: *Dickman.* It seems, however, that it may comment on his reserving his defence before the magistrate, so that it cannot be investigated before the trial: *McNair,* 25 T. L. R. 228, 1909; but in the only other report, 2 Cr. A. R. 2, this point is said to have been taken by the judge (only).

Putting in defendant's statement] If there is one before the magistrate, this is put in at the trial 'as part of the case for the prosecution' at the end of its evidence: *Gardner,* above, at 155 (Q. B.). So *Shimmin* 'as a matter of course.' Cf. *Greenacre* and *Haines,* 1858. The usual course is that the court has the statement read to the jury.

No case] At the close of the case for the prosecution a judge is never in law bound to withdraw the case from the jury if that course is not formally submitted to him, even by an undefended person: *A. George,* 1908 (and 73 J. P. 11. and 25 T. L. R. 66), where the

C. C. A. thought he might have done so on his own initiative 'and probably many judges would have done so'; if defendant supplies evidence against himself he may be convicted: so *Gay,* 1909; *F. Jackson,* 5 Cr. A. R. 22, 1910. Otherwise if there is such a submission: *Leach,* 2 Cr. A. R. 72, 1909; *Joiner,* 4 Cr. A. R. 64; 74 J. P. 200; 26 T. L. R. 265, 1910: c. q. But *Joiner* was not followed in *A. Fraser,* 7 Cr. A. R. 99; 76 J. P. 168, 1911 (cf. *B. Pearson* (No. 1), 1 Cr. A. R. 77; 72 J. P. 449, 1908, where the C. C. A. thought that the case against one of three defendants ought to have been withdrawn: c. q.; *Batty,* 7 Cr. A. R. 286; 76 J. P. 388; 28 T. L. R. 485, 1912; so *A. White,* 13 Cr. A. R. 211, 1918: c. q.), and was definitely overruled by five judges in *J. Power,* 14 Cr. A. R. 17, 1919: c. q.: 'To have been quite safe he should have taken no part in the subsequent proceedings.' 'In cases near the line' it is 'perhaps better' to leave them to the jury: *J. Bennett,* 8 Cr. A. R. 11, 1912: c. q. Another instance in which, it seems, the judge ought to have stopped the case is *W. H. Page,* 11 Cr. A. R. 191, 1915, where the only evidence of guilt offered was that a detective cautioned defendant and then told him that he would be charged with others for stealing watches; 'B. [accused] has handed me two out of the 24 you sold him and they were stolen'; defendant replied: 'All right'; the C. C. A. declined to regard this as an admission: c. q. Blackburn J.'s dictum should be remembered: 'the rule which has been laid down in civil cases ought *à fortiori* to be applied to criminal ones, namely, that a mere *scintilla* of evidence ought not to be left to the jury': *Smith,* 1865.

ii. DEFENCE.

Opening defence] Only one counsel opens, even in treason, but formerly two were allowed, *e.g. Layer,* at 233-44, where each made half his speech at the time. In 'murder, or any other case where counsel for the defence is calling witnesses other than the prisoner, he has a perfect right to open his case before calling his evidence, without interference of any kind on the part of the judge': *per* Alverstone L.C.J., *E. Hill,* 7 Cr. A. R. 3, 1911. Since the Crim. Ev. A. 1898, the judges have insisted that counsel's speech for the defence should be made after defendant's evidence (if he is called).

Defendant not the only witness] It is 'most important' that he should be called first: *per* Alverstone L.C.J., *Morrison,* 6 Cr. A. R. 165, 1911.

Defendant witness] See above. For the duty of the judge to inform him of his right to give evidence, see below.

Addressing the jury] The judge ought to inform an undefended person of his right, but the omission to do so is not a mistrial: *Saunders,* 1898.

Order of defences] Where there are several defendants and they are severally defended, the order in which defending counsel address the jury is not very clearly settled. In *Barber, &c.,* 1844, Gurney B. said that the rule was this: that, if counsel cannot agree among themselves on the course to be adopted, it is for the court to call on them in the order in which defendants are named in the indictment and not in that of seniority; and counsel who called no witnesses were not allowed to postpone their speeches till after one defendant had called his. In *Esdaile* (conspiracy to defraud) L. Campbell C.J. called on the counsel for defendants in the order of seniority. In *Belton,* 5 Jur. N. S. 276, 1859, Martin B. said that, where one person was defended and another not, he made it an invariable rule to hear counsel first. In *Thomas and Harris,* 3 Jur. N. S. 272, 1857, Channell B. in a similar case decided on following the order in the indictment, though only the second defendant in order had counsel; but in *Holman, ib.* 722, Pollock C.B. said, he would not subscribe to the imaginary rule (of the order in the indictment, *i.e.* 'the caprice of the person who draws' it). In *Meadows,* 2 Jur. N. S. 718, 1856, Erle J. admitting the rule, added, 'Attention must, however, be paid to the precise offence with which each prisoner is charged; for instance, the principal should make his defence before the accessory, and the thief before the receiver, and such like; but when an indictment is drawn by a knowing man, he usually puts the principal person first.' When counsel for one defendant had witnesses to facts to examine, counsel for another who had not was not allowed to postpone his address to the jury until after those witnesses had been examined; *Barber,* above; but this is probably a matter for the discretion of the judge.

Counsel stating defendant's account] Counsel, in addressing the jury, is not allowed to state anything which he is not in a situation to prove, or which is not already in proof: *per* Coleridge J., *Beard,* 8 C. & P. 142, 1837. In *O'Donnell,* 99 Sess. Papers, C. C. C. 157, 1883, murder, counsel for the defence, after objection taken ('as it was in effect making the counsel in the case himself a witness') and withdrawn by the attorney-general, stated defendant's own account of the transaction.

The matter is practically settled by a resolution of the judges, stated in the 10th, 11th, and 12th editions of this work, which give the date of Nov. 26th, 1881, to run: 'In the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence.' See for a discussion of the principles of the controversy, *Best, Ev.* s. 635 and note *y* (p. 540, 10th ed.). Now, of course, what 'they propose to prove' may include defendant's evidence. On defendant's counsel expressing to the jury his regret that he could not tell them defendant's account how the death (charged as murder) was caused, Cockburn C.J. allowed him to do so. *Weston,* 14 Cox C. C. 546, 1879. A learned writer in the *Law Journal* for Jan. 21, 1882, p. 36, thinks that the subsequent cases were 'a development' of this permission.

Defendant's unsworn statement] The fundamental principle of the common law being that all evidence must be sworn, the courts discouraged any statement by him (except one speech in defence), even one to his counsel, if the jury could hear it: *Layer,* at 177, 258, 275; and any statement of fact which the accused made in any court was for centuries *theoretically* a nullity, though as Stephen J. showed in 1 *Hist. Crim. L.* 440, c. xii., it might *in effect* help him considerably. That learned writer notes the rise in his own day of the practice of counsel making 'any statement they please as from their clients' and of the gradual organization of defendant's unsworn statement; it is not easy to keep these two points apart. When defendant was unrepresented there was little or no practical difficulty. When he had counsel there was considerable variety in the practice: thus *Layer,* at 261, 1722, followed his counsel, and Ellenborough C.J. *invited Watson* (treason: 1817), at 538, to address the jury immediately after his counsel's (second) speech; 'but you must not after the counsel for the crown has replied.' But at precisely the same point in a felony Coleridge J. said: 'Your counsel has spoken for you. I cannot hear both.' *Boucher,* 8 C. & P. 141, 1837. Where there was no one present at an alleged shooting 'with intent' but prosecutor and defendant, Alderson B. allowed the latter, in these circumstances, to make his own statement before his counsel addressed the jury. *Malings,* 8 C. & P. 242, 1838. And the same course was permitted by Gurney B., but with an observation that it ought not to be drawn into a precedent: *Walkling, ib.* 243, 1838. 'The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counnsel, and that rule should not be infringed on, except in very special cases indeed': *per* Patteson J., *Ryder,* 8 C. & P. 539, 1838; *Dyer,* 1 Cox C. C. 113, 1844, however, is strong in defendant's favour. Cf. *Pearce,* 1840. In *Taylor,* 1 F. & F. 535, 1859, Byles J. refused to permit it, but allowed defendant to exercise the option of either

speaking for himself or of having his counsel to speak for him. In 1882, Cave J. stated that the following course was approved by the judges, namely, that a defendant may—and if represented, then at the conclusion of his counsel's speech—make his statement to the jury, provided that 'what he states from the dock is subject to the right of reply on the part of the prosecution, as being in the nature of new matter laid before the jury:' apparently this does not apply where there was a statement before the magistrates. *Shimmin,* 15 Cox C. C. 122, 1882. So in *Taylor, &c.,* 15 Cox C. C. 267, 1883, 'defendants were allowed [by L. Coleridge C.J.] at their earnest instance to address the jury after their counsel, giving their own account of the transaction.'

In *Foster,* 1887, defendant desired to make a statement to the jury, and her counsel applied to the court for directions. Field J. said, 'It is in the discretion of the judge when and where the prisoner should make a statement. There is no practice either way, and I consider that the prisoner should make her statement after the speeches of counsel. In my opinion, it would be hard to prevent a prisoner from making a statement if he thinks fit.' (Earlier editions of this work.) In *Doherty,* 16 Cox C. C. 306, 1887, Stephen J. permitted a similar course, but required the statement to be made before the court was addressed by defendant's counsel, and held that it gave the crown a right of reply. This was the course in *Casement,* 1916.

The Criminal Evidence A., by opening the defendant's mouth, has practically put an end to the controversy, but the former situation is often reproduced when defendant has counsel and does not go into the box; s. 1 (*h*) of that A. expressly keeps alive defendant's right to make an unsworn statement. In *Sheriff, &c.,* 20 Cox C. C. 334, 1903, defendants called no witnesses and did not give evidence; Darling J. refused their counsel's application that *after* the prosecution had summed up they might make unsworn statements. They each made such statement, the prosecution summed up and their counsel followed. For an *undefended* person in such a case, see above.

Defendant's right to give evidence] The usual practice is that the judge informs an undefended person of his rights of defence: *Mack,* 1 Cr. A. R. 132, 1908; *J. Warren,* 2 Cr. A. R. 194, 1909: c. q.; and some judges also inform him that if he goes into the box, he may be cross-examined.

Defendant not a witness—judge's duty] The C. C. A. thought that it was proper in some cases that the jury should be directed on the point: *Bernard,* 1 Cr. A. R. 218, 1908; *Hampton,* 2 Cr. A. R. 276, 1909, murder, especially when the defence is an *alibi; Mack; Kirkham,* 2 Cr. A. R. 255, 1909; or in receiving cases, 'obviously those in which an innocent prisoner would go into the box . . . at the earliest possible moment': *Theadorus,* 3 Cr. A. R. 271, 1909. But, *per* Alverstone L.C.J., the judge's comment must not go too far: *Vassileva.* The Criminal Evidence A. has not affected the point: *Rhodes,* 1899.

In *W. H. Palmer,* 6 Cr. A. R. 241, 1911, murder, the C. C. A. did not disapprove of the judge's not commenting on defendant's not giving evidence. In *Probets,* 8 Cr. A. R. 113, 1912, the trial judge put favourably to defendant his not giving evidence, but the C. C. A. pointed out its effect on the jury.

To what extent, corroboration] 'Although the fact that appellant

was not called is not of itself corroboration, we think it entitles a jury to act where, perhaps, they would not otherwise have done so': *per* Alverstone L.C.J., *Blatherwick,* 6 Cr. A. R. 282, 1911: using illegal instrument. Buckley and Phillimore L.JJ. thought (but Kennedy L.J. doubted) that a defendant who did not set up prosecutrix's bad character either by evidence or cross-examination when it was a good defence, and he had done so before the justices, was corroborating by *conduct* her case on a bastardy summons: *Mash* v. *Darley.*

Adoption of co-defendant's witness] There seems to be no authority on the point, but this practice, convenient sometimes to save time, is tantamount to calling the witness.

Recalling defendant] He may be recalled like any other witness, even to be cross-examined on his previous convictions: *Seigley.*

Witnesses for defence] The earliest enactment is 1 E. 6, 1, 6 (or 7), in 1547: in trials on indictment for certain offences against the Sacrament the accused 'shall be admitted to purge or try his or their innocency by as many or more witnesses in number and of as good honesty and credence as the witnesses be which deposed against him. . . .' See, further, *Phips.* 431. In 1554 *Sir Nicholas Throckmorton,* indicted for treason, stated—1 St. Tr. 887—that when Queen Mary appointed Bromley, who was trying him, Lord Chief Justice, 'notwithstanding the old error amongst you which did not admit any witness to speak or any other matter to be heard in the favour of the adversary, her majesty being party, her highness's pleasure was that whatsoever could be brought in the favour of the subject should be admitted to be heard'; but it does not appear whether this concession applied to other offences than treason and defendant did not in fact call witnesses. But in 1660 *Hulet,* a regicide, was refused *sworn* witnesses for his defence; but they were 'examined': 5 St. Tr. 1191. S. 3 of 1 Ann. st. 2, c. 9, assumes that in 1702 the defence could call witnesses in felony as it could since 7 W. 3, 3, 1, 1695, in treason.

Trying two indictments together] Where there were cross-indictments for assault, both for the same transaction, Gurney B. directed the jury to be sworn on both; each counsel in the order of their clients' pleading not guilty to open his case and call his witnesses; neither side to have a reply: *Wanklyn, &c.,* 8 C. & P. 290, 1838.

Witness called by judge] See p. 160 and *Baines,* 1909.

iii.

Right to reply] Wherever any witness other than the defendant is called, or any document put in, on behalf of defendant, at any time in the course of the trial, the prosecution will have a right, at the conclusion of the defence, to address the jury in reply. This is so laid down of depositions offered as evidence for defendant, in the rules drawn up by the judges in 1837 (see p. 282); but the practice is precisely similar in all cases. Defendant's statement is now generally put in by the prosecution. For the old practice and the changes made by those rules, see *Edwards,* 8 C. & P. 26, 1837: murder, whence it appears that the right to reply was never insisted on when merely depositions were cross-examined to or witnesses to character called.

Where four persons were jointly indicted, two for stealing a sheep, and two for receiving separate parts of the sheep so stolen, and counsel

for the receivers put in the depositions to contradict the case against them, by showing a variation between the testimony of the principal witness and his deposition, but no evidence was given on behalf of the others: Parke B. 'stated that the reply must be confined altogether to the case of the receivers, adding, that he did not wish to lay down a general rule, that in no case, where several were indicted together, would witnesses be called by one entitle the prosecutor to reply against all; but in this case the offences were distinct, as the receivers might have been indicted separately from the principals.' *Hayes,* 2 M. & R. 155, 1838. Three men were indicted for murder, and witnesses were called for the defence of one only; Talfourd J. held that the counsel for the prosecution was entitled to reply generally on the case, and was not to be limited in his reply to the case against that defendant, although the evidence adduced for him did not affect the case against the other two; but *aliter* if the offences were different, *e.g.* larceny and receiving. *Blackburn,* 1853. Where two defendants set up an *alibi,* and one called witnesses to prove it, Williams J. 'as the defences were the same,' allowed the counsel for the prosecution to reply on the whole case. *Briggs,* 1 F. & F. 100, 1858. But in *Burton,* 2 F. & F. 788, 1861, Wightman J. advised the counsel for the prosecution to confine his remarks to the case of the one defendant who had severed in his defence and called witnesses. So *Trevelli.*

A. and B., the drivers of rival omnibuses, were indicted for manslaughter, caused by their negligence in racing. After the case for the prosecution had closed, and A.'s counsel had addressed the jury without calling witnesses, witnesses were called on behalf of B., who threw the blame on A.; it was held by three judges that counsel for A. was entitled to cross-examine B.'s witnesses first, next the prosecution, and then B.'s counsel to re-examine: then A.'s counsel might again address the jury, strictly confining himself to B.'s evidence, and then the prosecution might reply generally. *Woods, &c.,* 1853; so *Burdett,* 1855.

Comment] See s. 1 (b) of Crim. Ev. A. Probably it is 'comment' to ask a defendant-witness whether his or her spouse is in attendance, and if the answer is 'no,' then to ask 'why not?'

Right of the attorney-general] The attorney-general of England (and of Ireland, at any rate, in a trial: *O'Connell, &c.,* 5 St. Tr. N. S. 31-2, 1843) prosecuting in person for the crown, has the right to reply whether witnesses be called or not. (As a Commonwealth judge put it: 'counsel for the state must speak last': *Lilburne,* at 1397.) This is admitted, but it is doubtful whether the crown has the right in any and, if in any, in what other cases.

In *Hensey,* 19 St. Tr. 1343, 1758: treason, Yorke S.-G. 'declined summing up the evidence'; defendant called none—'choosing to reserve himself for the reply': the K. B. (four judges) agreed; the S.-G. in reply 'he made only some general observations' on the crown's evidence, 'but did not sum it up particularly . . . but confined himself to what defendant's counsel had urged . . . in point of law and reason.'

The fifth resolution of the judges in 1837 was: 'In cases of public prosecutions for felony, instituted by the crown, the law officers of the crown, and those who represent them, are, in strictness, entitled to reply, although no evidence is produced on the part of the prisoner.'

In *Esdaile,* 1858, a crown prosecution, the right was exercised without objection by another counsel, the attorney-general, who had conducted part of the case, becoming Lord Chancellor during its course. In *Beckwith,* 7 Cox C. C. 505, 1858, a prosecution by the poor law board, Byles J. refused to permit it to the representative of the attorney-general, saying that the right was confined to the attorney-general of England *in person,* 'and if I could do so I would not allow it even in that case,' despite *Gardner,* 1 C. & K. 628, 1845, to the exact contrary, cited to him. In *Christie,* 1 F. & F. 75, 1858, a prosecution by the Board of Trade, Martin B. refused to permit it to the attorney-general of the *county palatine,* and said that he thought the practice in any case was a bad one. In *Wood, &c.,* 88 Sess. Rep. C. C. C. 261, 1878, Hawkins J., allowing the claim, explained that the prosecution must be really at the suit of the crown,' *i.e.* 'on behalf of the country,' and not merely nominally for the crown as 'ordinary prosecutions' are. In *Taylor,* 1859, Byles J. said, he did not admit the right of counsel for the crown—who was not the attorney-general—prosecuting for the mint. The controversy is now closed, for in 1884 the English judges resolved, 'That in those crown cases in which the attorney- or solicitor-general is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed as of right to the counsel for the crown and in no others.' 5 St. Trials, N. S. 3, note *c* and authorities, *ib.* vol. 2, 1019. In *Brown,* 1899, the A.-G., Sir R. Webster, renounced the right, as it was 'an ordinary case.' This settles the point in the sense of Hawkins J. above, *i.e.* the right is, in fact, exercised only in cases where in the public interest a law officer appears; neither now practises privately.

In *O'Connell,* above, the H. L. held that when the crown is defendant *in error* it is not necessarily entitled to the final reply.

Sometimes, apparently, another counsel with the crown lawyer was allowed to reply: *Layer,* at 287, 1722.

Counsel for the prosecution should abstain from appeals to the jury likely to inflame or prejudice their minds: *Banks,* 12 Cr. A. R. 74, 1916.

iv.

Additional evidence] is occasionally permitted during the reply: *Morrison,* 22 Cox C. C. 214, 1911, where defendant's counsel called a witness, who was cross-examined and re-examined, and then addressed the jury on that evidence, and counsel for the crown resumed.

Evidence on sanity] At what stage, if at all, the judge should call witnesses, see *Mental Unsoundness.*

v. SUMMING UP.

Judge's summing up or *'charge' to the jury*] Blackstone, who says nothing of the speeches of counsel, says: 'When the evidence is gone through on both sides, the judge . . . sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence': 1 Comm. 375. When these words first appeared (1765) the subject had received little attention, but the C. C. A., which has devoted a great deal to it, has, it may safely be said, but developed the principles here laid down, with, of course, a corresponding interest in the *contemporary* incidents of a trial. Some valuable remarks on the point, in the H. L., will be found in *Prudential Assurance Co.* v. *Edmonds*, 2 A. C. 487, 1877.

An authoritative statement by Stephen J. is made 1 *Hist. Cr. L.* 455 (1883): 'I think that a judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his duty. . . . I further think that he ought not to conceal his opinion from the jury, nor do I see how it is possible for him to do so if he arranges the evidence in the order in which it strikes his mind. . . . The act of stating for the jury the questions which they have to answer, and of stating the evidence bearing on those questions, and showing in what respects it is important, generally goes a considerable way towards suggesting an answer to them, and if a judge does not do as much at least as this, he does almost nothing. The judge's position is thus one of great delicacy . . . it is not easy to be true and just.'

In *Arnold* v. *The King-Emperor*, 1914, A. C. 644; 83 L. J. P. C. 299; L. R. 41 Ind. App. 149; 111 L. T. 324; 30 T. L. R. 462, L. Shaw, delivering the judgment of the Jud. Com. of P. C. (which also included L. Sumner, L. Parmoor, Sir John Edge and Mr. Ameer Ali) said: 'A charge to a jury must be read as a whole. If there are salient propositions of law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection if, upon the general view taken, the case had been fairly left within the jury's province.' 24 Cox C. C. 299.

General rules: misdirection—non-direction] The C. C. A., dealing exclusively with criminal trials, has rather insisted by criticism on its view of a defective summing up than positively asserted the criterion of a good one. One of its general rules was thus expressed by Alver-

stone L.C.J.: 'Summings up are not to be criticised because particular expressions are or are not to be found in them, unless they amount to a misdirection. A summing up is not a lecture on law; it must be looked at from the point of view of the questions raised at the trial. . . . The court must look at how the case was conducted. If conducted on a wrong view of the law, the court ought to interfere. Except for a few chance epithets which may have been suggested to the judge's mind by the way in which the case was conducted, there is nothing in the summing up as a whole to which the law can take exception. The observation . . . 'not to allow people to do with impunity what has here occurred' had perhaps better not have been made. . . .' *R. C. Mason, &c.*, 1 Cr. A. R. 76, 1908. So in *Meyer, ib.* 10, where, perhaps, the direction did not distinguish between larceny by a bailee and that by a trick, but the case had in fact been contested as the former, the court thought an 'omission to direct the jury on a point which was not taken at the trial may not matter if no injustice is done.' So *Stoddart,* 1909, at end of judgment.

Where the point was not raised the judge was not bound to direct that unlawful wounding could be found on a charge of wounding with intent to murder: *Vaughan,* 1 Cr. A. R. 25, 1908. When there might well have been an alternative defence (denial or justifiable force), but was not, the C. C. A. refused to interfere because there was no direction on the point: *Deane,* 7 Cr. A. R. 69, 1911; so *J. May,* 1912.

Misstatement of evidence] Where a gross misstatement of evidence was alleged as misdirection, the C. C. A. thought that, if it was made, counsel ought to have corrected it at once, but doubted, in view of the conduct of the case, whether it had been made, *Kams,* and insisted strongly on 'the necessity of care in the summing up of these difficult cases': cf. *H. Martin,* 1908, below. In *Savosky,* 1 Cr. A. R. 98, 1909, and *F. A. Mason,* 2 Cr. A. R. 59, 1909, c. q. on the ground of misstatements of facts or of their effects: see under *Law,* below, II. In *Schofield,* 12 Cr. A. R. 192, 1917, the court treated appellant's remark on arrest, 'Just my luck,' as an admission: c. q. Cf. *Feldman.*

Jury misled] Where the judge led the jury to think that he would pass no sentence (for bigamy), 18 mos. imp. w. h. l. were reduced to one day: *G. S. Ellis,* 13 Cr. A. R. 196, 1918.

Non-direction] In *Prudential, &c.* v. *Edmonds,* at 507, L. Blackburn said: 'Although it is generally said and said truly that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a subject for a bill of exceptions and would be a ground for a *venire de novo.* When once it is established that a direction was not proper, either wrong in giving a wrong guide or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the judge to give a guide . . . there must be a *venire de novo.*' The view of the C. C. A. was expressed in *Bradshaw, &c.,* 4 Cr. A. R. 280, 1910; *Vassileva;* and *T. Finch,* 12 Cr. A. R. 77, 1916 —'non-direction may amount to misdirection': c. q. The judge may be asked to deal with certain points before leaving the case: *McDougall,* 1912; or to correct suggested misdirection: *Wann,* 7 Cr. A. R. 137; *J. May,* 8 Cr. A. R. 66. But he may use his discretion *in the interest of defendant* by not directing the jury to inadmissible questions which

have been asked, especially if they were asked early in a long trial: *L. Cohen,* 1914, citing *D. Watson,* 1913.

Defence must be put] One general rule is 'paramount': *Dinnick;* viz. the summing up must fairly put the case for the defence whatsoever it be, especially when defendant has no counsel: *Totty,* 10 Cr. A. R. 79; 24 Cox C. C. 227, 1914; *Warner,* 1908; *Immer,* 13 Cr. A. R. 22, 1917; 'as carefully as that of the prosecution': *Keating,* 2 Cr. A. R. 61, 1909; *Dinnick,* 3 Cr. A. R. 77; 26 T. L. R. 74, 1909, where the defence that the 'brawling' charged was within defendant's right was not put to the jury: c. q., as in *H. Field,* 1910; *G. H. Richards* (i), 4 Cr. A. R. 161, 1910, and *B. Taylor,* 11 Cr. A. R. 41, 1914, where the direction was that unless the jury believed that all the prosecution's witnesses had committed perjury out of spite to defendant (who gave a possible explanation), they must convict. *Frampton,* 12 Cr. A. R. 202, 1917: c. q. Evidence ignored; *Badash,* 13 Cr. A. R. 17, 1917: c. q.

Inadmissible evidence] See that title and *Similar Acts,* below. When such evidence had been given but stopped by the judge who had sufficiently warned the jury against it, the C. C. A. did not quash, but added: 'There might be a case where the question asked is so serious in its application to the particular facts of the case that it might not be sufficient to tell the jury to banish it from their minds': *Kurash,* 1915, 2 K. B. 479; 84 L. J. K. B. 1497; 79 J. P. 399; 113 L. T. 431; 25 Cox C. C. 55; 11 Cr. A. R. 170.

Popular language] In *H. Pope,* 1910, Darling J. said: 'Counsel has urged that the summing up was so bad that the C. C. A. ought to quash the conviction. The summing up was forcible and expressions apt for addressing the jury at the moment were used by the learned judge. Even a judge is not disentitled to use advocacy if it is proper for the occasion. He must see that the balance is held evenly between the prosecution and the defence. If a statement is pressed too hard by the defence the judge must put it in a proper light for the jury; and the same observation applies to the prosecution. Counsel had criticised many points of the summing up. But almost everything may be criticised. What we must consider is whether the summing up was so one-sided as to lead to the conviction of the prisoner. . . . As regards 'the intent to defraud,' the judge asked the jury whether the prisoner did it honestly or whether he did it dishonestly. In the first place he used the technical words and then he gave the popular words which would be understood by the people he was addressing. Isolated passages must be considered in reference to their context and to the summing up as a whole. The critical parts of a summing up are the beginning and the end, like the exordium and the peroration of a speech. But the nature of a false pretence in law, as differing from mere dishonesty, ought to be pointed out.' *G. Baker,* 4 Cr. A. R. 153, 1910.

In practice it is often impossible to deal with the facts and the law of a case separately, but for convenience decisions are here classified under those two heads. In *J. Gray,* 1911, the C. C. A. found almost every possible defect in a summing up.

I. The Facts.

'However strong a judge's view may be of the evidence, he should leave questions of fact to the jury, and it is unfortunate that his interlocutory remarks and the early part of his summing up, and, no doubt, the way in which the observations were made, could lead the jury to believe that there was no issue for them in that matter, and if they had any doubt his final observation might have been fatal to that doubt': *Beeby,* 6 Cr. A. R. 141, 1911; he must not 'take the decision out of the hands of the jury': *G. Bryant,* 13 Cr. A. R. 51, 1918: c. q.

Perhaps one rule is that the judge should consider whether the proved facts are *consistent* with innocence.

Omission] 'As L. Esher said, omission is not of itself necessarily misdirection; it is only when the omission is such as is calculated to mislead the jury that it amounts to misdirection': *Vassileva,* 6 Cr. A. R. 231, 1911: c. q. because it was not pointed out to the jury that the proved facts were consistent with innocence; cf. *Page,* 1915; so *Caley,* 12 Cr. A. R. 231, 1917. In *A. Hill,* 7 Cr. A. R. 250, 1912, receiving, there was no direction whether the property in question was stolen: c. q. So when there were so many omissions that what was said was 'worse than no summing up at all': *McGill,* 10 Cr. A. R. 267, 1914. In *Finch,* 1916, the C. C. A. said that the jury was entitled to the assistance of the judge on the facts: in *H. Kurasch,* 13 Cr. A. R. 13, 1917.

In *M. Cohen and Bateman,* 73 J. P. 352; 2 Cr. A. R. 197, 1909, though the court thought that the summing up was not what it ought to have been (Cr. A. R. 210, 212), it observed: 'In our view a judge is not only entitled, but ought to give the jury some assistance on questions of fact as well as on questions of law. Of course, questions of fact are for the jury. . . . Yet the judge has experience on the bearing of evidence and in dealing with the relevancy of questions of fact. . . . It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore, of very confident expressions in the summing up does not show that it is an improper one . . . one must give credit to the jury for intelligence and for the knowledge that they are not bound by the expressions of the judge upon questions of fact': cf. the cases under *Law,* below, and *O'Donnell,* 12 Cr. A. R. 219, 1917. So where the judge expressed 'a strong view' on the defence of no *animus furandi: Melville,* 2 Cr. A. R. 173, 1909; or 'considerably overstated the force and cogency of the evidence' about a certain sum of money: *Monk,* 7 Cr. A. R. 1912: fraud on creditors: five judges. And he is entitled to make an independent suggestion on the evidence: *Ryder,* 9 Cr. A. R. 100, 1913; *ib.* 109, *Bentley,* both murders; though in *G. J. Smith,* 1915, the C. C. A. thought it would have been better if he had not added to the suggestions of the crown and the defence. But positive expressions of belief in defendant's guilt are to be deprecated: *Randles,* 1 Cr. A. R. 194, 1908; *Hepworth,* 4 *ib.* 128, 1910; *Pratley, ib.* 161, 1910.

Specific facts] In cases of any complexity there ought to be a direction on the facts that must be found to convict, and where the

judge did not distinguish between larceny of a cheque and that of its proceeds, c. q., as showing that the defence had not been appreciated: *Hampton,* 84 L. J. K. B. 1137; 24 Cox C. C. 722; 113 L. T. 378; 11 Cr. A. R. 117, 1915. Actual misstatement of essential evidence may be a ground for quashing: *Feldman,* 5 Cr. A. R. 214, 1910; the chairman *may* have misled the jury: *Crane,* 6 Cr. A. R. 185; 75 J. P. 415, 1911; where, in fraud, the judge did not distinguish between 'under *value*' and 'under *cost price*': *Brooks,* 6 Cr. A. R. 264, 1911; where there being 'a good deal of suspicion but not much evidence,' there was the more need of a careful direction: *Savidge,* 7 Cr. A. R. 34; 76 J. P. 32, 1911, where the judge said that defendant's witnesses could not be tested as they had not before publicly given their evidence —whereas they had done so before a coroner. In *Wann,* 7 Cr. A. R. 135; 23 Cox C. C. 183; 76 J. P. 269; 28 T. L. R. 240; 107 L. T. 462, 1912, where the issue depended on a date which was not sufficiently discussed: c. q.; so in *Corrigan,* 1912, where the judge stated that defendant said he had bought parts of the stolen property from two different men, whereas he only mentioned one. See also *Hagan,* 9 Cr. A. R. 25, 1913: c. q. Owing to a mistake in his note 'on a matter of importance,' there was a wrong direction: c. q.: *R. Myers,* 9 Cr. A. R. 264, 1913. The direction should distinguish between defendant's evidence of what he had heard and what he had known himself: *Wolff,* 10 Cr. A. R. 107, 1914: five judges: perjury. When the judge drew an unfavourable inference from a certain person not being called, and suggested unwarrantably an offence on his part, after he and other evidence was heard, c. q.: *J. H. Hall,* 11 Cr. A. R. 22, 1915. Where there was a total misapprehension of an indictment and a direction on a count not before the jury, c. q. on that count as a matter of course: *G. Simpson,* 3 Cr. A. R. 54, 1909; so *J. Long,* 8 Cr. A. R. 17, 1912.

Details—brevity] But a judge need not go into every detail in the case (though sometimes it would be better if he did): *Hayes,* 2 Cr. A. R. 70, 1909; *Anon.,* 11 Cr. A. R. 283, 1915; nor *discuss* the defence: *Nicholls,* 1 Cr. A. R. 167, 1908, where, if he had done so, he might have done it 'unfavourably' to the defence; nor is he bound to suggest to the jury that they can acquit, unless the facts require it: *S. Lyons,* 5 Cr. A. R. 99, 1910; or put to them a 'mere hypothesis' of 'impulsive insanity': *F. Thomas,* 7 Cr. A. R. 36, 1911; the summing up must be looked at as a whole: *Crippen,* 5 Cr. A. R. at 267, 1910; *Kleiss,* 4 Cr. A. R. 101, 1910; *ib.* 146, *W. Butler;* and its substance rather than its terms: *Bradshaw,* 1910; *H. Carter,* 7 Cr. A. R. 194, 1912; especially where counsel have dealt with both sides exhaustively and the case is 'plain': *McDougall,* 7 Cr. A. R. 132, 1912.

Defence before committal] The judge should be acquainted with this: *Corrigan,* 8 Cr. A. R. 4, 1912: c. q. partly on the ground of a misstatement about this.

Previous conviction] Not only must there be no unauthorised reference to this point, but the judge should not use language suggesting a previous conviction when none is in evidence: *Burnell,* 10 Cr. A. R. 222, 1914.

Comment on defence] When this amounted to charging the witnesses with perjury and to an expression of belief in defendant's guilt, c. q.:

Frampton, 1917. But the C. C. A. will not review comment on defendant not giving evidence or not calling a particular person: *Voisin,* 13 Cr. A. R. 89, 1918.

II. Law.

See cases above, and title, *Inadmissible Evidence.*

'The mere fact that counsel for the defence has not taken a point' of law does not affect the judge's duty to take it: *M. A. Smith,* 12 Cr. A. R. 42, 1916. The C. C. A. must have *some* apprehension of injustice before it will interfere: *Bowler; M. Cohen and Bateman,* 1909, where the court said (2 Cr. A. R. 207): 'A mistake of the judge as to fact or an omission to refer to some point in favour of the prisoner is not a wrong decision of a point of law which (*ib.* 208) would be fatal unless the case came within the proviso of the section' [*i.e.* 4 (1) of Cr. Ap. A.]. To the same effect, *H. Martin,* 1 Cr. A. R. 52, 1908, where 'the judge may in some small respects have slightly misstated the effect of the evidence,' and *Totterdell,* 5 Cr. A. R. 276, 1910, where there were serious irregularities' and the chairman made a mistake in law. See above, p. 292.

Onus] See that title. One clear rule is that where a *primâ facie* case having been made against him, defendant offers an explanation, the jury must be directed that the *onus* of proof of guilt is still on the prosecution and that, if on the whole evidence they are in doubt, they should acquit: *Stoddart,* 2 Cr. A. R. 217; 73 J. P. 348; 25 T. L. R. 612; 53 S. J. 578, 1909: c. q. So *H. Field,* 4 Cr. A. R. 190, 1910, and *Hagan;* and cf. *J. A. Bradley,* 1910. So in larceny it must be pointed out that the prosecution must prove intent: *Sturgess,* 9 Cr. A. R. 120, 1913: c. q. For receiving, see especially, *Schama, &c.,* 1914, with the comment of the C. C. A. in *Hamilton,* 1917; *Badash; Aubrey,* 11 Cr. A. R. 182, 1915; *G. Bryant,* 13 Cr. A. R. 49, 1917: c. q.

Intent] See cases above. Where there was no direction on intent in treason, c. q.: *Ahlers.* It is a serious misdirection to tell the jury to consider, 'has defendant proved himself innocent?'; circumstances calling for explanation must not be confused with those establishing guilt: *Brain,* 13 Cr. A. R. 199, 1918: c. q.; especially when defendant gives evidence: *A. E. Lewis,* 14 Cr. A. R. 33, 1919: c. q.

Mistake] In *Dyson,* 1908, manslaughter, the judge omitted to direct the jury on the 'year and a day' rule: c. q. (ten years' p. s.). Under s. 13 (1) of the Debtors A. it is necessary to find an intent to defraud, and when a jury was directed to the contrary, c. q.: *Brownlow,* 4 Cr. A. R. 131, 1910. In *Ellsom,* 7 Cr. A. R. 4; 76 J. P. 38; 28 T. L. R. 1, 1914, murder, the judge wrongly assumed that an incriminating statement by the chief witness for the crown had been known to the defence, and treated it therefore as 'tantamount to' his 'deposition and evidence at the trial,' whereas the defence knew only of other statements by him—which vitiated the whole direction: c. q. So when the summing up used evidence in the depositions not given at the trial: *Rimes,* 7 Cr. A. R. 240; 28 T. L. R. 409, 1912.

Consent] This defence must be clearly put and when it was not,

c. q.: *J. A. Bradley,* 4 Cr. A. R. 225; 74 J. P. 247, 1910. So when the judge told the jury that this defence was an 'afterthought' when in fact it had been made before the magistrates: *Rodda,* 5 Cr. A. R. 85; 74 J. P. 412; 26 T. L. R. 539, 1910. When this defence is not raised the judge may mention the fact: *Wann.* But if he does, he must not mislead the jury into thinking that, if consent is a good defence, they may convict, though in fact they believe that there was consent: *Horn,* 7 Cr. A. R. 200; 76 J. P. 270; 28 T. L. R. 336, 1912. In *J. May,* 1912, 3 K. B. 572; 82 L. J. K. B. 1; 23 Cox C. C. 327; 77 J. P. 31; 108 L. T. 351; 29 T. L. R. 24; 8 Cr. A. R. 68, indecent assault, five judges formulated the following principle: '. . . if the facts of a case proved in evidence are such that the jury might reasonably infer consent, there ought to be a direction to the jury . . . on that question. It is easy to point out where the *onus* of proof lies and what is the evidence on that point in any particular case. But if the facts proved . . . are not such that the jury might reasonably infer consent, and particularly if the case has been conducted by counsel in such a way as to make the question of consent immaterial [as in this case] or an entirely secondary issue to the main defence, there is no necessity for such a direction. It is impossible to lay down a rule applicable to all cases. . . .' If counsel acquiesces in the judge's statement that consent (or any other defence) is not to be raised, he cannot rely on that defence on appeal: *Wann,* above.

False pretences] The direction on the pretence relied on must be precise: *Heath,* 7 Cr. A. R. 247, 1912: c. q.; so in *Dutt,* 8 Cr. A. R. 51, 1912, where there was not a separate direction on separate *obtainings* or on the guilty knowledge of the defendant at the time of each. Though it is not necessary to insist on the intent to defraud in every case, *e.g. W. R. Carr,* 12 Cr. A. R. 140, 1916, c. q. where this was omitted: *Ferguson,* 9 Cr. A. R. 113, 1913; *Secombe,* 12 Cr. A. R. 275, 1917; *W. Hunt,* 13 Cr. A. R. 157, 1918. A proper direction is especially necessary where evidence has been improperly admitted: *R. Wilson,* 1913; where there are several counts and no election there must be a direction on each separate offence: *Norman,* 1915. But in *Bentote,* 13 Cr. A. R. 149, 1918, where there was no direction on intent, the C. C. A. applied the proviso to s. 4 of the Cr. Ap. A. In *Summerskill, ib.* 170, 1918, there was no specific direction on the intent, no distinction between it and a mistake: c. q.: 'it is very dangerous to refer to "recklessness" or "carelessness."'

Larceny—by a trick] See *Hilliard.* When the defence is that the property charged is not stolen the identity must be put to the jury: *Bruhin,* 11 Cr. A. R. 276, 1915: c. q.; *Buol, ib.* 306: c. q. See also *J. Clay,* 1909.

Receiving stolen property] See *Onus,* above. The direction must deal with the knowledge of defendant: *Higginbottom,* 8 Cr. A. R. 81, 1912: c. q.; and his *possession: C. Cook, ib.; Flatman, ib.* 256—joint, not to be presumed; and *Ashworth,* 1911; *Leary,* 9 Cr. A. R. 85, 1913: c. q. in all. So *Hampson,* 11 Cr. A. R. 75, 1915, where the jury were not asked to consider whether defendant's explanation was reasonable. In a clear case there need be no reference to the proof that the property was stolen: *T. Austin,* 1916; *H. L. Hamilton,* 13 Cr. A. R. 32, 1917: no kind of indication what constituted guilt; no direction on count of being accessory after the fact: c. q.; *J. Bacon, ib.* 36,

1917: 'defence that receiving was innocent ignored: c. q. Especial caution is necessary where there are other charges, convictions, pleas or confessions on the same facts: *Halikiopulo.*

Corroboration] i. Of *Accomplices:* see that title. Asking the jury directly to say whether the accomplice's evidence has been 'corroborated in material particulars implicating' defendant is not enough; nor to tell the jury that defendant's possession is such corroboration: *Norris,* 1916.

ii. Other cases. If counsel has insisted on this point the judge need not be so emphatic: *Quinn,* 6 Cr. A. R. 269, 1911; but he should consider, as the trial develops, whether a witness may turn out to be an accomplice: *Jennings,* 1912.

There should be a caution on the uncorroborated evidence of a young child: *Pitts,* 8 Cr. A. R. 128, 1912, 'apart from any rule of law': *Cratchley,* 9 Cr. A. R. 232, 1913; see *W. Davies,* 1915. In perjury the judge must direct that each assignment must be corroborated: *Gaskell,* 8 Cr. A. R. 107; 77 J. P. 112; 20 T. L. R. 108, 1912: c. q. He is entitled to say that the corroboration in law is sufficient: *Bovy,* 12 Cr. A. R. 15, 1916: abortion (and, perhaps, *generally, ib.*).

Alibi] This defence must be left expressly to the jury: it is not for the judge to say that it has broken down: *Rufino,* 7 Cr. A. R. 47; 76 J. P. 49, 1911; *E. Curtis,* 1913; *Finch,* 1916: c. q. Apparently the jury should be directed that they cannot disregard evidence of an *alibi* unless there is stronger evidence against it: *Chadwick, &c.,* 12 Cr. A. R. 247, 1917: c. q.

Alternative verdict] 'The option of the jury to find the lesser offence must depend on the particular circumstances of the case. It cannot be said as a matter of law that the judge must always tell the jury they can find the lesser offence': *Naylor,* 5 Cr. A. R. 21; 74 J. P. 460, 1910; and he may tell them not to: *Fitzgibbons,* 7 Cr. A. R. 264, 1912: murder and manslaughter; *Parratt,* 8 Cr. A. R. 193, 1913: disclosing information. When the only defence in murder is accident, he is not bound to suggest manslaughter: *J. Fletcher,* 1912; *Clinton,* 12 Cr. A. R. 215, 1917; but where there is this alternative defence (or even where there is not, if the facts warrant it), it must be properly put: *Hopper,* 1915, 2 K. B. 431; 84 L. J. K. B. 1371; 79 J. P. 335; 31 T. L. R. 360; 25 Cox C. C. 34; 11 Cr. A. R. 136: murder, where manslaughter was substituted and sentence varied. Cf. *Gorges,* 11 Cr. A. R. 259, 1915, where there were alternative defences of accident and manslaughter, and the judge said of the former, 'I do not think you will have any great difficulty in disposing of that.'

In *Parks,* 10 Cr. A. R. 50, 1914, 'unlawful wounding' was substituted for 'wounding with intent to do grievous bodily harm,' where there had been no direction on the point; cf. *Vaughan,* 1908.

But, on the other hand, the judge should not direct the lesser offence to be found (*e.g.* indecent assault instead of attempted rape) because he thinks defendant's evidence amounts to it; he must not take away from the jury the decision of facts: *J. West,* 4 Cr. A. R. 179, 1910: c. q. Cf. *G. Stevens,* 1913.

Prejudice] Irrelevant observations on the morality instead of the law of a case may lead to quashing: *Bloom,* 1910.

Special verdict of insanity] In a proper case there should be a clear direction that the jury can find this: *J. W. Smith,* 5 Cr. A. R. 130; 26 T. L. R. 614, 1910. But when defendant repudiates this defence and sets up another, *e.g.* self-defence, the latter must not be ignored: *J. H. Hill,* 7 Cr. A. R. 26; 22 Cox C. C. 625; 76 J. P. 49, 1911: c. q.

The essential direction is that the issue is sanity or insanity, and if this is given formal reference to a 'special' verdict is unnecessary: *Coleman,* 7 Cr. A. R. 65, 1911.

It seems that the judge should carefully discuss the evidence of insanity: *Loake.* He is entitled to make known his views on *M'Naughten's case; Marsland,* 7 Cr. A. R. 80, 1911. Though insanity must be put to the jury, inability to form an intention owing to drunkenness, if there is no evidence that defendant was drunk, need not be: *Honeyands,* 10 Cr. A. R. 60, 1914. See *Intoxication.*

Similar acts] See *Inadmissible evidence,* above. Where these have *wrongfully* been given in evidence, the judge cannot too emphatically confine the jury's attention to the act charged: *Probets.* Where they are admissible, the direction must be express that they are alleged solely as proof of a specific intent: *Baird,* 1915.

Confession] See *Boughton,* 1911.

Co-defendant's incriminating statement] See that title.

Conspiracy] It is not enough to treat the case of each defendant separately; the alleged concert must be dealt with: *Bailey* and *Underwood,* 9 Cr. A. R. 94, 1913: c. q. So *Ashdown,* 1916. The jury must not assume that if one is convicted the other must be: *F. Higgins,* 14 Cr. A. R. 28, 1919: c. q.

Assault—indecent or common?] See *Assault.*

More than one defendant] The direction must carefully distinguish between different defences: *Rowan;* especially where one defendant is likely to suffer from connection with another: *Batty; Pritchard,* 9 Cr. A. R. 210; 23 Cox C. C. 682; 109 L. T. 911, 1913: one c. q. Cf. *Seddon.* Where there was no direction on the statements of co-defendants, c. q.: *Altschuler,* 11 Cr. A. R. 243, 1915; *Ashdown,* 12 Cr. A. R. 34, 1916: c. q. So *McGill,* 1914: c. q.; *W. Johnson,* 6 Cr. A. R. 82, 1910: false pretences; *Schofield,* 12 Cr. A. R. 192, 1917: c. q.; *Ashworth,* 1911: all c. q.; *A. Graham,* 14 Cr. A. R. 7, 1919: c. q.; *A. Matthews, ib.* 23: c. q.; and see *Conspiracy,* above.

Several charges in one indictment] There should be a direction that if the jury are satisfied with the defence [*alibi*] on one, it is open to them to acquit on all: *T. Finch,* 12 Cr. A. R. 77, 1916: c. q. Where there was mis-direction on one of distinct counts tried together, c. q.: *E. Morgan,* 13 Cr. A. R. 2, 1917.

More than one indictment] The direction must be especially careful where the defendant has been tried by the same jury for a similar offence: *Brereton,* 10 Cr. A. R. 201, 1914.

Motive] In *Brownhill,* 8 Cr. A. R. 120, 1912: libel, appellant complained that the judge had not mentioned the absence of motive, but

the C. C. A. observed: 'In many cases this is a matter of the highest importance, but in this . . . not . . . of any.'

Good character] Strictly it is only in cases of doubt that a jury is entitled to take this into consideration: *Bliss Hill,* 13 Cr. A. R. 125, 1917. In offences which lead to doubts of the offender's sanity, no inference can be suggested on this ground: *Brownhill,* above.

Reasonable doubt] So long as this point is properly made, the wording is unimportant: *Sykes.*

Habitual criminal] See that title.

Verdict not clear] For the powers of the judge, see *Verdict.*

No summing-up] A judge may, in a simple case, invite the jury to say that they do not want one: *Newman,* 9 Cr. A. R. 136, 1913.

Interruption of summing up] Except to correct a clear mistake of the judge, this is not permitted: *L. Preston,* below; *Layer,* at 293, 1722; *H. Hunt,* at 485, 1820; *Kams,* 4 Cr. A. R. 8, 1916—counsel ought to correct an obvious mistake; *W. Butler,* 4 Cr. A. R. 145, 1910; *Mowbray,* 8 Cr. A. R. 9, 1912.

Amicus curiae] is first mentioned in 1586: 4 R. 39 *b; Crompton,* Fitzherbert's Justice, 33 *b,* 41.

No address to jury after summing up] 'It is contrary to the course of all proceedings in such cases to have anything said to the jury after the court has summed up the evidence . . . it is not the course to reply upon the court': *per* Holt L.C.J., *L. Preston,* at 743, 1691, who was undefended and as a favour was allowed to address the court and *not* the jury at this stage.

Witness called after summing up] This is occasionally permitted: *Sullivant.* Care must be taken to enable the other side to cross-examine and rebut, if it wishes: *Howarth,* 1918: c. q.

vi.

Discharge of jury without verdict (a) *before deliberating*] If a juryman be taken ill so as to be in competent opinion incapable of attending through the trial, the jury may be discharged and the defendant tried *de novo:* another juryman may be added to the eleven; but in that case the defendant should be offered his challenges over again to the eleven, and they should be re-sworn and the trial begin again *de novo. Edwards,* R. & R. 224, 1812; 4 Taunt. 309; 2 Lea. 621 *n.*; 3 Camp. 207; *Ashe,* 1 Cox C. C. 150, 1845; cf. *Gould,* in 1763, 18 St. Tr. 415 *n.*—juror carried out of court 'not being in custody of a bailiff': the whole jury was necessarily discharged.

This course was taken in *Lawrence,* 25 T. L. R. 374, 1909: murder, the judge reading his notes to the witnesses who were asked to confirm them. If the juror retires *temporarily* from the box in the custody of a bailiff it is advisable, though not essential, to swear the latter to keep him strictly apart (except from a doctor): *Crippen.*

Where, in a felony, it was discovered that defendant had a relative on the jury. Erskine J. (and Tindal C.J.) held that he had no power to

discharge the jury, but that the trial must proceed. *Wardle,* C. & M. 647, 1842.

Absent witness] In manslaughter, it was discovered, after the swearing of the jury, that the surgeon who had examined the body was absent, and as *defendant* prayed that the jury might be discharged, they were discharged accordingly, and he was tried the next day. *Stokes,* 6 C. & P. 151, 1833. But the C. C. A., following *Charlesworth* and *Winsor,* below, and admitting that the discharging of a jury without a verdict is entirely within the discretion of the judge, thought that it should not take place 'in order to allow the prosecution to present a stronger case on another trial'; and disapproved of what was done in *R. Lewis,* 2 Cr. A. R. 180; 73 J. P. 346; 78 L. J. K. B. 722; 25 T. L. R. 582; 100 L. T. 976, 1909, where the prosecution, in the middle of its case, owing to the absence of witnesses, had obtained an adjournment, and the jury was discharged.

When a juror during the hearing, unobserved, left the box and the court, the jury was discharged and a new trial had: the C. for C. C. R. approved. *Ward,* 10 Cox C. C. 573, 1867.

So where in the course of a trial for murder a juryman separated himself from his fellows and mingled with the public during an adjournment, Kennedy J. discharged the jury, and a fresh jury being subsequently impannelled defendant was tried and convicted. *Macrae,* Northampton Assizes, December, 1892. When a juror, on the retirement, left the court for about ten minutes the C. C. A. declined to consider whether defendant was prejudiced by the act or not: c. q. *Ketteridge,* 1915, 1 K. B. 467; 84 L. J. K. B. 352; 79 J. P. 216; 31 T. L. R. 115; 11 Cr. A. R. 54: rape; distinguished from *Twiss,* 13 Cr. A. R. 177, 1918, where during an adjournment a juror spoke to a witness about the case.

(b) 'When the evidence on both sides is closed, and, indeed, when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict, but are to consider of it and deliver it in with the same forms, as upon civil causes. . . . But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court.' 4 Bl. Com. 360. Cf. *Wade,* 1825. The ancient practice is illustrated by *Watts* v. *Brains,* Cro. Eliz. 778, 1600, appeal of murder; ten jurors found 'not guilty,' two 'because they could not endure or hold out any longer' ultimately consented, but 'if the court disliked thereof, then they should all change the verdict.' 'The court much misliking thereof, being contrary to their direction, examined every one of them by the poll': a verdict of guilty was then found, and all the ten were fined and imprisoned.

Custody of the jury] *Lilburne,* 4 St. Tr. 1404, 1649: treason to the Commonwealth, when the jury were retiring, said: 'I understand the officer that is to keep their door hath declared something of bitterness of spirit against me; I desire, therefore, he may have some indifferent man joined with him to see I have fair play'; 'which was granted and he sworn.' That jury, on retiring, 'desired to drink a cup of sack, for they had sat long,' but the court refused, saying, 'in ordinary juries they have been permitted to drink before they went from the bar; but in case of felony or treason . . . never.' *Ib.* 1404. But they were allowed a light. 'Even in modern times juries are sometimes

without refreshment for undue periods: *e.g.* in *J. Flood,* 10 Cr. A. R. 227, 1914.

By 33-4 V. 77, 23: 'Jurors after being sworn may, in the discretion of the judge, be allowed, at any time before giving their verdict, the use of a fire when out of court, and be allowed reasonable refreshment, such refreshment to be procured at their own expense.' In *O'Connell, &c.,* 1 Cox C. C. 411, 1843: misdemeanour, at 6 p.m. on the twenty-fourth day of the trial, the summing up being concluded, the jury asked leave to go home, but Pennefather C.J. said he had no power to permit them; they must go to the jury-chamber unless 'by consent' (which was not forthcoming) they 'were brought to a convenient place in the custody of the sheriff.' They were, however, allowed to go to church on Sunday, in his care. In *Stone,* 1796: treason, L. Kenyon did not ask for any 'consent,' but 'the jury retired to an adjoining tavern,' and some such practice is invariable in England. In *O'Connell,* 'temperate refreshment' was allowed in the jury-room. It being Saturday, there was some doubt whether the verdict could be received on Sunday, and it was not, though found. In 4 Steph. Comm. 361, 1914, it is positively stated that it may not be given on Sunday.

No communication whatever may be made to a jury deliberating except by the consent of the judge, and when a clerk of assize, sent to them by the judge to know if they were agreed, answered questions of and advised some jurors, c. q.: *Willmont,* 10 Cr. A. R. 173; 78 J. P. 352; 30 T. L. R. 499, 1914.

In misdemeanours the practice has been to allow the jury to separate. See *Kinnear,* 2 B. & Ald. 462, 1819. Now, in England, by 60-1 V. 18, the Juries Detention A. 1897: 'Upon the trial of any person for a felony other than murder, treason or treason felony, the court may, if it see fit, at any time before the jury consider their verdict, permit the jury to separate in the same way as the jury upon the trial of any person for misdemeanour are now permitted to separate.'

Jury disagreeing] In *Davison* (by *certiorari* in the C. C. C.), defendant demurred on the ground that he had been tried before for the same offence, the jury having disagreed and been discharged; they had deliberated for five hours till all other business was finished. Three judges held, however, that the discharge of the jury was a matter for the discretion of the judge, and must be assumed to be for some valid reason, though no reason for the discharge appears on the record. 2 F. & F. 250; 8 Cox C. C. 360, 1860.

The power to discharge a jury was very much discussed in *Charlesworth,* 31 L. J. M. C. 25; 1 B. & S. 460; 8 Jur. N. S. 1091; 5 L. T. 150; 9 W. R. 842; 9 Cox C. C. 44; 2 F. & F. 326, 1861—an information for bribery; at the trial a witness (*Fernandez*) refused to give evidence. Hill J. committed him to prison, and a conviction being impossible, discharged the jury; the defendant objected, and applied for leave to place on the record a plea setting out these facts, but this the court refused on the ground that there was already a plea of not guilty on the record, and that in misdemeanour there could not be two different pleas; but they said the facts stated in the plea might be so recorded as part of the proceedings, which was accordingly done. A rule was then obtained, calling on the crown to show cause why judgment *quod eat sine die* should not be entered for defendant, and why the award of jury process and all other proceedings should not be set aside. The rule was discharged, the court being of opinion that,

whether the judge had power to discharge the jury *or not*, the defendant was not entitled to final judgment, and that the new trial ought to proceed; it being open to the defendant to take advantage of the objection (if any) on a writ of error.

Necessity] The weight of opinion seems to incline to that power being limited in *law* only by the discretion of the judge; but that it *ought* not to be exercised, except in some cases of physical necessity; or where it is hopeless that the jury will agree, or where there have been practices to defeat the ends of justice. Much reliance is placed by the court on the opinion of Crampton J. (set out in L. J. report), in *Conway* v. *R.*, 7 Ir. Law Rep. 149; 1 Cox C. C. 210, 1845, who differed from his brethren, and took substantially the view afterwards taken by the Q. B. in England in *Charlesworth*.

The point was fully discussed in *Winsor* v. *R.*, L. R. 1 Q. B. 289; 35 L. J. M. C. 121; 7 B. & S. 490; 12 Jur. N. S. 561; 14 L. T. 567; 14 W. R. 695; 10 Cox C. C. 327, 1866: murder, where after five hours' deliberation (at the end of the assizes) the jury could not agree; it was held by the Ex. Ch. that a judge had power to discharge the jury before verdict, when 'a high degree of need' for such discharge was made evident to his mind from the facts which he had ascertained; and that the exercise of this discretion could not be reviewed by a court of error, and that such a discharge—even if the discretion was improperly exercised—did not prevent defendant from being tried a second time.

No verdict on one defendant] Scroggs L.C.J. stopped the case (treason) against *Whitebread* and another, among several defendants, on a legal point expressly without an acquittal, and they were tried on another indictment for that crime later: 7 St. Tr. 120, 1678. But as early as 1696 this precedent was condemned by A.-G. Trevor in *Rookwood*, at 166. Now there would be an acquittal.

Quarter sessions] A court may discharge a jury which disagrees, though the individual justices did not try the case: *Richardson*, 8 Cr. A. R. 159, 1913; but it seems that defendant should be present.

Verdicts] If by mistake the jury deliver a wrong verdict (*e.g.* where it is delivered without the concurrence of all), and it is recorded, and a few minutes elapse before they correct the mistake, the record of the verdict may also be corrected. *Parkin*, 1 Moo. C. C. 46, 1824. But when the foreman returned 'guilty of making a false statement,' and the C. C. A. doubted whether the whole jury had considered the intent to defraud: c. q. *W. Hunt*, 1918. But a verdict delivered in their presence without their dissent, is presumed to be theirs. In *Vodden*, D. & P. C. C. 229; 6 Cox C. C. 226; 23 L. J. M. C. 7, 1853, a verdict of 'not guilty' was entered by the clerk purely by mistake, and defendant was discharged; the mistake was immediately corrected, and he was brought back and sentenced. The C. for C. C. R. held that the verdict was properly amended, and insisted on the value of the formula after verdict: 'And that is the verdict of you all.' Cf. *Watts* v. *Brains*.

On a trial for murder, and verdict 'not guilty,' the jury must be asked, 'Do you find manslaughter?' or, at any rate, when the judge has directed them on the latter: *Baxter*, 9 Cr. A. R. 60, 1913.

General or partial] In the latter, the jury acquit of part of the indictment; hence, when there are several assignments in perjury and a *general* verdict of guilty, if one assignment was not corroborated the conviction is bad: *Gaskell,* 1912. When the same act was charged variously in three counts (obtaining (1) goods, (2) credit by false pretences, (3) credit by other fraud), and only one conviction was possible, but a general verdict was found, the C. C. A. assumed that a conviction on the lesser charge (viz. 3) was meant, and reduced the sentence accordingly: *D. Johnston,* 9 Cr. A. R. 262, 1913.

Special] The jury have a *right* to find either a general or a special verdict ('setting forth all the circumstances of the case, and praying the judgment of the court whether, for instance, on the facts stated it be murder, manslaughter, or no crime at all,' as *e.g.* in *Parkes* and *Brown,* 1796, where the court directed a general verdict). 4 Bl. Comm. 361; 1 Chitty, C. L. 637, 642; *Mayor, &c. of Devizes* v. *Clark,* 3 A. & E. 506, 1835: jury insisting on a general verdict; *Dudley,* 14 Q. B. D. 273, 560; 54 L. J. M. C. 32; 52 L. T. 107; 33 W. R. 347; 15 Cox C. C. 624; 49 J. P. 69, 1884: formerly called 'a verdict at large.' And in a felony, although a judge may make the suggestion, he will not direct the jury to find special facts, and they may, if they think proper, return a general verdict, instead of finding special facts, with a view to raise a question of law: *per* L. Abinger C.B., *Allday,* 8 C. & P. 136, 1837. For an instance, see *York,* 1848. Pollock C.B. doubted whether the mode of putting questions to the jury, and then recording a verdict without taking a direct answer of *guilty* or *not guilty,* was correct; and in *Davies,* 1897, 2 Q. B. 199; 66 L. J. Q. B. 513; 18 Cox C. C. 618: C. C. R., L. Russell C.J. said, 'it is ordinarily a safer and better course to get the opinion of the jury'—guilty or not guilty: c. q.: *Sleep,* L. & C. 47, 1861. Such verdicts have often been corrected by the C. C. A. In *T. Knight,* 1 Cr. A. R. 186, 1908, the questions and answers were: 'Were the fowls defendant's property? Yes. If so, were they seized by the sheriff as defendant's wife's goods? Yes, under the impression that they were her goods.' (The direction had been that if they answered *yes* to both questions that meant 'guilty.') Then the jury were asked: 'Do you find defendant took away the' fowls? 'Yes.' This was entered as 'guilty,' but the C. C. A. thought it was 'not guilty.' In *Muirhead,* 1 Cr. A. R. 189; 73 J. P. 31; 25 T. L. R. 88; 53 S. J. 164, 1908, it was asked: 'Did defendant obtain credit by false pretences? Yes. Did he do so with intent to defraud? No': verdict entered as guilty was reversed. On an indictment for false pretences and fraudulent conspiracy, the finding was 'guilty of conspiracy without fraudulent intent,' explained to mean 'guilty of conspiracy only' and subsequently 'guilty of conspiracy with other' defendants 'to get possession of the premises, but not with a view to avoid payment of rent.' The judge advised the jury to find whether he was 'guilty of conspiring to help others to defraud'; they then found 'guilty of conspiring with the others, but without false pretences': entered as guilty on the conspiracy count. The C. C. A. had no doubt that the jury meant to find guilty of the conspiracy (but confused offences in different counts). *Rawlings,* 3 Cr. A. R. 7, 1909. On four counts (forging, uttering, obtaining money, &c. under a cheque) the finding was 'guilty of participation in the forgery and the proceeds of the forgery, but not of forging or uttering the cheque'; Bosanquet C.Sjt. asked the jury to reconsider this finding; they then found 'guilty'; the C. C. A. approved, adding

that there was an acquittal of forging and uttering: *Hutchinson,* 7 Cr. A. R. 19, 1911. So the C. C. A. interpreted as guilty of murder (not manslaughter) the verdict in *Philpot,* 1912. On a charge of encouraging the defilement of his child, the finding was 'guilty of negligence' (the mother being 'guilty of criminal neglect on all counts'); the judge objected to this form, and 'guilty of criminal neglect' was then found, when the judge asked: 'Do you mean he . . . by his neglect caused' the defilement of her?—the foreman assented. The C. C. A. doubted whether the jury 'ever . . . meant to convict him' of the *offence charged;* 'it would have been better to take the words in which they found their verdict': c. q. *Chainey,* 1914, 1 K. B. 133; 83 L. J. K. B. 306; 23 Cox C. C. 620; 78 J. P. 127; 30 T. L. R. 51; 9 Cr. A. R. 179; so *Lomas,* p. 368. See also *M. Johnson,* 1913. When in receiving two of the findings were 'the explanation given by defendant may reasonably be true' and 'such explanation is not true in fact,' c. q.: *A. J. Norris,* 12 Cr. A. R. 156, 1916.

Statutory 'special' verdict] By 46-7 V. 38, 2, '(1) Where . . . it is given in evidence on the trial . . . that he [the accused] was insane, so as not to be responsible according to law for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.' By (2) he is 'a criminal lunatic.' See below and *Machardy.* It is an acquittal: *Felstead,* 1914, A. C. 534; 78 J. P. 313; 24 Cox C. C. 243; 10 Cr. A. R. 129.

Judge's power] A judge is not bound to receive the first verdict which the jury give unless the jury insist on having it recorded. He may direct them to reconsider it, and the verdict ultimately returned is the true verdict. *F. Smith,* 1804; *Meaney,* 32 L. J. M. C. 24; L. & C. 213; 9 Cox C. C. 231, 1862, when Channell J. refused to accept 'guilty,' but the jury persisted: c. q.: *Dollery,* 6 Cr. A. R. 255, 1911; see below. But where, in larceny, the jury being unable to agree, were asked whether they believed the evidence for the prosecution and replied that they did, on which a verdict of guilty was entered, c. q., as the jury had not found *animus furandi. Farnborough,* 1895, 2 Q. B. 484; 64 L. J. M. C. 270; 18 Cox C. C. 191: C. C. R. In *Jameson and Others,* Report from Shorthand Notes, pp. 395-6, 1896, the jury answered the categorical questions of the court, and at first declined to find a general verdict, but ultimately did so on the direction of the court.

Inconsistent verdict] The verdict must be consistent: *Muirhead,* above; *Charlton,* below. 'Wilful neglect through ignorance' is a verdict of guilty: *Petch,* 2 Cr. A. R. 71; 25 T. L. R. 401, 1909; cf. *Gray,* 1891. 'Guilty, but done in ignorance' (viz. trees destroyed); this finding was refused, the jury being told that though defendant thought that the trees were his property, yet if he destroyed them *maliciously,* he was guilty: c. q. because the C. C. A. could not tell from the shorthand note whether the finding did not intend to negative malice; 'We do not say that in such a case defendant might not be

rightly convicted': *Rutter*, 1 Cr. A. R. 174; 73 J. P. 12; 25 T. L. R. 73, 1908; cf. *Syme*, 1911: threat. 'Guilty,' with a recommendation to mercy because 'we have doubts on various points' is not an inconsistent verdict: *Charlton*, 6 Cr. A. R. 119, 1911; nor on the ground of defendant's ignorance of the law: *Crawshaw*, 1860. For findings *technically* inconsistent, see under *Summing Up*.

In *Crisp*, 7 Cr. A. R. 173, 1912, attempted suicide, the first finding was 'guilty, but of unconscious mind,' explained thus: 'You would not call that insane—we say he is guilty but unconscious of his act at the time'; the final verdict was guilty; the C. C. A. thought that they intended at first to acquit *and might have insisted on doing so*, but they accepted the judge's invitation to reconsider.

Verdict founded on extraneous matters] Where it appeared that some of the jurors were influenced to convict by the suspicion of one that defendant was an old offender, though there was no evidence thereof, c. q.: *J. Newton*, 7 Cr. A. R. 214, 1912. So *Gaskell*, 1912: c. q.

Verdict against the weight of evidence] The C. C. A. is extremely slow to reverse a verdict on the facts; nor will it do so merely because the judge disapproves of the verdict: *Gaskell*, above; *J. Smith*, 10 Cr. A. R. 232, 1914: conviction affirmed; cf. *Berwick*, 12 Cr. A. R. 37, 1916. For an instance, see *Schrager*, 6 Cr. A. R. 253, 1911, where *all* the magistrates present at Q. S. had reported that they were not satisfied with the conviction; cf. *Bennett*, 1912, where the C. C. A. thought that the jury 'gave a guess' (though a correct one); in *J. Flood*, 10 Cr. A. R. 227, 1914, the verdict being for common assault, though the facts pointed to a graver offence, and there being great doubts on other points, c. q. Where the jury found receiving, of which the C. C. A. thought there was no evidence on a charge of stealing (of which there was evidence) and receiving, c. q.: *T. Evans*, 12 Cr. A. R. 8, 1916: strongly condemning a 'compromise' verdict. A 'special' verdict in murder was substituted by the C. C. A. in *Gilbert*, 84 L. J. K. B. 1424; 112 L. T. 479; 24 Cox C. C. 586; 11 Cr. A. R. 25, 1914.

Disagreement at first] When in such an alleged case 'the chairman recalled a witness and then' the jury, 'on being informed that they would be locked up for two hours, eventually agreed,' the C. C. A. thought that 'the procedure was regular' and the jury were not coerced: *Hartleigh*, 1 Cr. A. R. 17, 1908.

Recommendation to mercy] is no part of the verdict: *Trebilcock; Crawshaw; Charlton*, 1911.

Perverse verdict] 'may, probably, be defined as one that is not only against the weight of evidence, but is altogether against the evidence': Stroud, *Jud. Dict.*; perhaps *Dollery*, above, is an instance.

Acquittal] There is no means of reviewing an acquittal: *Simpson, &c., Ex p. Smithson*, 1914, 1 K. B. 66; 78 J. P. 55; 23 Cox C. C. 739; 83 L. J. K. B. 233; 30 T. L. R. 31: K. B. D. (summary jurisdiction). In *Parry*, 1837, Park J. said: 'I never intermeddle with an acquittal,' though he asked juries to reconsider convictions of which he disapproved; 'and a judge might do it on an acquittal.' L. Denman C.J.: 'And in many cases ought.' But after acquittal a judge should

not refer to accused's character because there may be other indictments pending: *H. Smith,* 13 Cr. A. R. 9, 1917.

Statement by juror pending trial] It is unwise for an individual juror to talk about the case he is hearing to a non-juror: *Syme,* 79 J. P. 40; 112 L. T. 136; 30 T. L. R. 691; 10 Cr. A. R. 287, 1914. Q. S. quashed a verdict where this was done during retirement: *Fowler,* 4 B. & Ald. 273, 1821.

Statement by juror after trial] L. Mansfield refused to hear a juror's affidavit on motion for a new trial (libel) on a point of law, 'whatever may be the case of his affidavit tending to rectify a mistake in fact': *per* Aston J., *Almon,* 5 Burr. 2688, 1770. In *Melik,* 11 Cr. A. R. 100, 1915, the court refused to consider a letter from a juror to the trial judge; presumably it depends on the nature of the statement whether any action should be taken on it.

Second summing up and verdict after a good verdict] When defendant was convicted and sentenced, and counsel argued that the conviction was bad, whereupon the chairman read the evidence to and asked the jury a specific question on the issue raised, and they convicted, the C. C. R. affirmed and, though it was not necessary to pronounce on the procedure, evidently disapproved of it: *Baines,* 69 L. J. Q. B. 681; 19 Cox C. C. 524; 64 J. P. 408, 1900.

Arraignment on previous conviction] Pp. 190, 244. By 24-5 V. 96, 116 (larceny, &c.), 'the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows: (that is to say) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence,' and after plea or verdict of guilty on subsequent offence, 'he shall then, and not before, be asked whether he had previously been convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged' to inquire whether he has been so convicted. (The earlier part of the s. is set out p. 244 and the later is identical with s. 37, below.) The words 'any offence' are perfectly general, and are not limited to offences under the A. *Faulkner* v. *R.*, 1905, 2 K. B. 76; 74 L. J. K. B. 562; 69 J. P. 241; 20 Cox C. C. 838: attempt at larceny—not within the A.—where defendant was arraigned on and pleaded not guilty to three counts, the last for a previous conviction; the trial was stopped, and remitted to the next sessions, when he was tried, without a fresh plea or arraignment, on one count and convicted: c. q. by K. B. D. on error. When defendant was not arraigned on the previous conviction the C. C. A. reduced the sentence: *Metcalfe,* 9 Cr. A. R. 9, 1913; 'the habit of acting on statements . . . in the calendar' is 'irregular': 29 T. L. R. 512. So precisely 24-5 V. 99, 37, in coinage offences: see *Coining* and *Martin,* L. R. 1 C. C. R. 214; 11 Cox C. C. 343; 39 L. J. M. C. 31, 1869, and crimes under the Prevention of Crime A. 1871, by s. 9. When there were three indictments, to the third of which under s. 7 defendant pleaded guilty, but to the first of which he pleaded not guilty, and was tried and convicted on it, the C. C. A. pointed out that to avoid

the jury knowing that he confessed a previous conviction alleged in the third indictment, he might have asked 'the officer of the court' not to call on him to plead to the third till the first had been tried (and seemed to think that that course might have been adopted): *Froggatt.* On this analogy two previous convictions for poaching were not proved till after the third, though the A. did not require this: *Woodfield,* 1887.

Trying another indictment] On an acquittal for stealing from the person, another jury convicted on exactly the same evidence, under 34-5 V. 112, 7, of being in a public place with the intention of committing the felony of which there had been an acquittal (the indictment using the same words as the previous one); the C. C. A. refused to interfere, saying that after the acquittal the judge could suggest that it should 'make an end of the whole case': *F. Miles,* 3 Cr. A. R. 15, 1909.

When *per incuriam* no verdict was taken on two out of three counts and that on the third was quashed, the C. C. A. (ordered (?) or) advised that those two should be tried again, and they were tried and a conviction obtained: *B. Myro Smith,* 14 Cr. A. R. 83, 1919.

vii.

Conviction—what is] It is not necessary that judgment should have been given on the primary charge. 5 Eliz. 14 (rpd.) made a second conviction for forgery capital. Hale (I. 686) says of it: 'By conviction, I conceive, is intended not barely a conviction by verdict where no judgment is given'; 'the party is concluded . . . by the record of that [the former] conviction.' If defendant either pleaded or was found guilty, that amounts to a conviction, though only a recognisance to come up for judgment was entered into: *Miles,* 1890; *Blaby,* 1894, 2 Q. B. 170; 63 L. J. M. C. 133; 18 Cox C. C. 5; 58 J. P. 576; 70 L. T. 89: C. C. R. So a 'ticket-of-leave' man (under 27-8 V. 47, 4, 1) who is bound over is 'convicted': *Rabjohns,* 1913, 3 K. B. 171; 82 L. J. K. B. 994; 77 J. P. 435; 23 Cox C. C. 553; 29 T. L. R. 614; 9 Cr. A. R. 33. At common law 'conviction' implies a judgment: *Burgess* v. *Boetefeur,* 7 Man. & Gr. 481, 1844.

Previous conviction of defendant] Apart from *Habitual Criminals* the law stands thus:

A. Before verdict on plea of not guilty.

1. On a trial under s. 7 of the Prevention of Crimes A. proof may be given as part of the case of the prosecution, as this is of the gist of the offence: *Penfold;* but only under this s.

2. If defendant gives evidence of his *good character* by his cross-examination or his own witnesses, such proof may be given (in felony under 6-7 W. 4, 111, and) in felony or misdemeanour under 24-5 V. 96, 116: *Faulkner* v. *R.* (which relied on the words, 'the proceedings upon any indictment . . . as follows,' with which words in 24-5 V. 99, 37, passed the same day, are identical).

3. If defendant is a witness, proof is regulated by the Criminal Evidence A.: at the most he may be cross-examined on the point.

4. If defendant does not give evidence of any sort of his *good character,* a previous conviction (as such) cannot be proved.

See p. 115.

B. After plea or verdict of guilty.

1. If the indictment alleges a previous conviction, that issue, unless defendant confesses it, must be tried. The procedure is stated above; defendant must be identified and a certificate of conviction produced. No other proof of any conviction is legal. See *Metcalfe*, 1913. But in the last quarter of a century a practice has sprung up of so proving one such conviction strictly and then in addition of the same witness or another, sometimes even by hearsay, giving a list of previous convictions; and sometimes not even one such conviction is strictly proved. In the cases where there is no allegation in the indictment, there is obviously no issue before the court.

2. If no previous conviction is so alleged, strictly none can be proved after verdict, and no sentence legally dependent on a previous conviction can be imposed. In *Willis*, L. R. 1 C. C. R. 363; 41 L. J. M. C. 102; 12 Cox C. C. 192, 1872, several such convictions were proved but not alleged, and the C. for C. C. R. reduced the sentence of seven years' penal servitude—the maximum, under a repealed s., after a previous conviction—to five, saying: 'prisoner was entitled to have his identity tried by a jury, which could not be, as the previous conviction was not upon the record'; following *Summers*, L. R. 1 C. C. R. 182; 38 L. J. M. C. 62; 12 Cox C. C. 248, 1869. The court, therefore, which always has defendant's 'record' before it during the trial, can only inflict an aggravated sentence permitted by law after a previous conviction, when that is strictly proved; though, within the limits of the maximum legal sentence, it is, perhaps, reasonably influenced by that 'record': see below.

3. There may be an allegation of a previous conviction in any indictment, but it is useless to insert it unless it has a legal effect.

Evidence on oath after verdict or plea of guilty] This seems to be in the nature of a *voire dire*. It is either (a) in mitigation of sentence or (b) police evidence.

(a) It seems that defendant may give such evidence, not only from *A. Bright*, 1916, 2 K. B. 441; 32 T. L. R. 600; 12 Cr. A. R. 69, where Darling J. in effect overruled his own judgment to the contrary in *Hodgkinson*, 64 J. P. 808, 1901, but from *C. Wheeler*, 86 L. J. K. B. 40; 33 T. L. R. 21; 61 S. J. 100; 12 Cr. A. R. 159, 1916, where defendant had pleaded guilty in summary jurisdiction, had then given such evidence in mitigation of punishment and had been convicted of perjury in respect thereof: the C. C. A. held that he was 'lawfully sworn' within 1-2 G. 5, 6, 1 (1), describing the effect of the Criminal Ev. A. thus: 'Wherever the defence can be heard, the prisoner can be a witness on his own behalf.' The law must be the same on the trial of an indictment, but it is difficult to see how an issue between defendant and the prosecution is to be tried at that stage: apparently in the form of an indictment for perjury. Cf. B. 1, above.

In *Bright* defendant pleaded guilty to an offence under the Defence of the Realm Regulations, 1914, and was sentenced to p. s. for life: had 'the court' found that there was an intent to assist the enemy the sentence might have been of death. There was no indictment of intent, but two soldiers who had been in the cells with defendant gave evidence that he had suggested mutiny to them. The judge did not doubt that the jury would have found the intent. The C. C. A. thought that he was right in hearing that evidence 'to decide on the degree of

culpability and the sentence . . . due . . . he had a perfect right to consider motives, whether . . . good or bad. There is no legal ground for saying that a judge may only consider motives if he decides that they were good motives. He should consider both. . . .' But the C. C. A. disapproved of the judge assuming a crime or a 'statutory aggravation' not in the indictment, and reduced the sentence to ten years' p. s.

'In considering sentences it has been the invariable practice to inquire into the prisoner's history in his own interest, and if . . . facts come out which damage him, the judge ought to take notice of it': *per* Alverstone L.C.J., *H. Weaver,* 1 Cr. A. R. 13, 1908.

(b) *Police evidence*] In *Pearson,* 5 Cr. A. R. 188, 1910, a police officer produced a copy of prison records, photographs, and finger-prints from S. Africa as proof of a conviction there, but did not otherwise identify defendant, and alleged convictions in Australia, but this the judge rejected, stating that he would take no notice of them: the C. C. A. thought that the sentence was justified by the latest crime, Alverstone L.C.J. observing: 'The evidence was given . . . not in order to increase the legal sentence. . . . It was merely a means of assisting the judge to determine the proper sentence.' He had previously said in *K. Edwards,* 3 Cr. A. R. 60, 1909: 'on the question of character it has been the practice of the courts for years that information even of suspicious events may be given'; it 'may be in the interest of the defendant, as the police should report anything they discover favourable to the accused. The question whether the judge should take notice of offences not admitted by the defendant has nothing to do with evidence being given whether the defendant has worked or not, or left the last place with or without a character, and the like. Such matters ought always to be taken into account.'

In *Kendrick,* 6 Cr. A. R. 117, 1911, the C. C. A. thought that an excessive sentence (which it reduced) was influenced by a remark of an official of the court in aggravation for which there was no evidence, and approved of the judge not taking into account two pending charges denied by defendant. So when the court acted on unsupported police evidence that defendant disposed of *other* stolen property: *Court, ib.* 121, 1911. In *D. Campbell,* 6 Cr. A. R. 132; 75 J. P. 216; 27 T. L. R. 256, 1911, Alverstone L.C.J. dealt substantively with the matter: 'It is the duty of some responsible officer of police to tell the court what he knows about the prisoner as the result of inquiry, where it would involve great difficulty and expense to prove the facts by legal evidence'; after stating that the practice under s. 10 (5) of 8 Ed. 7, 59, had been borrowed from this 'long recognised' practice, he proceeded: 'At times, no doubt, police officers on these occasions say more than they ought to say against prisoners. . . . If the prisoner wishes to deny anything, he can . . . do so at the time. . . . If the prisoner challenges any statement, *it is the duty of the judge to inquire into it;* if necessary, he should adjourn the matter, and *if it is of sufficient importance he may require legal proof of it.* Or he may ignore it, and if he does so he should state that he is not taking it into consideration. If the prisoner does not challenge the statements the court may take them into consideration and no injustice is likely to be done. Very often it is in the prisoner's interest that his antecedents should be stated. . . .' When that case was cited to the C. C. A. Reading L.C.J. observed that an untried and unconfessed indictment ought not to be considered in sentence: *W. H. Cooper,*

10 Cr. A. R. 197, 1914. In *Bradshaw, &c.*, 6 Cr. A. R. 221, 1911, three sentences were reduced in view of inaccurate police evidence, *i.e.* it was based on hearsay, which was shown to be mistaken. So *Goodbrand,* 6 Cr. A. R. 287, 1911; *G. Brooks,* 8 Cr. A. R. 111, 1912, where a detective gave a long list of offences supposed to have been committed by defendant, 'but some of which ought not to have been taken into account unless they were admitted by the appellant.' So *Everitt, ib.* 156, 1913. In *Stratton,* 10 Cr. A. R. 35, 1914, though the court did not reduce the sentence, it severely condemned police officers (and reported one) whose evidence did not distinguish between their own knowledge and information given to them, or between statements of fact or of opinion. In *W. Palmer,* 8 Cr. A. R. 246, 1913, ten years' p. s. for housebreaking was reduced to five because no opportunity was allowed defendant of disputing a detective's allegations after verdict. In *Trenholm,* 9 Cr. A. R. 19, 1913, the C. C. A. thought that 'too much effect' was given 'to the general bad character given to the appellant by the inspector,' and materially reduced sentence. In *M'Garry,* 1 Cr. A. R. 193, 1908, the C. C. A. sanctioned *written* police reports after conviction.

Evidence in mitigation of sentence] Counsel is always heard and evidence of character is always permitted. The old procedure by affidavit is obsolete except, perhaps, in the K. B. D., for which see *Crown Off. Rules,* 170-2. There is less need for such a procedure since there has been an appeal from sentence. The prosecution is, if it desires, also heard in comment on such evidence.

viii. THE JUDGMENT.

Arrest of judgment] A motion of this nature may be made for any substantial defect which appears on the face of the record. It is made at the time when defendant is called upon to receive judgment and cannot be made after judgment: see *Allocutus*, below. It is not affected by the right to appeal: see, *e.g. Garland*, 1909, where it had been made. See Crown O. R. 163. The powers of the K. B. D. to entertain such motions or to enter judgment *non obstante veredicto* in a criminal case tried on a record of the K. B. D. have not been specifically abolished by the Cr. Ap. A.: 2 Russ. Cri. 2006; *Short*, Cr. O. R. p. 142; R. 156. If the objections taken in arrest of judgment be valid, 'the whole proceedings shall be set aside, but the defendant may be indicted again': 4 Rep. 45; 4 Bl. Comm. 375. Where judgment on a record of the Q. B. was pronounced at the assizes under 11 G. 4 & 1 W. 4, 70, 9 (now rpd.), the court on motion, finding the judgment wrong, thought that the only way of amending it was by striking it out, *i.e.* in effect, by ordering it to be arrested: *Nott*, 1843. A sentence of imprisonment passed at *nisi prius* under that s. 9 may declare that it shall commence on the day on which he shall be taken to and confined in prison: *King* v. *R.*, 7 Q. B. 782, 795; 14 L. J. M. C. 172, 1844; and under C. O. R. 163 this apparently may be done in any case.

Absent defendants] 'On all trials for felonies and misdemeanours in the K. B. D. . . . judgment may be pronounced . . . whether such persons [defendants] be present or not in court': C. O. R. 162; and see *Short* on R. 167. The rule on motions for new trial was that the K. B. D. would not hear them, even in misdemeanour, if the defendant was not present: *Spragg*, 2 Burr. 930, 1760; *Bembridge*, 3 Doug. 330 n., 1783.

Joinder of charges or defendants] Where there are several felonies or misdemeanours charged, care must be taken in passing sentence, and also in making up the record, that no error is made which will vitiate the judgment. There is some obscurity about what will constitute a ground of appeal in this respect. In *Powell*, 2 B. & Ad. 75, 1831, the first count of the indictment charged an assault with intent to ravish, the second a common assault. The record stated that the jury found that 'the said H. P. is guilty of the *misdemeanour and offence* in the said indictment specified, in manner and form as by the said indictment is alleged against him; whereupon all and singular the premises being seen, &c., it is . . . adjudged by the court here, that the said H. P. for the said misdemeanour, be imprisoned,' &c. . . . for two years 'with hard labour.' The Q. B. held on a writ of error that the word 'misdemeanour' was *nomen collectivum*, and that the finding of the jury applied therefore to the whole indictment, and was good.

In the case of *O'Connell* v. *R.* there were several counts for various acts constituting the offences against various defendants. The judgment was against each of the defendants and was stated in the record to be 'in respect of his offences aforesaid.' Some of the counts turned out to be bad, as did some of the findings on some counts. A large majority of the English and all the Irish judges (for whom, see 7 Irish L. R. 261 and foll.) thought that the judgment being warranted by the counts which were good ought to be confirmed, and in this opinion L. Brougham and L. Lyndhurst concurred; but L. Cottenham, L. Campbell and L. Denman thought otherwise; and the judgment was reversed. The H. L. held that the offence charged in each count was separate, that the words 'his offences aforesaid' applied to all the offences of which each defendant had been found guilty, and, therefore, that as some of the counts and findings were bad such judgment was bad also.

The following rules were laid down by the H. L.: 'Where an indictment contains several counts, of which one is bad [and where the punishment is not fixed by law: Cl. & Fin.], a general judgment for the crown is bad. A good finding on a bad count and a bad finding on a good count are nullities': 1 Cox C. C. 413. 'Where a count in an indictment contains only one charge against several defendants, the jury cannot find any one of the defendants guilty of more than one charge': 11 Cl. & Fin. 155. See further under *Conspiracy* for an application of these rules.

In *Campbell* v. *R.*, 11 Q. B. 799; 14 L. J. M. C. 76; 1 Cox C. C. 269, 1846, there were two counts, one charging a stealing *in the dwelling-house* of A., monies of A. (above the value of 5*l.*), the other for a simple larceny of certain chattels and the same goods, &c., describing them precisely as in the first count, of A. (not 'other' monies and not 'in the dwelling-house, &c.'). The record stated the finding of the jury to be 'guilty of the felony aforesaid on them above charged in the form aforesaid, &c.,' and what the judgment was: different judgments were applicable to each count. The Q. B. held that the word 'felony' in this record could not be construed in the same way as the word 'misdemeanour' in *Powell,* above (which was doubted), namely, as *nomen collectivum,* so that it was uncertain to which of the felonies charged the finding of the jury applied; and that as the judgment (of transportation for ten years) was applicable to the first felony charged only, it was erroneous and must be reversed. The Ex. Ch. confirmed.

It was said in the argument in *Campbell* v. *R.* that, even if the word 'felony' could be construed in the way contended for, the judgment was erroneous, on the authority of *O'Connell* v. *R.*; but the Ex. Ch. seemed to think otherwise, and that in that case the judgment would have been good (11 Q. B. 837).

Amendment of judgment] In *Gregory* v. *R.*, 15 Q. B. 957 and 974, 1848 and 1850; 19 L. J. Q. B. 367; D. & L. 777, 1847, the sentence passed was, that 'for the offences charged upon him in each and every count of the indictment, the defendant be imprisoned in the Queen's prison for six months now next ensuing.' The Ex. Ch. seemed to think that the judgment as stated in the record was in form a sentence of one term of six months' imprisonment on the whole indictment, and would, therefore, be erroneous if any count were bad. No final opinion was, however, expressed, because on the motion of the prosecution, the court below allowed the judgment to be amended

according to the sentence passed, a note of which was contained in the master's book. Erle J. said: 'It is clear that mistaken statements of the acts of the court made by its officers on records may be amended according to the truth by common law: 8 Rep. 156 *a*'—*Blackamore's case*, 1611, where Coke, 157 *b*, thinks that 14 E. 3, st. 1, c. 6 (1340—the earliest statute of amendment) did not 'extend to pleas of the crown,' as Powell J. said in *Tutchin*, 6 Med. 283, 1705, where some of the judges insisted on the power of amendment at *common law*. 42-3 V. 59, Sched. Part II., in repealing 14 E. 3, st. 1, c. 6, adds: 'except as to criminal proceedings'; Erle J., above, thought that the earlier statutes of amendment were applicable to criminal proceedings. Patteson J., who passed the sentence, said: 'I know that since *O'Connell's case* the court has always been particular in passing sentences so as to be applicable to each count. . . . Where the indictment contains many different counts and the party pleads guilty, the sentence must be passed in this way' (15 Q. B. 971): so L. Denman, at 968. See 973, note *b*.

Hence the best plan and the usual practice in making up the record is to state a separate judgment for each count. Cf. *Bowers* v. *Nixon*, 12 Q. B. 546, 1848.

Where the record set out the finding and judgment on the second count, but omitted to notice the finding (viz. an acquittal) or judgment on the first, it was held that each count for the purpose of the verdict was a distinct indictment, and that, as there was a good finding on a good count, defendant might be convicted on it. *Latham* v. *R.*, 9 Cox C. C. 516; 5 B. & S. 635; 33 L. J. M. C. 197; 10 Jur. N. S. 1145, 1864.

The difficulty was frequently got over by the power conferred by s. 5, 11-12 V. 78, rpd. by 7 E. 7, 23, 22, *e.g.* in *Holloway* v. *R.*, 2 Den. C. C. 287; 17 Q. B. 319; 15 Jur. 825, 1851. See now *Appeal*.

Allocutus] In non-misdemeanours the clerk asks defendant before judgment: 'Have you anything to say why judgment should not be given against you according to law?' A female convicted capitally may allege pregnancy; she is then given in charge to a sworn

Jury of matrons] numbering twelve, who may or may not examine her personally or may hear a doctor. Formerly sentence was given *first*: *Baynton*, 14 St. Tr. 634, 1702; and then, if necessary, respited.

ix. SENTENCE. A.

Sentence of death] By 24-5 V. 100, 2: 'Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this Act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon.' But such sentence cannot be pronounced on or recorded against a child or young person: 8 E. 7, 67, 103; see *Fitt*.

By s. 3: 'The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so

direct.' The K. B. has 'power to order execution' where it thinks proper: *Garside,* conviction at Chester, execution in Surrey.

Recording judgment of death] was by 4 G. 4, 48, 1, permitted except in murder, but the statute is now a dead letter: 1 *Stephen,* Hist. Cr. L. 472; piracy and setting fire to the King's ships are the only crimes to which it can apply. But such sentence may not even be recorded against persons under sixteen: 8 E. 7, 67, 103.

Date of sentence] It is doubtful whether a court can antedate a sentence before the first day of assizes or Q. S.: *W. S. Davies,* 7 Cr. A. R. 255, 1912.

For post-dating, see *King* v. *R.*

B. OTHER SENTENCES.

1. Incarceration.

Not of Child or Young Person.

By 7-8 G. 4, 28, 8 (as amended): 'Every person convicted of any felony not punishable with death, shall be punished in the manner prescribed by the statute or statutes especially relating to such felony; and every person convicted of any felony, for which no punishment hath been, or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable . . . to be transported beyond the seas for the term of seven years.'

Penal servitude] was gradually substituted for transportation by 16-7 V. 99, 1853; 20-1 V. 3, 2, 1857; and 27-8 V. 47, 1864, the two former of which authorise the convicts being sent 'beyond the seas' (so that 'criminals were kept in confinement at Bermuda and in Gibraltar till very lately': *Stephen,* 1 Hist. Cr. L. 482, 1883, of which see for the history of this subject, p. 480 and foll.).

Prisoner already under sentence] See *Term, &c.,* below. In 7-8 G. 4, 28, 10, it is doubtful whether 'subsequent offence' means one committed *or* tried subsequently: *J. J. Hemming,* 1912.

Sentence for life] For what remains of the Transportation A., 5 G. 4, 84, see p. 585. By 7-8 G. 4, 28, 11: 'If any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable to be transported beyond the seas for life.' This s. is practically obsolete (and for simple larceny impliedly repealed).

Remanets] It was pointed out by Hawkins J., in *King,* 1897, 1 Q. B. 214; 66 L. J. Q. B. 87; 18 Cox C. C. 447: C. C. R., that where there is an unexpired term of penal servitude which a convict may be sent back to serve out, there is no power in the tribunal to make the new sentence run concurrently with this term, which must commence after the expiry of the sentence, under 27-8 V. 47, 9 (amended by 54-5 V. 69, 3); where the court made a mistake on this point, the C. C. A. amended: *Hamilton,* 1908. So in *J. Smith,* and *M. Wilson,* 1909, 2 K. B. 756; 79 L. J. K. B. 4; 73 J. P. 407; 2 Cr. A. R. 271, where the court said that no *remanet* should be mentioned in sentence as it operates by law.

Term] By 54-5 V. 69, 1 (1), 'Where under any enactment in force when this section comes into operation [Aug. 5, 1891] a court has power to award a sentence of penal servitude, the sentence may at the discretion of the court be for any period not less than three years and not exceeding either five years or any greater period authorised by the enactment.'

By 54-5 V. 69, 1 (2), 'Where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years with or without hard labour.' In consequence of this s. a large number of alterations have been made by S. L. R. Acts, in 1892 and 1893, in the Consolidation Acts, 1861, and other criminal statutes in order to bring the latter into conformity with the s. The words, too, 'at the discretion of the court' have been repealed in very many passages, but not in all.

Imprisonment] At the same time the power to award solitary confinement (in the old sense)—a form of punishment which before 28-9 V. 126, 1868, 'was allowed to be inflicted only for a short part of the whole term' and had fallen into disuse—has been taken away; it remains, however, in a (modified) form, called 'separate,' regulated by the Prison Rules (St. R. & O. Rev. 1904, Prison E. 77-108; amended St. R. & O. 1901-15). *Separate* confinement 'is now [1883] inflicted in all cases as the regular and appointed mode of punishment': *Stephen, ib.*, who says that 'in practice' it 'means much the same thing as solitary.' 'The only distinction' in point of character, says *Sweet,* Law Dict., 'between penal servitude and imprisonment with hard labour' seems to be that the latter is carried out within the walls of a gaol . . . while penal servitude is carried out in any place appointed for the purpose by the proper authority.' In *Hamilton,* 1 Cr. A. R. 88, 1908, Alverstone L.C.J. said, 'a sentence of two years' imprisonment' with hard labour 'is by many considered severer than three years' penal servitude.' In *A. Arnold, ib.* 28, he said the same of eighteen months' imp. w. h. l. Cf. *H. White,* 1912. But three years' imp. w. h. l. may still be a sentence under 14-5 V. 19, 12.

Three divisions] When hard labour is not imposed, if the court makes no order, the offender is in the third division; if it makes an order it must specify whether he is to be in the first or second: 61-2 V. 41, 6 (2); but if 'the visiting committee consider the case suitable for treatment in the second division' they may transfer it thither from the third: 4-5 G. 5, 58, 16 (2). Neither a court nor the committee shall put any one in the second division 'if his character and antecedents are such that he is likely to exercise a bad influence on first offenders': *ib.* 16 (3).

The moral grounds, as they may be called, of this classification are set forth in a Home Office circular of April, 1899, for which see 1 Russ. Cri. 214. The details of the distinctions will be found for local prisons in Stat. R. & O. 1899, p. 1128 and foll.; juvenile prisoners, p. 1135; for convict prisons, p. 1151 and foll., where the three classes are 'star,' 'intermediate' and 'ordinary.'

'I have frequently sentenced prisoners to hard labour, and then on being asked to put them in the second division I have done so, but I have increased their sentence': *per* Channell J., *Kirkpatrick,* 1 Cr. A. R. 171; 73 J. P. 29; 25 T. L. R. 66, 1908.

In refusing to put *S. Harris,* 2 Cr. A. R. 50, 1909, in the second division, Darling J. said: 'The question whether a convicted person should be sent into the second division or not depends upon the kind of person so convicted, and not upon the class of offence' (here corruption).

Special treatment pending appeal] under s. 14 (1) of the Crim. Ap. A. In *Gylee*, 1 Cr. A. R. 244, 1908, the C. C. A. stated, on the authority of the Home Office, that there is a distinction between this and the second division, but in *Dyer, &c.*, 2 Cr. A. R. 175, 1909, that 'the conditions are identical.' Where a judge had first imposed hard labour for larceny, and then substituted the second division, the C. C. A. restored the former, having regard 'to the nature of the [previous] convictions': *Mortimer*, 1 Cr. A. R. 24; 72 J. P. 391; 24 T. L. R. 745, 1908, a very rare instance of that court increasing a sentence.

Hard labour] The punishment and the phrase occur first: 5 An. 6, 2, 1706; rpd. 7-8 G. 4, 27, 1. It has always required statutory authority for its infliction. By 4-5 G. 5, 58, 16 (1), superseding unrpd. 14-5 V. 100, 29 (whereby the following indictable *misdemeanours* were made punishable *additionally* with hard labour: any common law cheat or fraud; conspiracy to cheat or defraud, to extort money or goods; falsely to accuse of crime, to obstruct, &c. public justice; 'escape or rescue from lawful custody on a criminal charge'; public and indecent exposure of the person; 'public selling or exposing for public sale or to public view, of any obscene book, print, picture or other indecent exhibition'), when there is a conviction without the option of a fine, imprisonment may 'be either with or without hard labour, notwithstanding that the offence is an offence at common law or that the statute under which the sentence is passed does not authorise the imposition of hard labour or requires the imposition of hard labour.' (Till then hard labour must be imposed by 46-7 V. 51, 6 (2), for personation.) But when 'imprisonment is imposed . . . in respect of the non-payment of any sum adjudged by' a 'court to be paid,' it 'shall be without hard labour.' See *E. Saunders*, 12 Cr. A. R. 61, 1916; *A. A. Gould*, 13 Cr. A. R. 144, 1918. The result is that the only case in which hard labour *cannot* be imposed is when imprisonment is due to non-payment of a fine.

The incidents of hard labour are regulated by the (chief) Prison Acts (see *Index*) and the rules made under them. 'A prisoner is [now] able to earn a remission of one-sixth of the sentence by good conduct, and the really severe period of the hard labour is quite short': *per* Pickford J., *Jenner*, 6 Cr. A. R. 64, 1910.

Preventive detention] See *Habitual Criminal*. There can be no sentence *with a view to* preventive detention unless there has been a *trial* for being a habitual criminal: *Flicker, Chuter*, 5 Cr. A. R. 79; 74 J. P. 381; 26 T. L. R. 540, 1910: sentences reduced.

2. *Police supervision*] Where a person is convicted on indictment of 'any felony or . . . of uttering false or counterfeit coin or of conspiracy to defraud or of any misdemeanour' under 24-5 V. 96, 58 [*i.e.* of being found by night armed with intent to break into any house], after a previous conviction, the court may '*in addition to* any other punishment' direct that he be under police supervision for any period not exceeding seven years, immediately after the expiration of his sentence: 34-5 V. 112, 8, 20; s. 8 is amended 54-5 V. 69, 4 (1), and extended 42-3 V. 55, 2. When no previous conviction is proved this sentence cannot be inflicted: *Bendon*, 6 Cr. A. R. 178, 1911.

3. Term and Nature of Sentence.

Where a statute left it doubtful under which s. sentence should be passed (where it was different under each), 'the court will choose the lighter': *Turner,* 20 Cox C. C. 592, 1903: C. C. R. Cf. *D. Johnston,* 1913; *G. W. Norman,* 11 Cr. A. R. 60, 1914.

The decisions of the C. C. A. in reviewing the sentences of the courts of trial are naturally some guidance on these points, but the court has laid down very few general principles. In the following pages on this subject no notice has been taken of cases in which the court above has considered fresh evidence or new facts not before the judge at the trial, or those in which it has interfered with a sentence on the ground of misdirection; see *Standardisation,* below.

That court only acts when it is apparent that the trial judge proceeded on wrong principle or gave undue weight to any fact proved; the term which any individual member of the court would have imposed is not the criterion: *Sidlow,* 1 Cr. A. R. 29, 1908; *Maurice, ib.* 177; *Nuttall, ib.* 180, 1908. Thus ten years' p. s. for manslaughter was reduced to three where the court thought that it had been overlooked, that there was provocation and no vindictive feeling and defendant was under the influence of drink: *C. O'Connell,* 2 Cr. A. R. 11, 1909.

Age—youth] Five years' p. s. reduced to three, in *A. F. Dean,* 4 Cr. A. R. 155, 1910, twenty years old, with a very bad record but no previous p. s.: housebreaking; *T. Wright,* seven years' p. s. reduced to three: burglary; seven years' p. s. reduced to five, larceny: *Fenlon,* 11 Cr. A. R. 13, 1914, who was twenty-two; three years' p. s. for burglary, after five convictions, reduced to twelve months' imp. w. h. l., defendant being twenty-one: *C. Owen, ib.* 292, 1915. See *Mayes* and *Fox,* 1916, and *Golding,* 12 Cr. A. R. 184, 1916. Imprisonment was reduced to the second div. solely on the ground that defendant was only fifteen and a half, and though not previously convicted, he had confessed many burglaries: *Leverett,* 13 Cr. A. R. 1, 1917. So *J. West, ib.* 16, three years' p. s. reduced to eighteen months' imp. w. h. l. Two concurrent terms of two y. imp. w. h. l. on three indictments for larceny, altered, despite the prison-governor's view, to three y. 'Borstal': *S. Thorpe,* sixteen years of age: 13 Cr. A. R. 176, 1918. For eighteen months' imp. w. h. l. and two years' police supervision, two years in a Borstal institution substituted, after previous convictions: *G. E. Morton,* 14 Cr. A. R. 37, 1919.

Old age] Eight months' imp. w. h. l. reduced to four (incorrigible rogue): *Annie Kent,* 6 Cr. A. R. 291, 1911. Three years' p. s. for a petty theft was, despite many previous convictions, reduced to six months' imp. in the second div., defendant being seventy-two: *Maria Jones,* 9 Cr. A. R. 251, 1913. A man of sixty-two, against whom nothing was recorded till he was fifty, but who after that had lived a criminal life, was sentenced to three years' p. s. and seven years' preventive detention; the former was reduced to eighteen months' imp. w. h. l. (and the latter consequently remitted): *J. Thompson,* 10 Cr. A. R. 124, 1914. Five years' p. s. for obtaining by false pretences reduced to three after many previous convictions (but none for three years): *Montgomery, ib.* 282. Seven years' p. s. for abominable crime reduced to twelve months' imp. w. h. l., defendant being sixty-six: *Kelly,* 11 Cr. A. R. 12, 1914. Five years' p. s. reduced to three, defen-

dant being seventy: *W. C. Bennett,* 14 Cr. A. R. 35, 1919: false pretences. Five years' p. s. reduced to two years' imp., defendant being eighty-one and senile: *Ferrua,* 14 Cr. A. R. 39, 1919: procuring abortion.

Co-defendants] The C. C. A. has in some cases refused to consider the disparity of their sentences: *W. H. Ball,* 6 Cr. A. R. 54, 1911; but in *Canham,* 5 Cr. A. R. 110, 1910, where a receiver, of previous excellent character, was sentenced to the same term as one of the principals, six months' imp. w. h. l. was varied to the second div. Where the court thought that appellant was 'the moving spirit' of a joint larceny, and sentenced him to eighteen months' imp. w. h. l., the C. C. A. equated it to the term imposed on the other defendant, viz. nine: *W. Stanley,* 7 Cr. A. R. 149, 1912. *Caroubi, ib.* 155; see *Kervorkian;* was decided on the same ground, but 'without in any way laying down a rule.' Where defendant played a lesser part in an assault with intent to rob, but received the same sentence—twelve months' imp. w. h. l.—as the principal, it was reduced to six: *J. Lyons,* 8 Cr. A. R. 3, 1912. But a manager who ordered his assistant to inflict a blow was rightly sentenced to the same term as the latter: *Dent,* 9 Cr. A. R. 224, 1913. An accessory who went through a form of marriage with a woman whom he knew to be married was sentenced to nine months' imp. w. h. l., while she was sentenced to three, but the C. C. A. reduced his term to the latter: *E. Read,* 11 Cr. A. R. 89, 1915.

When a brother and sister were sentenced to twelve months' imp. w. h. l. for obtaining credit by fraud, &c., but the C. C. A. saw 'a substantial difference in the gravity of the two offences,' it reduced the woman's sentence to four months' imp. without h. l.: *E. I. Davies,* 12 Cr. A. R. 60, 1916. In crimes of violence the actual striker, &c. should be punished more severely: *Pridmore,* 1913.

Confusion of offences] Where there is more than one indictment or a graver charge has been preferred, the judge must be careful not to be influenced by this fact in sentencing on the verdict found: *E. Wells,* 2 Cr. A. R. 259, 1909: bigamy and falsification of marriage register: sentence reduced; see *Maximum Sentence.* On a plea of guilty to common assault there was a sentence of six months' imp. w. h. l., the court being influenced by a count for indecent assault to which there was a plea of not guilty: reduced to one month: *Brockless,* 9 Cr. A. R. 122, 1913. So when there were two indictments for incest, only one of which was tried, ten years' p. s. was reduced to five: *W. H. Cooper,* 10 Cr. A. R. 198, 1914. See *A. Bright,* 1916: p. s. for life reduced to ten years. In *F. Marshall,* 12 Cr. A. R. 208, 1917, six months' imp. w. h. l. was reduced to six weeks for violence to a wife, the C. C. A. remarking, 'One of the most difficult duties of a judge is to adjust his sentence to the verdict of the jury when he does not agree with it.'

Defence, an aggravation] *e.g.* on a trial for perjury in bastardy proceedings, by grave imputations on the prosecutrix: *G. Lucas,* 1 Cr. A. R. 234, 1908: twenty months' imp. w. h. l. But because the judge thinks appellant has committed perjury in his defence and, after conviction, has 'brazened it out' by protesting his innocence, he ought not to increase sentence: *A. Newman,* 9 Cr. A. R. 134, 1913. Cf. *M. Myers,* 11 Cr. A. R. 115, 1915.

Detention before trial] may be taken into account: *Gulston,* 1 Cr. A. R. 165, 1908; but it is always a matter of discretion for the judge: *Mackintosh,* 12 Cr. A. R. 42, 1916. In *S. Harrison,* 2 Cr. A. R. 94, 1909, Channell J. said: 'I generally allow for the previous imprisonment by counting it at the rate of one half.' So *Haden,* 1909. When four months' detention had preceded trial, two years' imp. w. h. l. for carnal knowledge was reduced to eighteen months': *F. Taylor,* 8 Cr. A. R. 26, 1912. Cf. *McCulloch,* 11 Cr. A. R. 51, 1914. In *G. H. Wood, ib.* 53, three months were allowed; so *Gillon,* 12 Cr. A. R. 251, 1917: 'incorrigible.' But whether sentence can be ordered to run from the beginning of detention is doubtful: *M. Rouse,* 10 Cr. A. R. 179, 1914.

Drunkenness] may affect the guilty intention and so mitigate sentence: *Morton,* 1 Cr. A. R. 255, 1908: burglary; *O'Connell,* 1909; *Haden,* 2 Cr. A. R. 149, 1909: larceny. But cf. *G. Davies,* 4 Cr. A. R. 48, 1910. A severer sentence than is usual should not be imposed for attempted suicide (nor *semble* for any offence) merely for purposes of reclamation: *H. Crisp,* 7 Cr. A. R. 173, 1912: six months' imp. reduced to six weeks': no previous conviction. See that title and *A. Beard,* 1920.

Expulsion] If expulsion is not recommended, term of sentence may be increased: *Fine,* 8 Cr. A. R. 78, 1912; but if it is confirmed the preceding imp. may be lessened: *Rappoport,* 11 Cr. A. R. 206, 1915. See *Friedman,* 1914.

Feeble-mindedness] See *McQueen,* 1912.

Fine] Apparently a heavier fine (and consequently longer imp. in default) ought not to be imposed because the court thinks some one will pay it for defendant: *W. Perkins,* 6 Cr. A. R. 251, 1911: using house for betting.

First offence] See *No previous conviction.*

Flogging] should diminish a term of p. s.: *Entwistle,* 8 Cr. A. R. 93, 1912. The C. C. A. apparently is not in favour of this punishment for 'incorrigibles' except in very bad cases: *Fidler,* 9 Cr. A. R. 197, 1913. Twenty-five strokes with 'the cat' were reduced to fifteen for immoral solicitation, but fifteen months' imp. w. h. l. stood: *C. V. Smith,* 10 Cr. A. R. 111, 1914.

Forfeiture of pension] Two concurrent terms of twelve months' imp. w. h. l. were reduced to two consecutive terms of six, to save forfeiture: *A. Griffith,* 13 Cr. A. R. 199, 1918.

Fraudulent trustee] The appropriate sentence seems to be three years' p. s.: *H. Pope,* 4 Cr. A. R. 128, 1910; and in the case of a solicitor, four years' is not too severe ordinarily: *Causton,* 1915.

Good character] See *No Previous Conviction.*

Hard labour] See *No Hard Labour.*

Hard labour after penal servitude] is to be avoided: *J. W. Johnson,* 7 Cr. A. R. 98, 1911: eighteen months' imp. w. h. l. for forgery,

after three years' p. s. for housebreaking, reduced to three and a half years' p. s. So *Veale,* 11 Cr. A. R. 114, 1915: twelve months' imp. w. h. l., after three years' p. s., remitted.

Hard labour—consecutive sentences] Whether a further sentence making the total term more than twenty-four months is legal, is doubtful; the point was not decided in *J. M. Taylor,* 2 Cr. A. R.158, 1909—where one court had imposed twelve and another fifteen consecutive months, as the C. C. A. reduced the latter to three. The court decidedly leans against it: *Borham,* 13 Cr. A. R. 193, 1918: thirty-three months' reduced to eighteen. Two consecutive terms of twelve months' imp. w. h. l. for larceny and false pretences were reduced by six months: *Cailes,* 9 Cr. A. R. 144, 1913. The second court should to some extent consider the first sentence; when nine months' imp. w. h. l. followed immediately on four months' for a similar offence about the same time, the second term was reduced to six: *Richardson,* 5 Cr. A. R. 278, 1910. For three sentences of six months' imp. w. h. l. for three larcenies by a trick committed about the same time, the C. C. A. substituted twelve months' from the date of the first conviction: *Laycock,* 6 Cr. A. R. 213, 1911.

No consecutive term of h. l. ought to be imposed on a sentence of two years' imp. w. h. l.: *M. Goldstein,* 11 Cr. A. R. 29, 1914.

Three years' imp. w. h. l. is still permitted by 14-5 V. 19, 12.

Interval since a previous conviction] should be taken into account: *J. Hill,* 2 Cr. A. R. 74, 1909, as good conduct may be presumed: *J. Cullen,* 4 Cr. A. R. 7, 1910: six years' interval, twelve months' imp. w. h. l. reduced to five; *B. Smith, ib.* 48: twelve months' interval, five years' p. s. reduced to eighteen months' imp. w. h. l.; *W. Chapman, ib.* 54: interval of nearly two years, twenty months' imp. w. h. l. reduced to twelve. But see *Crawford,* 2 Cr. A. R. 305, 1909: three years' p. s. for obtaining, &c., two: relapse after a long interval; *A. J. White,* 1916: interval, three years; same in *W. Griffiths,* 1911. After thirteen years, three years' p. s. reduced to eighteen months' imp. w. h. l.: *Yardley,* 13 Cr. A. R. 131, 1918: shop-breaking.

Though five years' p. s. for stealing a gig, the last conviction having taken place three years previously, was upheld: *Pratley,* 4 Cr. A. R. 159, 1910, the same term was reduced to eighteen months' imp. w. h. l. for a small theft when the severest previous sentence was twelve months' three years previously: *Mountford,* 4 Cr. A. R. 224, 1910. In *S. Hawkins,* 5 Cr. A. R. 237, 1910, the last 'really serious offence' being seven years earlier—housebreaking, six months' imp. w. h. l.—eighteen were reduced to twelve for the same offence; *Wilkinson,* 6 Cr. A. R. 89, 1910: receiving: eighteen months' imp. w. h. l. reduced to nine in view of six months' honest work. After an interval of good conduct for six years, three years' p. s. for uttering a forged cheque was reduced to eighteen months' imp. w. h. l.: *Nevell,* 8 Cr. A. R. 158, 1913; cf. *Doubleday,* 1917. Though there were five previous convictions, as the last for housebreaking, followed by twelve months' imp. w. h. l., was three and a half years previously, since which defendant had worked honestly, two years' imp. w. h. l. for a small theft was reduced to nine months': *Alden, ib.* 176. After many previous convictions, p. s. should only be imposed for a trifling offence of the same nature when it is committed soon after release from prison: *T. Connor,* 9 Cr. A. R. 131, 1913, where the interval was nearly a year. This case was cited not as a 'binding' rule, but 'some

guide' in *C. Sanders, ib.* 180, where there were many previous convictions, but the value of the things stolen was small and the interval was nearly two years: five years reduced to three. *McKone, ib.* 182: receiving, is to the same effect. In *J. Connor, ib.* 183, the twentieth conviction was for a larceny committed a few days after release from prison, but as the value of the property was small eighteen months' imp. w. h. l. was reduced to nine. Despite a 'series of convictions' after eighteen months' interval since release, four years' p. s. for stealing cycles was reduced to eighteen months' imp. w. h. l.: *Malkin,* 12 Cr. A. R. 277, 1917. After seventeen years since a conviction for perjury, six months' imp. w. h. l. for larceny was reduced to two without h. l.: *Bibbings,* 13 Cr. A. R. 205, 1918.

Local circumstances] Prevalence of a crime in a particular district is a ground for severity: *Spencer, Boyd,* 1 Cr. A. R. 37, 65, 1908; *A. Smith,* 1918; or difficulty in coping with it: *Warner,* 1909; *Sprake,* 3 Cr. A. R. 63, 1909, where a woman was sentenced to four months' imp. w. h. l. for stealing coal, though it was a first offence. But twelve months' imp. w. h. l. for a first offence of receiving was excessive and reduced to six: *Court,* 6 Cr. A. R. 122, 1911; for a second, eighteen months' imp. w. h. l. was upheld: 7 Cr. A. R. 127, 1912; eighteen months' imp. w. h. l. was reduced to twelve: *Richmond,* 6 *ib.* 204: van robbery; *Bradshaw and others, ib.* 223, though the C. C. A. agreed that housebreaking in Middlesex must be repressed with special severity. See *No Previous Conviction.* Where the use of the knife was prevalent in a quarter of Birmingham, five years' p. s. was upheld, though previous convictions would not otherwise have warranted that sentence: *A. C. Green,* 7 Cr. A. R. 225, 1912; cf. *Connor,* 8 Cr. A. R. 156, 1912: three years' p. s. for wounding with *intent* to do *grievous* bodily harm. But if defendant is feeble-minded, such severity is inappropriate: *McQueen,* 8 Cr. A. R. 91, 1912: housebreaking in Middlesex: twelve months' imp. w. h. l. reduced to six.

Frequency of an offence generally is a ground for increasing severity: *Colpus,* 12 Cr. A. R. 201, 1916. So pending war, the court declined to encourage the view that meritorious military service was a ground for mitigation, as it had led to an increase of offences: *Ansell,* 13 Cr. A. R. 110, 1918: three years' p. s. obtaining money by false pretences; especially in bigamy: *Spargo, ib.* 122.

Maximum sentence] should be reserved for the worst cases: *S. Harrison,* 1909—indecent assault found on indictment for rape: 'The judge . . . was not at liberty to take into consideration that in fact the prisoners might have been guilty of rape. We think that he must have taken that possibility into consideration': *per* C. C. A. Inveterate theft justifies such a sentence, even when the value of the thing stolen in the particular case is small: *McCreese,* 4 Cr. A. R. 72, 1910. After several previous convictions for various crimes, five years' p. s. was reduced to three years' for malicious wounding (partly owing to defendant's having suffered from sunstroke): *Camp,* 12 Cr. A. R. 279, 1917.

For incorrigible rogues: *E. Edwards,* 2 Cr. A. R. 79, 1909; *W. Cooper,* 5 Cr. A. R. 274, 1910; viz.: twelve months' imp. w. h. l., reduced.

In *H. White,* 8 Cr. A. R. 3, 1912: larceny, Darling J. said: 'A sentence of two years' imp. w. h. l. is very severe: judges only impose it for very grave offences because it is known that day for day it is

harder than a similar period in a sentence of penal servitude'; though appellant had a bad record 'the want of deliberation' in the theft was taken into consideration and the sentence reduced to twelve months' imp. w. h. l.

It is excessive to inflict the maximum sentence—five years' p. s. —for obtaining three shillings by false pretences, even if defendant's record is very bad; 'there should be some proportion between the punishment and the crime'; appellant was sixty-four: *G. R. Williams,* 7 Cr. A. R. 51, 1911: reduced to eighteen months' imp. w. h. l. Twelve months' imp. w. h. l. for a common assault, after two long terms (p. s. and imp. w. h. l.), was reduced to three, but a recommendation for expulsion was not set aside: *Josephson,* 10 Cr. A. R. 10, 1914.

Where the maximum sentence by statute was four months' imp. w. h. l., but the conviction (for brothel keeping) was at common law and nine months in the second division were imposed, in a case admittedly not serious, five weeks were substituted: *Stallwood,* 11 Cr. A. R. 162, 1915.

Motive] Absence of corruption mitigates sentence in certain cases: three years' p. s. reduced to twelve months' imp. w. h. l. for disclosing information which might assist the enemy without bad intention: *Spalding,* 12 Cr. A. R. 253, 1917.

Nature of offence] See *Trivial Nature.*

Nature of previous offences] After two years' imp. w. h. l. for abduction, three years' p. s. for housebreaking was reduced to eighteen months' imp. w. h. l.: *Parsons,* 7 Cr. A. R. 76, 1911. In *W. Stanley,* eighteen months' imp. w. h. l. was reduced to nine for a first larceny, though there was a conviction for living on immoral earnings. After two convictions for bigamy, three years' p. s. for housebreaking was reduced to twelve months' imp. w. h. l. partly in view of defendant's good character in the army: *Kesingland,* 8 Cr. A. R. 57, 1912. See *Bibbings,* 1918.

No hard labour] Imp. without h. l. (to save forfeiture) may be for a longer term than with: *A. G. E. Bright,* 4 Cr. A. R. 194, 1910. For the same purpose, three years' p. s. was reduced to one year's imp.: *Tanner,* 6 Cr. A. R. 63, 1910: postman altering postmark; and fifteen months' imp. in the second division to nine months': larceny by a non-commissioned officer: *Daniels,* 11 Cr. A. R. 101, 1915. H. l. was remitted in the case of a violinist with a view to future professional work: *Burdee,* 12 Cr. A. R. 153, 1916.

No violence] A housebreaker sentenced to ten years' p. s. and ten years' p. d., who was not guilty of violence, had the former reduced to three: *Sumner,* 13 Cr. A. R. 88, 1918.

No previous conviction] The second division was substituted for hard labour in *A. Rouse,* 2 Cr. A. R. 74, 1909: larceny, and in *Heap,* 6 Cr. A. R. 101, 1910: embezzlement. In *Fitzgerald,* 6 Cr. A. R. 99, 1910, and *Day,* 7 Cr. A. R. 250, 1912, twelve months' imp. w. h. l. was reduced to six, for housebreaking, though that offence was frequent in the district.

But there are 'first offenders and first offenders,' and eighteen

months' imp. w. h. l. is not too severe for 'several first offences' on the understanding that they were all (for false pretences) taken into account: *Hagreen,* 7 Cr. A. R. 249, 1912; see *Chandler,* 1912. For receiving stolen property the court thought that eighteen months' imp. w. h. l. was too severe; the proper term was nine months'; another receipt of stolen property had probably been taken into account: *C. Harding,* 3 Cr. A. R. 10, 1909; *Sprake,* 1909; see *Penal Servitude.* In *S. Stanley,* 5 Cr. A. R. 19, 1910, it thought six months' undoubtedly severe for the same offence. When there was no previous conviction for a serious offence, twelve months' imp. w. h. l. for receiving was reduced to six: *Roberts,* 6 Cr. A. R. 4, 1910. *G. Green,* 7 Cr. A. R. 84, 1911: coining offence: five years' p. s. reduced to three. Though there was grave suspicion of habitual receiving and the property stolen (from a van) was worth 700*l.*, five years' p. s. was reduced to three: *C. Knight,* 7 Cr. A. R. 283, 1912. Where a youth of twenty had always borne a good character until, on arrest for burglary, he confessed to several burglaries, three years in a Borstal institution were reduced to two: *C. Hannay,* 9 Cr. A. R. 124, 1913. Ten years' p. s. for that offence were reduced to seven, defendant having previously borne a good character: *Sharman, ib.* 144.

This is 'a question of principle . . . it is not usual to give a sentence of penal servitude for a first offence unless the surrounding circumstances point to matters of extreme gravity or the nature of the crime itself necessitates a severe sentence.' *Kervorkian,* 7 Cr. A. R. 96, 1911: three years' p. s. for larceny reduced to eighteen months' imp. w. h. l., and deportation recommended; so *Caroubi,* his co-defendant.

Twelve months' imp. w. h. l. for housebreaking was reduced to six: *Evemy,* 7 Cr. A. R. 98, 1911; five years' p. s. for receiving reduced to twelve months' imp. w. h. l.: *C. Smith, ib.* 118, 1912. But cf. *Hagreen.* Expulsion was remitted *in misericordiam: Grunspan,* 8 Cr. A. R. 271, 1913. Five years' p. s. for burglary was reduced to eighteen months' imp. w. h. l.: *Trenholm,* 9 Cr. A. R. 19, 1913. In *G. Simmonds, ib.* 51, a very grave case of carnal knowledge, ten years' p. s. was reduced to five. For doing damage to trees to the extent of forty-seven shillings, four months' imp. w. h. l. was altered to that term in the second division in the case of a defendant of good character: *Friday,* 10 Cr. A. R. 35, 1914.

Four years' p. s. for receiving was reduced to three: *H. H. Austin,* 10 Cr. A. R. 72, 1914. Two consecutive terms of twelve months' imp. w. h. l. for living on immoral earnings were reduced to eighteen months': *A. King, ib.* 120. For gross indecency, twenty-one months' imp. w. h. l. was reduced to six in the case of a youth of nineteen: *Bartholomew, ib.* 121. When the court of trial first passed sentence of twelve months' imp. w. h. l., which it then altered to fifteen in the second division, for obtaining by false pretences, the C. C. A. reduced the latter term to twelve: *Burnell, ib.* 226. Two years' imp. w. h. l. is 'clearly excessive' for shopbreaking: reduced to six months': *Wilde,* 11 Cr. A. R. 35, 1914. Obtaining one pound by false pretences: twelve months in the second division reduced to four: *Burlison, ib.* 41. Three years' p. s. for systematic forgery was reduced in the case of a young man of twenty-three to eighteen months' imp. w. h. l.: *G. H. Wood, ib.* 54. Two concurrent terms of twenty months, one with and one without h. l., were reduced to twelve for conspiracy to defraud, &c. by a mock auction: *Kurasch, ib.* 171, 1915.

The corresponding terms (fifteen months) of his co-defendant were reduced to nine: *Brenner, ib.* 204. Where, perhaps, a larceny was only technical, three months in the second division was set aside and appellant bound over in her own recognisance: *Agnes Starling, ib.* 241. Apparently, for a first offence of larceny, imprisonment should *primâ facie* be in the second division: *Jowsey, ib.* 241. For a very serious assault, eighteen months' imp. w. h. l. was reduced to three, defendants being of good character and subjected (as the verdict found) to great provocation: *Matthews, &c. ib.* 288; two consecutive terms of nine months in second division for larceny reduced to twelve in all: *Burningham,* 13 Cr. A. R. 169, 1918. For 'a series of grave offences' (receiving) four and three years' p. s. were reduced to twenty and twelve months' imp. w. h. l.: *Clay,* 1918.

On the other hand, twelve months' p. s. for carnal knowledge of child of defendant seven and a half years old was confirmed: *J. H. Smith,* 4 Cr. A. R. 166, 1910.

A first conviction and a first offence are not synonymous: 'The First Offenders Act is not intended for the benefit of persons who have for some time lived a life of crime but have not been found out': *Chandler,* 8 Cr. A. R. 84, 1912: seven years' p. s. for shopbreaking. But the court leans against detention even in a Borstal institution: *Eling, &c.,* 14 Cr. A. R. 24, 1919.

Other penalties] may be taken into account, *e.g.* loss of pension. See *No Hard Labour; Forfeiture;* and

Penal servitude] 'The principle of inflicting penal servitude for a first offence can only be justified in very special circumstances': *Dench,* 4 Cr. A. R. 26, 1910: three years' reduced to eighteen months' imp. w. h. l. for larceny, the court having wrongly been influenced by poaching implements being found on defendant. And see *Roy,* 1911. Manslaughter through negligence in driving a motor-car (and partly accident) was not a case for p. s.: three years' reduced to twelve months' imp. w. h. l.: *Stubbs,* 8 Cr. A. R. 240; 29 T. L. R. 421, 1913. So *Haddon,* 12 Cr. A. R. 242, 1917.

Penal servitude after hard labour] should not as a general rule be imposed: *J. Jones,* 1 Cr. A. R. 196, 1908: imp. remitted. So *Islip,* 3 Cr. A. R. 99, 1909. Nor should concurrent sentences of each be passed: *M. A. Martin,* 1 Cr. A. R. 209, 1908: imp. remitted. So *Bruce,* 5 Cr. A. R. 233, 1910, because the effect is 'to prolong the period of hard labour and to reduce the opportunity to earn remission by good conduct': imp. remitted. Three years' p. s. consecutive on twelve months' imp. w. h. l. was commuted to twenty-one months', concurrent: *Hemming,* 7 Cr. A. R. 239, 1912; *Baumgarten,* 9 Cr. A. R. 213, 1913. Of concurrent sentences, two years' imp. w. h. l. and p. s. for life, the former was remitted: *Johnston,* 12 Cr. A. R. 137, 1916.

Penal servitude—after previous conviction] See *Previous Conviction,* below.

Penal servitude—concurrent sentences] The effect is only to add to the overlapping period 'a short further period': *Veale,* 1915.

Penal servitude—consecutive sentences] Whether two each of three

and a half years legalise preventive detention is doubtful: *W. Warner,* 2 Cr. A. R. 177, 1909.

Sentences of ten, five, and five years for larceny, &c. in a very bad case were ordered to be concurrent: *S. E. Clarke,* 9 Cr. A. R. 116, 1913.

Penal servitude—first term] The C. C. A. tends to limit this to three years, though it laid down no general rule: *W. Jones,* 13 Cr. A. R. 213, 1918; *Street,* 4 Cr. A. R. 88, 1910; *Warrilow,* 5 Cr. A. R. 230, 1910; *C. Franks,* 7 Cr. A. R. 24, 1911; *Wright, ib.* 52; *G. Green, ib.* 84; *C. Knight,* 7 Cr. A. R. 283, 1912; *Trenholm; M. Myers,* 11 Cr. A. R. 115, 1915: five years so reduced: larceny after several previous convictions. But this is not a binding rule: *Walden,* 12 Cr. A. R. 207, 1917. So *A. J. White,* 12 Cr. A. R. 53, 1916, where the last 'serious' offence was three years previously: reduced to twenty months' imp. w. h. l. In *Mayes, ib.* 178, without laying down any rule, in the case of a youth of twenty-four, none of whose many sentences had exceeded three months' imp., five years' p. s. for shopbreaking was reduced to three. Very similar was *A. Fox, ib.* 180, who was twenty-seven, and judgment was the same. See *Feigenbaum,* 1919: larceny, conspiracy: four years' p. s. reduced to three, but deportation retained. Cf. *W. C. Bennett,* 1919.

Pending charges] The general rule is that when defendant admits guilt and the charges are of the same character, 'whether there has been a committal or not,' the judge ought to take them into account. If they are not admitted, he should not. If there has been a committal for (other) offences admitted, the judge should be satisfied that the prosecution consents to their being dealt with, 'because it is possible that they may think it desirable that there should be a public investigation' of them. If the committal is in another county and for a different class of offence, and the prosecutors do not desire that it should be dealt with elsewhere, the judge should not deal with it; and even if they do consent, the judge must be satisfied that the public interest does not require further investigation: *A. McLean,* 6 Cr. A. R. 27, 1910, where a second sentence was quashed, defendant having asked the judge to take the second offence into account.

But it is not compulsory: *Shapcote,* 3 Cr. A. R. 58, 1909, and defendant must consent: *Werner, &c.,* 3 Cr. A. R. 93, 1909. And a serious charge should be tried separately: *Greig,* 4 Cr. A. R. 151, 1910; *Hillier,* 1911. Sentence must not be increased by a charge denied by defendant: *Everitt,* 8 Cr. A. R. 157, 1913: larceny: twelve months' imp. w. h. l. reduced to six; *W. Palmer, ib.* 246: ten years' p. s. reduced to five for housebreaking, after several previous convictions. See also *Markham,* 2 Cr. A. R. 160, 1909.

When the sentencing court was only aware of some other charges, which it took into account, the C. C. A. thought that the sentence might cover all: *Aleron,* 2 Cr. A. R. 152, 1909. And it often expresses this opinion when it makes no reduction, *e.g. W. R. Wells,* 3 Cr. A. R. 198, 1909. But occasionally, even when reducing sentence (on the ground of evidence of a period of honest work not before the court below), it declines to take pending charges in different counties into consideration: *Kendrick,* 6 Cr. A. R. 119, 1911. And when, in quashing (or otherwise dealing with) a conviction, appellant asks the court to deal with another pending indictment, it sometimes deals with both cases at once: *W. Smith,* 6 Cr. A. R. 202, 1911; or in lieu of reducing sentence, disposes of all charges: *Hagreen.* The C. C. A. disapproves

of a pending charge not being considered in order to enable the police 'to obtain further information . . . by pressure of further proceedings': *W. Davies,* 1913. Where charges were taken into consideration for some of which defendant had in fact already been imprisoned, eighteen months' imp. w. h. l. for larceny was reduced to twelve: *Barham,* 10 Cr. A. R. 74, 1914.

See further, *Evidence after Verdict.*

Previous conviction] See *Trivial Nature, &c.* below. Eighteen months' imp. w. h. l. for larceny of a shirt, after five short terms and one of twelve months' imp. w. h. l. for larceny of a horse, reduced to six: *Nuttall,* 1909, where there was not 'a deliberate return to crime,' some temptation and drunkenness. For deliberate return, cf. *Crawford,* 2 Cr. A. R. 305, 1909.

There must be no 'rule of thumb' on previous sentences: *T. R. Thornton,* 2 Cr. A. R. 285: three years' p. s. for stealing a coat, after ten previous terms, the last for eighteen months' w. h. l. was upheld; 'there comes a time when the sentence of imprisonment with hard labour must cease and a longer term and a different treatment must be tried': *per* L. Alverstone, *ib.;* as p. s. 'may possibly lead to reformation,' he said, in *Dowling,* 3 Cr. A. R. 63, 1909, on the same term and much the same facts. In *Roy,* 6 Cr. A. R. 114, 1911, after several convictions, the last of larceny (three years' p. s.), remarking that there is not and ought not to be 'any hard and fast rule making it necessary' that p. s. must succeed p. s., and there being a *remanet,* the C. C. A. reduced another of the same term for a petty theft, after nine months' honest work, to twelve months' imp. w. h. l. Cf. *Bennett and another,* 1911.

When there was only one previous conviction on indictment (one month's imp. w. h. l.) and a fine on summary conviction, three years' p. s. for two convictions for larceny (four other charges being taken into account) was reduced to twelve months' imp. w. h. l.: *Joy,* 6 Cr. A. R. 284, 1911. After many convictions, of which none was followed by a heavier sentence than eight months' imp. w. h. l., three years' p. s. for larceny from the person was reduced to twelve months': *A. Jackson,* 10 Cr. A. R. 29, 1914. Regard should be had to the last sentence: when it was three months' imp. w. h. l. for larceny, after several other convictions (including ten years' p. s. in 1903), three years' p. s. for theft to the value of nineteen shillings was reduced to fifteen months' imp. w. h. l.: *H. Morris,* 11 Cr. A. R. 44, 1914. Three years' p. s. on several charges of obtaining money, credit, &c. by false pretences, after several previous convictions, was too severe in the case of a woman of twenty-six, and was reduced to nine months' imp. w. h. l.: *Morrison, ib.* 279. After a previous conviction of a trifling character, twenty-four months' imp. w. h. l. was reduced to twelve months': *E. Green,* 12 Cr. A. R. 285, 1917.

Prisoners under sentence] They should be tried on another charge before the term has expired, so that both sentences may be considered together: *J. Sullivan,* 6 Cr. A. R. 7, 1910: three years' p. s. reduced to nine months' imp. w. h. l. So *Hawes,* 1 Cr. A. R. 42, 1908; cf. *John Jones,* 1908; *Higson,* 5 Cr. A. R. 167, 1910: sentence reduced.

When the second court was unaware that the former had taken into account a charge on which the latter passed a sentence consecutive on that of the former, the second was quashed: *Syres,* 1 Cr. A. R. 172, 1908.

When after the expiration of a sentence in Ireland, there was a conviction in Wales for a similar offence committed before that in Ireland and known to the Irish court, the C. C. A. acted on the report of that court (that it would not have increased the term had it dealt with the Welsh case) and (in effect) released appellant: *Birkett,* 6 Cr. A. R. 123, 1911. *W. Ward,* 7 Cr. A. R. 180, 1912, was very similar: eighteen months' imp. w. h. l. was reduced to six (the previous term being eighteen): the C. C. A. observing: 'it is contrary to the generally accepted policy that a person, having served his sentence and come out of prison, should find the prospect of another term of imprisonment before him.' But in a grave case it may be proper to try a convict on a charge not already taken into account: *Hillier,* 6 Cr. A. R. 215, 1911: procuring abortion: nine months after a sentence of three years' p. s., defendant was sentenced to seven years' p. s. for an offence earlier in date than the former, but not known to the first court of trial.

When all pending charges (see that title) but one were taken into account in a sentence of three years' p. s., the C. C. A. quashed the sentence, four years' p. s. concurrent, for that one: *W. Davies,* 7 Cr. A. R. 254, 1912.

For two distinct larcenies there were within a few days two sentences of five years' p. s. (concurrent), and as part of the former five years' preventive detention; the five years' p. s. was reduced to three: *Sinsen,* 9 Cr. A. R. 43, 1913. Three years' p. s. for receiving, on an indictment for burglary, was considered too severe when defendants were serving a term for another burglary, and was reduced to twelve months' imp. w. h. l.: *Dickinson* and *Moore, ib.* 215.

Twenty-one years' p. s. for housebreaking, concurrently with two consecutive terms of four (outrage on child) and five (housebreaking) after a great number of previous convictions, was reduced to seventeen, seven to be concurrent with the existing terms, the C. C. A. hoping that the remaining term would be converted into preventive detention: *J. Turner,* 11 Cr. A. R. 27, 1914. Three years' p. s. for shopbreaking consecutive on seven years' was 'clearly excessive,' and was made concurrent, though defendant was an old offender: *Jukes, ib.* 35.

Primary sentence and preventive detention] See *Habitual Criminal.* The C. C. A. thought that, in view of the latter being for five years, five years' p. s. was excessive, and reduced it to three years': *T. Smith* (Lincoln), 3 Cr. A. R. 90, 1909. The C. C. A. tends 'to shorten somewhat, but not unduly,' the former in view of the latter: *P. Jackson,* 4 Cr. A. R. 95, 1910. Four and five years' p. s. were respectively reduced to three and four preceding five years' preventive detention, both defendants being under thirty: *Hooper* and *Hardy,* 9 Cr. A. R. 5, 1913. A court 'cannot clothe itself with jurisdiction' to impose preventive detention by inflicting p. s. which otherwise it would not have done; such a course is 'wholly wrong': *G. Bell,* 10 Cr. A. R. 263, 1914: three years' p. s. (and five of p. d.) altered to twelve months' imp. w. h. l.; cf. *Sweeney,* 4 Cr. A. R. 70, 1910; *J. Jones,* 6 Cr. A. R. 1; 27 T. L. R. 108, 1910.

Provocation] by deceased reduced three years' p. s. for manslaughter to twelve months' imp. w. h. l.: *T. Keefe,* 13 Cr. A. R. 174, 1918.

Reclamation] After ten convictions for 'trumpery' thefts and eight for drunkenness, three years' p. s. was upheld on the ground that 'a time comes when short sentences become useless and only a long detention can reclaim from drunkenness.': *S. Rees,* 1 Cr. A. R. 83, 1908; *Jane Maurice, ib.* 176. But cf. *Crisp,* 1912.

Remanet *terms*] should be taken into account: *C. Smith,* 1910, 1 K. B. 17; 79 L. J. K. B. 1; 3 Cr. A. R. 47; 26 T. L. R. 23; *J. Fisher,* 5 Cr. A. R. 269, 1910. Where there was a *remanet* of two years, eight years' p. s. for housebreaking was reduced to six: *A. Saunders,* 7 Cr. A. R. 18, 1911. When the *remanet* was nearly four years, ten years' p. s. for coining was reduced to seven: *Fowles,* 11 Cr. A. R. 5, 1914. When there was one of eighteen months, two consecutive terms of four years were reduced to five: *J. Haynes,* 12 Cr. A. R. 224, 1917; *Enston,* 12 Cr. A. R. 284, 1917. See *Dorrington,* 1910.

Recommendation to mercy] The court is not bound to give effect to this: *Trueman,* 1913.

Remission for good conduct] A judge may take this deduction into account: *J. Wilson,* 5 Cr. A. R. 8, 1910, where it was stated by counsel that it may amount to a quarter of the term.

Reparation] Where the court was satisfied of defendant's repentance, two concurrent terms of three years' p. s. for 'a serious larceny' were reduced to six months' imp. w. h. l.: *Potter,* 9 Cr. A. R. 213, 1913. In similar circumstances, when the prosecution for misappropriation of trust funds by a solicitor was delayed for four years after his acknowledgment of it, four years' p. s. was reduced to six months' imp. in the second division, with a view to enabling him to make reparation: *Causton,* 11 Cr. A. R. 256, 1915. For information assisting the police, seven years' p. s. reduced to three: *F. Green,* 13 Cr. A. R. 201, 1918. Seven years' p. s. reduced to five for restoring proceeds of burglaries: *G. Bell,* 14 Cr. A. R. 36, 1919.

Social position] It is proper to consider this, but also that the offence may be aggravated thereby. Hence, 'it is very desirable, if possible, to pass a sentence on a man in a good position exactly the same as on a man in a different position': *per* Channell J., *Cargill.*

Standardisation] When there is a plea of guilty the C. C. A. is almost in the position of the trial judge, and 'desires, as far as possible, to standardise sentences, where it has the facts before it': *Nuttall:* sentence reduced. So *Woodman,* 2 Cr. A. R. 67, 1909. But in crimes of violence standardisation is almost impossible: *Gorman,* 2 Cr. A. R. 189, 1909. In *W. Baker,* 7 Cr. A. R. 252, 1912. three years' p. s. for a coining offence was upheld, though on a previous conviction for the *same* offence, quashed as a mistrial, another judge, on a plea of guilty, had only imposed eighteen months' imp. w. h. l., on the ground that at a full trial the facts came out more plainly. There cannot be standardisation for bigamy: *F. Mortimer,* 13 Cr. A. R. 146, 1918; or 'receiving': *Clay, &c.,* 13 Cr. A. R. 193, 1918.

Subsequent offence] It is doubtful whether a *concurrent* sentence for an independent subsequent offence is legal: *Woolley,* 3 Cr. A. R. 57, 1909, where the second was committed in prison.

Trivial nature of the offence] should be taken into account, even when there are previous convictions: *Boucher,* 2 Cr. A. R. 177, 1909: fraud other than false pretences; *J. Cooper,* 3 Cr. A. R. 95, 1909: twelve months' imp. w. h. l. for larceny of a fowl reduced to six, partly in view of defendant's being in custody for two months before trial; *Virgin,* 3 Cr. A. R. 175, 1909: three years' p. s. reduced to nine months' imp. w. h. l.; *Ray* and *Carter, ib.* 189: eighteen months' imp. w. h. l. for stealing a quart of milk—sentences 'out of all proportion to the nature of their offence, although both have bad records' —reduced to nine months'; *W. Ross, ib.* 198. But cf. *McCreese.* The court thought that five years' p. s. for stealing two odd boots was severe, even after previous convictions, but did not interfere: *Stutter,* 5 Cr. A. R. 64, 1910. On the ground of the triviality of a larceny, three years' detention in a Borstal institution was reduced to two: *G. Webb,* 5 Cr. A. R. 113, 1910. And the court does not like to send a man 'back to penal servitude for an isolated theft': *Dorrington,* 5 Cr. A. R. 119, 1910, where there being 270 days of a *remanet,* six months' imp. w. h. l. was substituted for six years' p. s. *J. Edwards,* 5 Cr. A. R. 229, 1910: two years' imp. w. h. l. reduced to one year's: larceny.

After nine convictions in eighteen years, five years' p. s. for obtaining half-a-crown by false pretences was reduced to twelve months' imp. w. h. l.: *Myland,* 6 Cr. A. R. 135, 1911, partly in view of six months' honest work since release from prison. *Bennett and another, ib.* 203: three years' p. s. similarly reduced—several summary convictions against both and one on indictment against one. Even after a term of three years' p. s. and many other sentences, the C. C. A. thought five years' p. s. for stealing clothes of trifling value, in the case of an appellant twenty-four years old, excessive, and reduced it to twelve months' imp. w. h. l.: *Simmonds, ib.* 247. Three years' p. s. for obtaining three shillings and one shilling by false pretences, after twelve previous convictions the last three years previously, being for the same offence and met by a sentence of six weeks' imp. w. h. l., was reduced to six months' imp. w. h. l.: *W. Griffiths, ib.* 266. Though defendant's record was very bad, five years' p. s., on a plea of guilty to two indictments for larceny of goods respectively worth fourteen or fifteen shillings was reduced to eighteen months' imp. w. h. l.: *J. Martin,* 9 Cr. A. R. 169, 1913. Two terms (consecutive) of six months' imp. w. h. l. for three petty frauds were reduced to one: *Hammerson,* 10 Cr. A. R. 121, 1914. *G. Bell,* 1914, was a case of twenty previous convictions on indictment, and of very recent release from prison, but the theft was trivial. Five years' p. s. for obtaining 2*l.* by false pretence was, despite many previous convictions, reduced to six months' imp. w. h. l.: *A. Baker,* 11 Cr. A. R. 177, 1915. Three years' p. s. was reduced in much the same circumstances to twelve months' imp. w. h. l.: *E. Douglas, ib.* 186. For a trifling forgery, see *Marck.* See *Maximum Sentence.*

*Undefended persons**] See under *Indecent Assault* and *Rape.* It is peculiarly the duty of the court to see that their interests are not

* See some eloquent remarks by Stephen J., 1 *Hist. Cr. L.* 442, 444.

neglected, and when certain questions were not put which would have helped defendant, sentence of three years' p. s. for larceny was reduced to twelve months' imp. w. h. l. (partly on other grounds): *Doubleday*, 12 Cr. A. R. 240, 1917. But if defendant is not prejudiced by want of counsel, no relief will be given: *H. Macdonald*, 1916.

4. *Borstal system*] The name is derived from a place near *Rochester* in Kent, 'where the first institution of the kind was, by order of the Home Secretary (16 July, 1874), appointed for males under penal servitude': 3 Steph. Comm. 82 *n*. The discipline is specially adapted to the ages of the inmates. See the observations of the C. C. A. in *Oxlade*, 14 Cr. A. R. 65, 84, 1919.

By 8 E. 7, 59, 1 (1): 'Where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, and it appears to the court—(a) that the person is not less than sixteen nor more than twenty-one years of age; and (b) that, by reason of his criminal habits or tendencies or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime; it shall be lawful for the court, in lieu of passing a sentence of penal servitude or imprisonment, to pass a sentence of detention under penal discipline in a Borstal institution for a term of not less than *two years* [4-5 G. 5, 58, 11 (1)] nor more than three years: Provided that before passing such a sentence the court shall consider any report or representations which may be made to it by or on behalf of the Prison Commissioners as to the suitability of the case for treatment in a Borstal institution, and shall be satisfied that the character, state of health and mental condition of the offender and the other circumstances of the case are such that the offender is likely to profit by such instruction and discipline as aforesaid.' By (2) the Secretary of State may subject to this s. persons apparently not more than twenty-three. By s. 7, 'incorrigibles,' &c., in such institutions may serve the rest of their term in imprisonment with or without hard labour. By s. 6 (1) and 4-5 G. 5, 58, 11 (1), the supervision of the Prison Commissioners continues for (not more than) a year after detention.

By 4-5 G. 5, 58, 10, in certain cases a court of summary jurisdiction may remit offenders between sixteen and twenty-one to Q. S. which, in similar conditions to those enacted above, may send them to a Borstal institution, subject to their right of appeal to the C. C. A.: *ib.* (5); but that court thinks that such a sentence is peculiarly within the discretion of the court of trial: *Stanton*, 1911.

'The report or representation' is not binding on the court, and where a recorder wished to commit to a Borstal institution but refrained in deference to the opinion of the gaol governor, the C. C. A. sent defendants thither: *Watkins, &c.*, 5 Cr. A. R. 93, 1910; *S. Thorpe*, 13 Cr. A. R. 176, 1918. If defendant sets up that he is twenty-one, the *onus*, it seems, is on him to prove it: *McCann*, 6 Cr. A. R. 115, 1911. The C. C. A. discourages sending to Borstal unless defendant will get 'the full benefit of the training': *Bee, &c.*, 12 Cr. A. R. 285, 1917; and leans against detention, even in a Borstal institution, for a first offence: *Wallbridge*, 14 Cr. A. R. 24, 1919. Cf. *G. E. Morton*, *ib.* 371; *E. Monkhouse*, *ib.* 38.

'*Modified*' *Borstal system*] is that approximating as far as possible

to the full system but applied to terms under three months in the prison of commitment and not in special prisons; nor can the commissioners release on licence; all 'juvenile adults' sentenced to a longer term than one month receive it: *J. H. Smith,* 9 Cr. A. R. 117, 1913; *A. Lee, ib.* 144; cf. *Daniel,* 14 Cr. A. R. 15, 1919.

5. *Detention in a state or other inebriate reformatory*] See 61-2 V. 60, under *Drunkenness.*

6. *Fines and sureties*] Sometimes only a fine can be imposed: see *Disturbing Public Worship* and *Employers.* By 24-5 V. 96 (Larceny A.), 117, 'Whenever any person shall be convicted of any indictable misdemeanour punishable under this [Larceny] Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorised, fine the offender, and require him to enter into his own recognisances and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the court may, if it shall think fit, require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorised: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.'

A similar provision is contained in c. 94, 4 (accessory after the fact); c. 97 (injuries to property), 73; c. 98 (forgery), 51; c. 99 (coinage), 38; and c. 100 (offences against the person), 71—all of 24-5 V. (the 'Consolidation' Acts). These provisions merely declare the common law: *Dunn,* 12 Q. B. 1040, 1848: perjury: relying on *J. H. Hart,* 30 St. Tr. 1344, 1808: libel; *Spratling.* Where the fine is not limited by statute, it is subject to the preamble (otherwise s. 1, 10) of 1 W. & M. sess. 2, c. 2, the Bill of Rights: 'Excessive bail ought not to be required nor excessive fines imposed; nor cruel and unusual punishments inflicted.' Imprisonment under this s. must formerly have been in the second division unless defendant was already convicted or the court put him in the first: 61-2 V. 41, 6 (4); but by 4-5 G. 5, 58, 16 (4), the court must now determine the division as in any other case. Q. S. has power to impose imprisonment in default of payment of a fine for an offence against s. 3 of 16-7 V. 119 (Betting A.): *W. Perkins,* 6 Cr. A. R. 248, 1911.

7. *Consequential Penalties.*

Disqualification] in certain cases automatically follows (rather than is part of) sentence: see generally, below, and Index for specific instances, especially under *Bribery.*

By 33-4 V. 23 (Forfeiture A. 1870), 2, a conviction for treason or felony followed by any sentence to imprisonment with hard labour, or any imprisonment exceeding twelve months or any more severe sentence, is to be a disqualification for 'any military or naval office or any civil office under the crown or other public employment or any ecclesiastical benefice [see *Clergymen*], or any place, office, or emolument in any university, college, or other corporation,' and causes a forfeiture of any pension or superannuation allowance payable by the public out of any public funds—unless the convicted person gets a royal pardon within two months or before his forfeited place is filled up; and until pardon or sentence served, he cannot hold 'any military or naval office or any civil office under the crown or other public employment or any

ecclesiastical benefice,' be elected to or sit in either House of Parliament or exercise any suffrage whatever in England, Wales, or Ireland; and by s. 4, the court by which judgment is pronounced or recorded may, if it shall think fit, on 'application of any person aggrieved, and immediately after' conviction for felony, award (to the limit of 100*l.*) compensation for loss of property, to be 'deemed a judgment debt.' But the court will not allow this s. to be used as a compromise between prosecutor and defendant pleading guilty: *Lovett,* 11 Cox C. C. 602, 1870. There is no such disqualification for felony of persons under fourteen: 8 E. 7, 67, 106.

Sometimes judges inflict longer terms without hard labour than they would have done with it, in order to save defendant's pension, &c.: *A. G. E. Bright,* 4 Cr. A. R. 194, 1910.

Old age pensions] By 8 E. 7, 40, 3 (2): Anyone 'convicted . . . and ordered to be imprisoned without the option of a fine or to suffer any greater punishment . . . shall be disqualified for receiving or continuing to receive an old age pension . . . while he is detained in prison in consequence of the order and for a further period of ten years after the date on which he is released from prison.' But 'in cases where the term for which a person has been ordered to be imprisoned without the option of a fine does not exceed six weeks' the 'ten years' of the preceding s. are reduced to two. 1-2 G. 5, 16, 4 (2).

By 8 E. 7, 40, 3 (3), in the case of anyone, sixty or more years old, who on conviction 'is liable to have a detention order made against him under the Inebriates A. 1898,' 'and is not necessarily' under this, the Old Age Pensions A. 1908, 'disqualified' for the pension, 'the court may, if they think fit, order that the person convicted be so disqualified for such a period not exceeding ten years, as the court direct.' By 1-2 G. 5, 16, 4 (3), any pensioner convicted of any offence in 'or deemed to be' in Sched. I. of the Inebriates A. 1898, shall 'if not subject to disqualification' [as above] 'be disqualified . . . for six months after . . . his conviction, unless the court . . . direct to the contrary.'

Selling intoxicants by retail] By 10 E. 7 & 1 G. 5, 24, 35 (2), anyone convicted of felony is disqualified 'during . . . lifetime' for holding a justices' licence, and so is anyone convicted of forging or uttering such a licence, or a holder of one permitting his premises to be a brothel: (3), (4).

Councillors, poor-law, parish officers, &c.] Anyone sentenced to imp. w. h. l. without the option of a fine or to a greater punishment cannot for five years afterwards be a parish or district councillor or a guardian of the poor: 56-7 V. 73, 46 (1) (c). Convictions for felony, fraud or perjury disqualify from holding parish offices or managing the poor: see *Office-holders.*

Professional] See Index.

Recognisance] For the power of a judge as a justice of the peace, see *Suspects.* If it be alleged that the condition of the recognisance has been broken, there may be an application to the court of trial to call on the defendant to come up for judgment. The court must at the hearing use its discretion on the materials before it; there is no issue for a jury. In *M. Davies,* 2 Cr. A. R. 31, 1909, the C. C. A.

quashed sentence in a case of this sort. The recognisance should be for a definite time: *C. Edgar,* 9 Cr. A. R. 13; 77 J. P. 356; 23 Cox C. C. 558; 22 T. L. R. 512, 1913, where it was doubted whether it could be for life.

Expulsion] By 5 E. 7, 13, 3, the Secretary of State may in certain cases here, on the recommendation of the convicting court or of the C. C. A. (7 E. 7, 23, 21), or abroad, and in some other circumstances, make an order expelling an *alien* from the United Kingdom and prohibiting his or her return. Eleven years' residence is not too long to prevent expulsion: *Kleiss.* There must be proof that defendant is an alien: *M. Ferguson,* 7 Cr. A. R. 24, 1911. When it appeared that defendant would be again punished in his own country the C. C. A. remitted the expulsion: *Zausmer,* 41. Expulsion should not be inflicted on persons only *technically* aliens, *e.g.* who have been in this country since infancy and settled here: *Friedman,* 10 Cr. A. R. 72, 1914.

Banishment] See *Jesuits.*

Flogging] seems to have been a common law punishment in Bracton's time. It cannot be inflicted on females: 1 G. 4, 57, 1, rpd.; otherwise see Index for its legality. It can, it seems, only be inflicted on adult males under the *Knackers* A., 26 G. 3, 71, 8, 9 (rpd. for London); 1-2 W. 4, 44, 2-6, and 5-6 V. 28, 8 (both for disloyal and other offences in Ireland); 5-6 V. 51, 2 (assault on the sovereign); the *Garrotters* A.; *Vagrancy* Acts; and for grave prison offences under 61-2 V. 41, 5 (and for certain *naval* and *military* offences). And only under statute 4-5 G. 5, 58, 36 (2), and not 'more than once for the same offence': *ib.* (1). See especially s. 37 of the Larceny A. 1916.

Abatement of a nuisance] See *Nuisance.*

Outlawry] though not absolutely abolished, is practically obsolete. 'The last is said to have been in 1859': *Kenny,* Outlines Cr. L. 488, who says that such a judgment may 'still' produce 'attainder.' See for the procedure, *Armstrong,* 10 St. Tr. 105, 1684, and *R. Johnson,* 1 Barnard. 79, &c.; 2 Str. 824, 1728, and *Sweet's* Law Dict.; also the preamble to 4-5 W. & M. 18.

Praemunire] is obsolete: see *Crook,* 6 St. Tr. 213, 226, 1662, whence it appears that the sentence was forfeiture of the whole of estate and imprisonment for life.

Forfeiture] on outlawry: see *Disqualification,* above, *India,* and specific instances in Index. To avoid forfeiture of *pensions* the C. C. A. sometimes reduces sentence, *e.g. F. Mortimer,* 13 Cr. A. R. 146, 1918: bigamy.

Destruction, &c.] on forfeiture, *e.g.* of articles with forged trademarks: 50-1 V. 28, 2 (4).

Guardianship of children] When this may be taken away on conviction, see Index and *Matrimonial Orders,* below. Of certain females, see Index.

Release on probation] By s. 1 (2) of 7 E. 7, 17, the Probation of

Offenders A. 1907, 'Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing a sentence of imprisonment, make an order . . . discharging the offender conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.' S. 2 (1) thereof and s. 8 of 4-5 G. 5, 58, regulate the conditions of such recognisance, including one for abstention from intoxicants; the latter A. contains other provisions.

By 7 E. 7, 17, 1 (3), the court may also order the offender to pay damages or compensation and costs.

By s. 3, a 'Probation Officer' may be appointed by the authority appointing the clerk to the justices of a petty sessional division; s. 6 (5) seems not to refer to conviction on indictment, but there is inherent power to bind a person convicted on indictment on his own recognisance to come up for sentence and to sentence him when he appears: *Spratling,* 5 Cr. A. R. 206; 27 T. L. R. 31; 55 S. J. 31, 1910: larceny: recognisance to abstain from intoxicants.

Matrimonial orders—against husband] A wife 'whose husband shall have been convicted upon indictment of an assault upon her and sentenced to pay a fine of more than five pounds or to a term of imprisonment exceeding two months . . . may apply to the court' of conviction for an order which 'shall have the effect in all respects of a decree of judicial separation on the ground of cruelty,' for the legal custody of the children of the marriage till they are sixteen, and for a weekly sum not exceeding 2*l.* to be paid by him to her: 58-9 V. 39, 4, 5. See *Assault.* The same when he is a habitual drunkard within s. 3, below: 2 E. 7, 28, 5 (1).

Against wife, who is habitual drunkard] The 'same' as in a wife's case, except that the husband may still have to pay her as above, and that, *if she consents,* the court, instead of making the *quasi*-decree of judicial separation, may order her into a certified inebriates' retreat: 2 E. 7, 28, 5 (2).

Habitual drunkard] is defined by 42-3 V. 19 (Habitual Drunkards A. 1879), 3: 'A person who not being amenable to any jurisdiction in lunacy is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others or incapable of managing himself or herself and his or her affairs.' Where a woman was sentenced under rpd. s. 1 of 4 E. 7, 15, to twelve months' imp. w. h. l. and under 61-2 V. 60, 2 (1) to three years' detention, the C. C. A. reduced the latter term to one year: *F. Prince,* 1 Cr. A. R. 252; 25 T. L. R. 197, 1908. In *Briggs,* 1909, 1 K. B. 381; 78 L. J. K. B. 116; 21 Cox C. C. 762; 73 J. P. 31; 100 L. T. 240; 25 T. L. R. 105; 1 Cr. A. R. 192, 206, the C. C. A. held that under 61-2 V. 60, 2 (1) there is no power to sentence to anything but detention, and quashed a term of hard labour.

Convict's property] On a conviction for treason or felony and sentence to death or penal servitude, the crown *may* appoint an administrator of the convict's property under 33-4 V. 23, 9, 10, for the term, who is bound to administer it with due care. By s. 15, he may, out of such property, satisfy or compensate loss of property or injury caused by the convict's crime or fraud, though not proved in court: see *Carr* v. *Anderson*, 1903, 1 Ch. 90; 2 Ch. 279; 20 Cox C. C. 416.

For *Abduction*, see p. 353.

Compensation] See above and Index.

Costs] See that title.

Despite the abolition of the pillory it is a punishment in an extant statute, 18 Eliz. 5, 5 (4), for a common informer.

Pulling down a building] See *Kenyon*, 1901.

Seizure of libels] See under *Blasphemy* and *Sedition*.

Impounding documents] See under *Documentary Evidence* and s. 695 (4) of Merchant Sh. A.

Advertisement of conviction] See *Food*.

Criminal lunatics] under 46-7 V. 38, 2 (1): defined under *Lunatics*. The 'special verdict' must be found in unequivocal terms; where it was 'guilty and we consider that she was in a frenzied state of mind at the time the act was committed,' this was held to be rightly entered as guilty: *Harding*, 1 Cr. A. R. 219; 25 T. L. R. 139, 1908.

By (2), 'the court shall thereupon order him to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct till' the crown's 'pleasure shall be known.' See further, 23-4 V. 75; and 47-8 V. 64, 2 (2): 'A person shall cease to be a criminal lunatic if he is remitted to prison or absolutely discharged in manner provided by this Act, or if any term of penal servitude or imprisonment to which he may be subject determines.'

8. *Restitution.*

'*Defectives*'] See that title.

Stolen, &c. property found in possession of defendant] It has been said by some judges that a constable has no right to take away from an arrested person any property which he has about him, unless it is in some way connected with the offence with which he is charged: *per* Patteson J., *O'Donnell*, 7 C. & P. 138, 1835—money; *Jones*, 6 C. & P. 343, 1834—money; *per* Gurney B., *Kinsey*, 7 C. & P. 447, 1836—watch, &c.; *Bass*, 2 C. & K. 822, 1849—money, to be used in conveying accused to prison and maintaining him there: *per* Platt B. The court will, on his application, order the property to be given up to him: *Kinsey*, above, and *Barnett*, 3 C. & P. 600, 1829—money; unless it be required as evidence. But this will not be done if the property, though not that actually stolen, is reasonably supposed before trial to be the proceeds of it. *Burgiss*, 7 C. & P. 488, 1836; *Rooney*, 1856. On a conviction for larceny, it was ordered that part of certain property (viz.: bonds), found in the possession of the convict on apprehension, but not shown to be part or proceeds of the property stolen, should be disposed of in a particular way; the Q. B. held that

the court had no jurisdiction to make the order, except in respect of one-sixth of the bonds proved to be such proceeds: *Corporation of London,* 27 L. J. M. C. 231; 2 B. & E. 509, 1858; see sub-s. 3, below.

For payment of *costs* out of money found on defendant, see *Costs.*

'It is undoubted law that it is within the power of, and is the duty of constables to retain for use in court things which may be evidences of crime, and which have come into the possession of the constables without wrong on their part. . . . It is also undoubted law that when articles have once been produced in court by witnesses it is right and necessary for the court or the constable in whose charge they are placed . . . to preserve and retain them, so that they may be always available for the purposes of justice until the trial is concluded': Wright J. in *Lushington, ex parte Otto,* 1894, 1 Q. B. 420.

Award of restitution of land] See *Forcible Entry.*

Restitution of stolen property] By 6-7 G. 5, 50, 45 (1): 'If any person guilty of any such felony or misdemeanour as is mentioned in this [Larceny] Act, in stealing, taking, obtaining, extorting, embezzling converting, or disposing of, or in knowingly receiving any property, is prosecuted to conviction by or on behalf of the owner of such property, the property shall be restored to the owner or his representative.

(2) In every case in this section referred to, the court before whom such offender is convicted shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner; Provided that where goods as defined in the Sale of Goods Act, 1893, have been obtained by fraud or other wrongful means not amounting to stealing, the property in such goods shall not re-vest in the person who was the owner of the goods or his personal representative by reason only of the conviction of the offender: And provided that nothing in this section shall apply to the case of (a) any valuable security which has been in good faith paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been in good faith taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had been stolen; (b) any offence against sections 20, 21 and 22 of this Act.

(3) On the restitution of any stolen property, if it appears to the court by the evidence that the offender has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any moneys have been taken from the offender on his apprehension, the court may, on the application of such purchaser, order that out of such moneys a sum not exceeding the amount of the proceeds of such sale be delivered to the said purchaser.'*

Note that the *first* proviso above is practically the same as s. 24 of the S. of G. A. below.

It is only the court of trial which can make the order; hence, when the trial was at the Central Criminal Court, there being a dispute whether certain moneys were the proceeds of a robbery or not, no order was made for their restitution, the Q. B. had no power to make one: *L. Mayor, &c. of London,* L. R. 4 Q. B. 371; 38 L. J.

* (3) is substantially 30-1 V. 35, 9, *now* limited to *summary* cases.

M. C. 107, 1869; nor has the C. C. A. under s. 6 of the Cr. Ap. A.: *H. Elliott,* 1908.

In *Joyce* and *Osborne,* 1 Cr. A. R. 143, 145, 1908, the C. C. A. in quashing convictions revoked such orders. In *Elliott,* the convicted receiver had sold some of the stolen jewellery and some ingots of gold alleged to be melted from the rest stolen, to D., who paid him in ten notes (eight at least of which were found on the convicted thieves) and cash. All these and two other notes of like denominations, and all the cash found on the defendants, Q. S. ordered to be delivered to prosecutors, owners of the jewellery. But the K. B. D. thought that restitution should only have been ordered *either* of the stolen goods *or* of their proceeds, and allowed prosecutor to elect which: *London County Justices,* 72 J. P. 513, 1908.

Where stolen property was found in the possession of a person, and after his acquittal of the larceny it was handed back to him by a police-officer, despite a demand for delivery by the true owner, the officer (though a subordinate) was held liable by the K. B. D. in trover to the true owner, his own subordinate being held not liable: *Winter* v. *Bancks & Lings,* 19 Cox C. C. 687, 1901.

The court cannot, under (the same words as in) the first proviso above, order a Bank of England note, which has been paid and cancelled, to be delivered up to the prosecutor. *Stanton,* C. & P. 431, 1836. A jubilee 5*l.* gold-piece, if not part of the currency, may be restored under this s.: *Moss* v. *Handcock,* 19 Cox C. C. 324, 1899: Q. B. D.: it is 'goods' within 56-7 V. 71, s. 24 (s. 62 excludes 'money' from 'goods').

The order must be limited to property identified at the trial and the subject of the indictment: *Goldsmith, Smith,* 12 Cox C. C. 594, 597, 1873.

Proceeds] See *Elliott,* above. Where a defendant was convicted of stealing money, and he was at the time the owner of a horse which it was clear from the evidence had been purchased with the stolen money, an order was made for the delivery of the horse to the prosecutor. *Powell,* 7 C. & P. 640, 1836.

In *Goudie, &c.,* 135 Sess. Papers C. C. 279, 1902, Bigham J. made orders of restitution of the proceeds of frauds not only against the convicted, but against other accused persons not before the court into whose hands some of the proceeds were clearly traced by the depositions and affidavits, and against others who had acquired title from the guilty persons, not by discharge of valuable securities nor by transfer for valuable consideration. See *Law Journal,* March 1, 1902.

There may be an order when the goods or the proceeds were obtained 'by fraud or other means not amounting in law to larceny' (s. 24, below), the defrauded person has disaffirmed the transaction (or contract) and the goods, &c. are in defendant's possession: *George,* 65 J. P. 729, 1901, *per* Bosanquet C.Sjt. (and Bigham J.). The former also approved *Walker, ib.,* where the Recorder of London held that though on a conviction for obtaining by false pretences, if the facts disclosed larceny in law, the court can make an order, yet if they did not, and defendant has parted with the goods, it cannot. See below.

The application ought only to be granted if the proceeds are in the possession of the convict or of an agent who holds for him. *Justices of the Central Criminal Court,* 18 Q. B. D. 314; 16 Cox C. C. 196; 56 L. J. M. C. 25, 1886: C. A.: the order is 'in a criminal cause or matter.'

The Sale of Goods A. 1893] The vexed question about the property in goods stolen or obtained by fraud was set at rest by 56-7 V. 71, 24 (1): 'Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen vests in the person who was the owner of the goods or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.'

Goods obtained by fraud] (2) 'Notwithstanding any enactment to the contrary where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not re-vest in the person who was the owner of the goods or his personal representative by reason only of the conviction of the offender.' (2) is practically repeated in s. 45 of the Larceny A. 1916. The effect of this s. 'is . . . to override s. 100 [rpd., now s. 45, above] . . . in so far as it relates to offences other than offences amounting to larceny': *Chalmers* on this A. The conviction does not re-vest, 'but other circumstances may,' including the disaffirmance of the defrauded, by his common law right: Bosanquet C.Sjt., as above.

Pawned goods] By the Pawnbrokers A. 1872, 35-6 V. 93, 30 (2), 'If any person is convicted in any court of feloniously taking, or fraudulently obtaining any goods and chattels, and it appears to the court that the same have been pawned with a pawnbroker . . . the court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner, and the other circumstances of the case, seems just and fitting.'

By 42-3 V. 22, 7, 'the prosecution by the Director of Public Prosecutions shall, for this purpose, have the same effect as if the owner were the prosecutor, provided that such person shall give all reasonable information and assistance to the Director in aid of the prosecution.'

9. *Discharge on acquittal*] By 55 G. 3, 50, 4, extended by 8-9 V. 114, no fee whatever may be taken by a court or gaol official from a discharged defendant who 'shall be immediately set at large,' nor at any previous stage of the procedure whatever. Where after acquittal a warder took plaintiff to the cells, locked him in and made him answer certain questions before he liberated him, he obtained damages in an action for false imprisonment against the governor of the prison in whose legal custody he would have been had he not been on bail. *Mee* v. *Cruikshank*, 20 Cox C. C. 210; 86 L. T. 708; 66 J. P. 89, 1902. In *Demer* v. *Cook*, 20 Cox C. C. 444; 67 J. P. 206; 88 L. T. 629, 1903, where there was a variation by a recorder of sentence but there was no fresh warrant of commitment, damages were obtained against the prison governor (but not the clerk of the peace) for false imprisonment.

c. APPEAL.

The Criminal Appeal A. 1907, 7 E. 7, c. 23, has the following ss.:—

3. A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—

(*a.*) against his conviction on any ground of appeal which involves a question of law alone; and

(*b.*) with the leave of the Court of Criminal Appeal or upon the certificate of the Judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and

(*c.*) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law.*

4.—(1.) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.†

(2.) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3.) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

6.—(1.) The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the

* No leave is required for appeals against a sentence of preventive detention: 8 E. 7, 59, 11. An order on a parent, &c. to pay a fine, damages, &c. for a child, &c. under 8 E. 7, 67, 99, is by 6 (*b*) thereof appealable both for conviction and sentence under this s. Sentence by Q. S. to a Borstal institution is appealable by 4-5 G. 5, 58, 10 (5).

† The principle here asserted may be traced to *Ball*, R. & R. 132, 1807: evidence of uttering another forgery than that charged; and perhaps to *Tinckler*, 1 East, P. C. 354, 1781: evidence improperly received. Cf. *Forster*, 6 Cox, C. C. 522, 1855.

operation in case of any such conviction, of the provisions of subsection (1) of section twenty-four of the Sale of Goods Act, 1893, as to the re-vesting of the property in stolen goods on conviction, shall (unless the Court before whom the conviction takes place direct to the contrary in any case in which, in their opinion, the title to the property is not in dispute) be suspended—

(*a.*) in any case until the expiration of ten days after the date of the conviction; and

(*b.*) in cases where notice of appeal or leave to appeal is given within ten days after the date of conviction, until the determination of the appeal;

and in cases where the operation of any such order, or the operation of the said provisions, is suspended until the determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal. Provision may be made by rules of court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.

(2.) The Court of Criminal Appeal may by order annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

7.—(1.) Where a person convicted desires to appeal under this Act to the Court of Criminal Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within ten days of the date of conviction: Such rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires. Any case or argument so presented shall be considered by the court.

Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Criminal Appeal.

(2.) In the case of a conviction involving sentence of death or corporal punishment—

(*a.*) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and

(*b.*) if notice is so given, the appeal or application shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused, of the application.

8. The judge or chairman of any court before whom a person is convicted shall, in the case of an appeal under this Act against the conviction or against the sentence, or in the case of an application for leave to appeal under this Act, furnish to the Registrar, in accordance with rules of court, his notes of the trial; and shall also furnish to the Registrar in accordance with rules of court a report giving his opinion upon the case or upon any point arising in the case.

10. The Court of Criminal Appeal may at any time assign to an appellant a solicitor and counsel or counsel only in any appeal or

proceedings preliminary or incidental to an appeal in which, in the opinion of the court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.

11.—(1.) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of court provide that he shall have the right to be present, or where the court gives him leave to be present.

(2.) The power of the court to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present.

12. It shall be the duty of the Director of Public Prosecutions to appear for the Crown on every appeal to the Court of Criminal Appeal under this Act, except so far as the solicitor of a Government department, or a private prosecutor in the case of a private prosecution, undertakes the defence of the appeal, and the Prosecution of Offences Act, 1879, shall apply as though the duty of the Director of Public Prosecutions under this section were a duty under section two of that Act, and provision shall be made by rules of court for the transmission to the Director of Public Prosecutions of all such documents, exhibits, and other things connected with the proceedings as he may require for the purpose of his duties under this section.

13.—(1.)* provides for the expenses of appeal.

14.—(1.) An appellant who is not admitted to bail shall, pending the determination of his appeal, be treated in such manner as may be directed by prison rules within the meaning of the Prison Act, 1898.

(2.) The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

(3.) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence passed by the Court of Criminal Appeal, shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

(4.) Where a case is stated under the Crown Cases Act, 1848, this section shall apply to the person in relation to whose conviction the case is stated as it applies to an appellant.

* 8 E. 7, 15, 9 (5) applies this s. (and denies that A.) to cases stated under 11-12 V. 7, and (6) substitutes 'payment of costs out of local funds' under that A. for 'payment of expenses' under this.

16.—(1.) Shorthand notes shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the registrar so directs, and furnished to the registrar for the use of the Court of Criminal Appeal or any judge thereof: Provided that a transcript shall be furnished to any party interested upon the payment of such charges as the Treasury may fix.

17. The powers of the Court of Criminal Appeal under this Act to give leave to appeal to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the Court of Criminal Appeal in the same manner as they may be exercised by the Court, and subject to the same provisions; but, if the judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court of Criminal Appeal as duly constituted for the hearing and determining of appeals under this Act.

20.—(1.) Writs of error, and the powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, are hereby abolished.

(2.) This Act shall apply in the case of convictions on criminal informations and coroners' inquisitions and in cases where a person is dealt with by a court of quarter sessions as an incorrigible rogue under the Vagrancy Act, 1824, as it applies in the case of convictions on indictments, but shall not apply in the case of convictions on indictments or inquisitions charging any peer or peeress, or other person claiming the privilege of peerage, with any offence not now lawfully triable by a court of assize.

(3.) Notwithstanding anything in any other Act, an appeal shall lie from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river in whatever court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes, and shall not lie under this Act.

(4.) All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which is transferred to the judges of the High Court by section forty-seven of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act, and in any case where a person convicted appeals under this Act against his conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require a case to be stated accordingly under that Act in the same manner as if a question of law had been reserved.

21. In this Act, unless the context otherwise requires,—

The expression 'appellant' includes a person who has been convicted and desires to appeal under this Act; and

The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted or his

wife or children, and any recommendation of the court as to the making of an expulsion order in the case of a person convicted. . . .

22. The Acts specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
7 & 8 Will. 3, c. 3.	The Treason Act, 1695.	In section nine, from "but neverthelesse" to the end of the section.
11 & 12 Vict. c. 78.	The Crown Cases Act, 1848.	Sections three and five.
38 & 39 Vict. c. 77.	The Supreme Court of Judicature Act, 1875.	In section nineteen, the words "including the practice and procedure with respect to Crown cases reserved."
44 & 45 Vict. c. 68.	The Supreme Court of Judicature Act, 1881.	Section fifteen.

RULES

and a Schedule of Forms were made in 1908,* in accordance with s. 18 (1).

Record of the proceedings] In any case in which an appeal lies to the C. C. A., 'Shorthand notes shall be taken of the proceedings at the trial' by s. 16 (1) of the Criminal Appeal A. 1907, s. 8 of which assumes that the president of the court takes 'notes of the trial.' S. 16 (1) is explained by C. A. Rule 52: 'For the purpose of s. 16 of the Act, proceedings at the trial shall mean the evidence and any objections taken in the course thereof, any statement made by the prisoner, the summing up and sentence of the judge of the court of trial, but unless otherwise ordered by such judge, shall not include any part of the speeches of counsel or solicitor.' See further, Registrar's Instructions of June 30, 1910. Nothing must be omitted from the witnesses' examinations: *Beauchamp,* 2 Cr. A. R. 41, 1909. But irregularity in the note or transcript does not invalidate the trial: *Rutter,* 1908, where the summing up was omitted. Any incident affecting the trial during its course should be recorded, *e.g.* a statement interjected by someone not a witness, in court and heard by the jury: *T. Austin,* 12 Cr. A. R. 171, 1916.

In the event of a discrepancy, the judge's notes are preferred by the C. C. A.: *Beauchamp,* above.

'The official shorthand writer is bound under the rules to keep the transcript': *per* Alverstone L.C.J., *J. Harris,* 8 Cr. A. R. 35, 1912, the C. A. Rule being, apparently, 5 *b:* [he] 'shall retain the same

* Since which date no edition of the Rules seems to have appeared except that of the present editor (Jordan & Sons).

unless and until he is directed by the Registrar to forward' the note 'to him.'

Bail] In *Rawlings,* 1909, Alverstone L.C.J. said that the general rule of the court is not to allow bail pending appeal: so *E. Gordon,* 7 Cr. A. R. 182, 1912—especially when the sentence is for a long term: *W. Garnham,* 4 Cr. A. R. 150, 1910—and it especially objects to do so if notice has not been given to the prosecution: *Ridley,* 2 Cr. A. R. 113, 1909. It is doubtful whether it has power if it quashes a conviction and there is another indictment to try: *Halikiopulo,* 3 Cr. A. R. 275, 1909; the application should be made at chambers: *Coulter,* 5 Cr. A. R. 150, 1910. Nor is bail allowed when the application is made to delay the appeal: *Horner,* 4 Cr. A. R. 189, 1910.

The statute which created the C. C. A. abolished writs of error, and the method of revision in each case is so dissimilar that nothing is to be gained by reproducing the cases where relief was given or refused under the old system—especially as there does not seem to be a single instance where the modern tribunal has taken a precedent from that system. And there seems to be no instance in which relief could have been obtained through a writ of error in which it cannot now be more speedily obtained under the statute in question. Perhaps the certificate of the Attorney-General enabling, under s. 1 (6) of that A., an appeal from the C. C. A. to the H. L. is a relic of the writ of error.

New trial] The 'powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases are hereby abolished': s. 20 (1) of Cr. Ap. A. p. 344. But in *highway* and similar cases there is an appeal from conviction as if from a verdict in a civil action: s. 20 (3); see C. O. R. 17.

Venire de novo] It is pointed out, 2 Russ. Cri. 2006, that the C. C. A. 'has no express power conferred on it by the Cr. Ap. A. 1907, to grant a *venire de novo,* and as s. 4 (1) of the Act, after providing for the cases in which that court shall allow an appeal enacts that the court 'in any other case shall dismiss the appeal,' it seems doubtful whether that court has power to award a *venire de novo* at all.' *Ross,* however, Court of Crim. Ap. p. 5, says that it probably has the power to grant such a writ 'where the trial is a nullity.' That court has in fact ordered a *venire de novo* for mistrial in *W. Baker,* 1912, followed in *Ingleson,* 1915; and in *Dickman,* 74 J. P. 451, Alverstone L.C.J. is reported to have said: 'I agree that if . . . there had been a mistrial, I think this court [C. C. A.] would have had jurisdiction to grant such a writ'; indeed, it is difficult to deny the argument there for the appellant that that court 'inherits the jurisdiction' of the Court for Crown Cases Reserved under s. 20 (4) of the Cr. Ap. A.

Court for Crown Cases Reserved] By that s. the 'jurisdiction and authority' of that tribunal is merged in the C. C. A. rather than extinguished, and cases have in fact been stated to that court: C. A. Rule 26. If, therefore, the C. for C. C. R. had (or has) the power to award a *venire de novo,* the C. C. A. has it. In *Mellor,* 1858, there was great conflict of opinion in that court whether the power existed or not, and it was decided by seven to six that it did not, but in *Yeadon,* L. & C. 81; 31 L. J. M. C. 70; 9 Cox C. C. 91, 1861, the five judges of that court, all of whom had taken part in *Mellor,* awarded

a *venire* without discussing the point. Yet in *Martin,* 1872, five judges, none of whom had been parties to *Yeadon,* ignoring that case, which was cited, doubted whether the court had the power. The statute 11-12 V. 78 has become relatively less important.

Doubt of court of trial on a point of law] Under that statute the court could state a case to satisfy its own doubt—even after plea of guilty and sentence, as Kennedy J. did in *Riley,* 1896. Now the same object would be attained either by granting a certificate under the Cr. Ap. A. or by stating a case, and the C. C. A. may call for the latter: s. 20.

Depositions] In that case Kennedy J. seems to have doubted whether the court above could read the depositions—perhaps in view of *Clark,* L. R. 1 C. C. R. 54; 36 L. J. M. C. 16; 10 Cox C. C. 338, 1866. But there is no doubt that the C. C. A. can: *W. Hillman,* 1 Cr. A. R. 49, 1908.

Statutes] By 36-7 V. 66, 47, as amended, 'the determination of any such question [of law arising in criminal trials] by the judges of the High Court in manner aforesaid shall be final and without appeal, and no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record as to which no question shall have been reserved for the consideration of the said judges' under 11-12 V. 78. This s. is dealt with in s. 20 (4) of the Cr. Ap. A. See *Fletcher,* 2 Q. B. D. 43; 46 L. J. M. C. 4; 13 Cox C. C. 358, 1876: C. A.

By 38-9 V. 77, 19, as amended, 'subject to the first schedule' (of the A.) 'and any rules of court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act.'

d. COSTS.

a. *Payable by a local authority.*

By s. 1 of 8 E. 7, 15, the Costs in Criminal Cases A. 1908: (1) (a) 'a court of assize or a court of quarter sessions before which any indictable offence is prosecuted or tried . . . may on any such proceedings by order direct the payment of the costs of the prosecution or defence or both, in accordance with the provisions of this Act, out of the funds of the county or county borough out of which they are payable under this Act. . . .'

By s. 1 (2) these costs are to be regulated by the Secretary of State, and must 'appear to the court reasonably sufficient to compensate the prosecutor for the expenses properly incurred by him in carrying on the prosecution and to compensate any person properly attending to give evidence for the prosecution or the defence or called to give evidence at the instance of the court, for the expense, trouble or loss of time properly incurred in or incidental to the attendance and giving of evidence,' and the amount is to be ascertained "as soon as practicable.' By s. 1 (4) no expenses are allowed to 'witnesses to character only, unless the court shall otherwise order.'

Director of Public Prosecutions] By 8 E. 7, 3, 2 (4), the Director of Public Prosecutions is for this purpose in the position of a private

prosecutor. By 42-3 V. 22, 7, his intervention releases any private prosecutor from recognisance or security for costs, but though he cannot be made to give either, he is liable for security in lieu of the person he displaces. Hence, if the private prosecutor had not given such security, the Director was not liable on acquittal: *Stubbs* v. *Director, &c.*, 4 Q. B. D. 577; 59 L. J. Q. B. 201; 17 Cox C. C. 1, 1890. The Secretary of State's Regulations under the 1908 A. give mere forms without the figures of the costs allowed: St. R. & O. 1908, p. 234. Consequently, the actual scale of allowances must be sought in St. R. & O. 1904, p. 117 (which was in force on Dec. 31, 1915).

Where bigamy was committed in London, but tried at Manchester, the K. B. D. was clear that under s. 4 of the 1908 A. the London County Council was liable to pay the costs: *L. C. C., ex parte Keys*, 24 Cox C. C. 263, 1914.

By s. 4 (1), 'Costs in the case of offences committed or supposed to have been committed in a county borough, whether the court directing the payment is held in the borough or not, are payable under this Act out of the borough fund or borough rate of the county borough, and costs in the case of other offences are payable under this Act out of the county fund of the administrative county in which the offence is committed or is supposed to have been committed.' This enactment adopts the law in the following case.

Where murder was alleged in a borough but the death took place in the county, and the only charge was on the county coroner's inquisition, the borough magistrates having refused to commit, it was held, under rpd. ss., that an order that the *borough* must pay the expenses of the prosecution was right: *Re Brown; Ex parte Mayor, &c., Wigan*, 19 Cox C. C. 33, 1898.

Admiralty] S. 4 (1) continues: 'For the purposes of this provision, offences committed within the jurisdiction of the Admiralty of England shall be deemed to have been committed in the place where the offender is prosecuted or tried, or where the offender is tried at the Central Criminal Court, in the county of London; but any costs paid in the case of those offences out of the funds of any county or county borough shall be repaid out of moneys provided by Parliament.'

b. *Payable by defendant or prosecutor.*

Defendant] By s. 6 (1) of the 1908 A.: The court 'may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred in or about the prosecution and conviction, including any proceedings before the examining justices as taxed by the proper officer of the court.'

By 33-4 V. 23, 13, a convict's administrator (see *Convict's Property*) may pay out of his property 'all costs and expenses which the convict may have been condemned to pay.'

Prosecutor] By s. 6 (2): On an acquittal 'on any indictment or information by a private prosecutor for the publication of a defamatory libel or for any offence against the Corrupt Practices Prevention A. 1854, or for the offence of any corrupt practice within the meaning of the Corrupt and Illegal Practices Prevention A. 1883, or on an indictment for an offence under the Merchandise Marks A. 1887 to 1894,

or on an indictment presented to a grand jury under the Vexatious Indictments A. 1859, in a case where the person acquitted has not been committed to or detained in custody or bound by recognisance to answer the indictment, the court . . . may order the prosecutor to pay the whole or any part of the costs incurred in or about the defence,' &c., as in sub-s. 1, above.

By sub-s. (4), such an order on an individual may be *in addition* to that on 'local funds,' and in that case 'the costs shall primarily be payable out of local funds.'

No trial] By s. 7, any one committed and not 'ultimately tried' is to be deemed acquitted for this purpose.

Highway, &c. cases] By s. 9 (3), such proceedings are for this purpose *civil*.

'*Incorrigibles*'] committed to Q. S. are for this purpose deemed to be indicted: s. 9 (4).

7 *G.* 4, 64, *Criminal L. A.* 1826] In what is left of this statute, payment of expenses means 'the payment of costs out of local funds under this Act . . . or in any other enactment': s. 9 (6).

Delinquent directors, &c.] By s. 217 of 8 E. 7, 69 '(1) If it appears to the court in the course of a winding up by or subject to the supervision of the court that any past or present director, manager, officer or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to prosecute for the offence and may order the costs and expenses to be paid out of the assets of the company.' And (2) the liquidator in a voluntary winding up may, 'with the previous sanction of the court,' take such action, and then the proper expenses are so payable 'in priority to all other liabilities.'

On appeal] The C. C. A. cannot make an order for the costs of the trial unless appellant appeals against sentence: *Reynolds*, 6 Cr. A. R. 28, 1910; but it can decrease sentence by remitting costs: *H. Howard*, *ib.* 17, where it thought that to enforce them would be unfair to prior creditors.

Recovery of costs] It seems to follow from *Richardson* v. *Willis*, L. R. 8 Exch. 69; 12 Cox C. C. 351, 1873, that costs may be recovered exactly as in civil cases: a writ of *fi. fa.* may be sealed in the High Court as well as in the court of trial.

Central Criminal Court] By 19-20 V. 16, 13, the expenses of a prosecution removed into the Central Criminal Court under that A. may be ordered by that court to be paid, in the same way as if that court were holden under a commission of oyer and terminer and gaol delivery for the county or place in which the indictment was found. By s. 25 (slightly amended S. L. R. A. 1898), when the trial there is obtained by the crown, a sum not exceeding 20*l.* may be ordered by the K. B. (D.), or by a judge, to be paid by the Treasury to the person charged, to defray the expenses of the attendance of his witnesses. By s. 26, that court may order the expenses of any person,

tried there not on his own application and acquitted, caused by the removal of the trial, to be repaid—deducting any advance made under s. 25.

A person not bound over, and who was not the prosecutor, but who assisted in getting up a prosecution, was not entitled to any costs: *Yates*, 7 Cox C. C. 361, 1857; *Cook*, 1 F. & F. 389, 1858. In *Bushell*, 16 Cox C. C. 367, 1888, a wife was allowed the costs of her prosecution against her husband for assault, although she was not bound over to prosecute, the clerk to the magistrate having bound over the police to prosecute. 'Where,' said L. Coleridge C.J., 'there is a private prosecutor, and that prosecutor conducts the case before the magistrates, I do not think the magistrates' clerk ought to step in and take the case out of the private prosecutor's hands.' These difficulties cannot occur under the 1908 A., which speaks of 'the costs of the prosecution' and not of 'the prosecutor.'

Before verdict] In general no costs will be allowed before the trial has taken place; as when it is postponed. *Hunter*, 1829. However, in a case of murder, which was postponed until the following assizes on defendant's application, and in which the costs of the prosecution were very heavy, Alderson B. made an order for their payment. *Bolam*: so stated in previous editions of this work. So where a trial for murder was postponed, as defendant had been removed to a lunatic asylum, Pollock C.B. did not allow the costs; but at the next assizes, on an affidavit of a hopeless state of insanity, Patteson J. allowed the costs and bound over the witnesses. *Dwerryhouse*, 2 Cox C. C. 446, 1847: see now 8 E. 7, 15, 7. And where on a charge of administering noxious drugs an essential witness was ill and the trial was postponed, costs were allowed by Lush J. on an affidavit by the prosecutor that he had paid 12*l.*, but that he was poor and quite unable to defray any further expenses. *Wilson*, 12 Cox C. C. 622, 1874, and *Dooley*, 1871, in the note. The 1908 A. certainly does not take this power away.

Money found in possession of defendant] If such money belongs to someone else it cannot be applied to the costs of the prosecution. But when a rpd. s. expressly authorised 'moneys taken from' defendant 'on his apprehension' being so applied, such an order was valid against the trustee in bankruptcy, notwithstanding that defendant was adjudged bankrupt between the arrest and the conviction. *Roberts*, L. R. 9 Q. B. 77; 43 L. J. M. C. 17; 12 Cox C. C. 574, 1873, *per* Blackburn and Quain JJ.

Criminal lunatic] The costs of his maintenance may be recovered as a crown debt from his estate: *Re J.*, 21 Cox C. C. 766, 1909: C. A.

c. *Payment by other than local authorities*] By s. 8 of the principal A.: 'Nothing in this Act shall affect the operation of any enactment for the time being in force which provides for the payment of the costs of the prosecution or defence of an indictable offence out of any assets, money, or funds other than local funds or by any person other than the prosecutor or defendant.'

d. *Appeals to Q. S.*] By 12-3 V. 45, 5: 'Upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other

party or parties such costs and charges as may to such court appear just and reasonable, &c.' See *Archbold's Quarter Sessions*, 6th ed. p. 267 (1908).

By 54-5 V. 15 (Merchandise Marks A. 1891), 2 (extended to Board of Agriculture by 57-8 V. 19, 1), prosecutions under the Merchandise Marks A. 1887, undertaken in 'the general interests of the country' by the Board of Trade shall be paid for out of moneys provided by Parliament.

e. *Legal aid*] By 3 E. 7, 38, 1 (1): 'Legal aid' may be granted by a judge of the court of trial to a 'poor prisoner,' * regard being had 'to the nature of' his 'defence . . . as disclosed' in the proceedings before the committing justices. The expenses are regulated by Orders of 1903 and are printed *Statutory Rules and Orders, Revised* to Dec. 31, 1903, *Crim. Proc. Eng.*, p. 6. The Rules under this A. are printed *Stat. R. & O.* 1904, p. 123.

e. *Compensation.*

By defendant] See this title under *Judgment; Convict's Property.*

By way of reward for the apprehension of offenders] By 7 G. 4, 64, 28: 'Where any person shall appear to' the court trying an indictment 'to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary, or felonious house-breaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable, and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace, to have been active in or towards the apprehension of any party charged with receiving stolen property knowing the same to have been stolen, such court shall have power to order compensation to such person in the same manner as the other courts hereinbefore mentioned; provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses and compensation, as courts are by this Act empowered to allow to prosecutors and witnesses respectively.' By 14-15 V. 55, 8, the power of Q. S. in this particular is extended to all the offences mentioned in s. 28, above, 'which such sessions may have power to try,' and 'pro-

* For the ancient distribution of funds in charity to such persons, see 2 *Burr.* 667, 1759.

vided that such compensation to any one person shall not exceed the sum of five pounds.'

There is a similar enactment in cases of homicide where both deceased and defendant were subject to the Mutiny A., 25-6 V. 65, 11. See also under *Escape*.

It was held that the case of *sacrilege* was not included in the above section, not coming within the words *burglary* or house-breaking. *Robinson*, 1 Lew. C. C. 129, 1828. On the authority of this case, a similar application was refused, though two judges would otherwise have been disposed to put a different construction on the statute. *Ib.* But where a woman was indicted for an attempt to murder her child by suffocating it, a constable was allowed his extra expenses in apprehending her, the judge thinking that the case was within the spirit and intention of the s., though not within the words. *Durkin*, 2 Lew. C. C. 163, 1837. It has been held, however, by Maule J. that a stealing from the person is not within the words 'robbery on the person.' *Thompson*, York Spr. Ass. 1845, MS: 3rd ed. of this work (1846). Under the word 'exertions' in the above clause, a prosecutor was ordered a gratuity of five pounds for his courage in apprehending defendant. *Womersly*, 2 Lew. C. C. 162, 1836. The s. has been liberally interpreted: see 2 Russ. Cri. 2053; if the 'exertions,' &c. are not in evidence, the application must be on affidavit: *ib.*

By 7 G. 4, 64, 29, there is a fee of five shillings to the officer of the court (except at Q. S., s. 8, above) for such an order.

Scales of compensation] Under 14-15 V. 55, 5, as amended, a secretary of state may make regulations. But none have been made: Index to *St. R. & O.* in force Dec. 31, 1915, *Crim. Proc. Eng.* p. 169.

Allowance to the widows and families of persons killed in endeavouring to apprehend offenders] By 7 G. 4, 64, 30: 'If any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned [in s. 28], it shall be lawful for the court, before whom such person shall be tried, to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children, in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet: and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court; and every such order shall be paid by and repaid to the sheriff in the manner' mentioned in s. 29. For an instance of such an order, see *Platel*, 38 L. J. newsp. 273, 1903: 233*l.* to support widow and children.

PART II.

EVIDENCE OF CRIMES (INCLUDING ATTEMPTS).

ABDUCTION OF ELECTORS. See *Undue Influence.*
WOMEN AND CHILDREN.

Common law] It seems very doubtful how far abduction was in any case an offence at common law: see *Twistleton,* 1669. Of course, if the woman did not consent, there would be an assault on *her: Barratt,* 1840; if she consented, but those having lawful charge of her resisted, and force were used, there would be an assault on *them.* A conspiracy also to seduce would be an offence at common law, or to induce a woman, whether chaste or unchaste, to become a prostitute: see *Conspiracy; Howell,* 4 F. & F. 160, 1864. Nearly all the authorities usually quoted to show that this is an offence at common law, may be explained on one or other of these grounds. See *Wright* on *Conspiracies,* p. 106, and *L. Grey and others,* 1 East P. C. 460; *Mears,* 2 Den. C. C. 79; 20 L. J. M. C. 59; 4 Cox C. C. 423, 1851; 1 Hawk. P. C. 1, 42 (1st part), speaks of clandestine marriage only as an offence by statute. *L. Grey, &c.* seems to be the only known case of abduction at common law, and there the information was mainly for conspiracy. At any rate, there has been no common law case reported for a very long time. East is clear that marrying a woman under age without the consent of her father, &c., is not an offence at common law: but the taking of children from the proper custody to marry them, 'by any sinister means,' is indictable. P. C. 458-60. Perhaps the explanation is that the element of force always constitutes a common law offence: see *Force,* below.

Forcible abduction of a woman—girl under twenty-one] By 24-5 V. 100, 53: 'Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding fourteen years . . .; and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal

property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, co-heiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the attorney-general appoint.'

Intent to marry, &c.] By s. 54: 'Whosoever shall by force take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years.'

Girl under sixteen] By s. 55: 'Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be imprisoned for any term not exceeding two years, with or without hard labour.'

Child-stealing] By 24-5 V. 100, 56: 'Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away or detained, as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . .; and, if a male under the age of sixteen years, with or without whipping; provided that no person who shall have claimed any right to the possession of such child, or shall be the mother, or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof.'

These two ss. are subject to ss. 19-21, 24, 26-32 of the Children A. 1908; so s. 7, below.

The intent must be to deprive *permanently* of possession: *W. Jones*, 22 Cox C. C. 212, 1911, *per* Bosanquet C.S.

Girl under eighteen] By 48-9 V. 69, 7: 'Any person who, with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, takes or causes to be taken such girl out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. Provided that it shall be a sufficient defence to any charge

under this section that the person so charged had reasonable cause to believe that the girl was of or above the age of eighteen years.'

Evidence of husband or wife] By s. 20 of that A. (and also by s. 4 of the Criminal Evidence A.), in every charge thereunder and under ss. 52-5 (above) the defendant's spouse is a 'competent but not compellable witness . . . at every stage except . . . a grand jury'; the common law on this point is discussed at p. 144.

Since *Leach*, 1912, two cases in which defendant had married the prosecutrix since the alleged offence have lost their interest: see dictum *per* Wills J.: *Ellis*, L. J. Newspaper, p. 646, Dec. 2, 1899; and *ib.* Nov. 16, 1907, p. 704, where a learned writer points out that s. 20 is not rpd.

Search warrants] See under *Apprehension*.

'Taking' or 'detaining'] Even under rpd. 3 H. 7, c. 2, which did not contain the words 'or detain,' detaining a person who originally consented, but afterwards refused to continue, was considered to be within the statute. *Brown* (who was hanged though he had married the girl), Hawk. P. C. 1, 41 (part 2), 7; East P. C. 454; 1 Russ. Cri. 969.

Consent of female] In s. 55 it is clear that consent does not affect the offence. Thus, it is said that 4 & 5 P. & M. c. 8 (rpd.), which was to the same effect, and had the same age limit (16), 'was made to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises or gifts, and married in a secret way to their disparagement.' *Hicks* v. *Gore*, 3 Mod. 84, 1685; see below. So it was held that it was no excuse that the defendant made use of no other 'seducements but common complements among young people; and . . . that the encouragement to this affair proceeded from the daughter,' he in fact having eloped with and married her, 'a great fortune.' *Twistleton and others*, 1 Lev. 257; 1 Sid. 387; 2 Keb. 432, 1669; 1 Russ. Cri. 963, where the court held that there was an offence at common law, viz.: 'conspiracy and the deceitfull and riotous taking away a girl . . . the statutes 3 H. 7 and 4-5 P. & M. 8 were but for aggravation of punishment and do not create any offence originally' (Keb.). Note that the first part of s. 53 contains no limit of age.

Force] It has been argued that, though by the statute a taking by *force* is not necessary, still that a person cannot in any sense be said to be *taken* who goes willingly, as the word *take* in itself imports the use of some coercion. But where defendant went in the night to the house of B. and placed a ladder against the window, and held it for the daughter of B., a girl of fifteen, to descend, which she did, and then eloped with him; this was held to be a 'taking' of the girl out of the possession and against the will of her father within 9 G. 4, 31, 20 (rpd.), although she had herself proposed to defendant to bring the ladder, &c. *Robins*, 1 C. & K. 456, 1844. So in *Mankletow*, 1 D. & P. C. C. R. 159; 22 L. J. M. C. 115; 6 Cox C. C. 143, 1853, where defendant had privately persuaded a girl between twelve and thirteen to go away with him to America, and on the morning of his departure had secretly told her to make a bundle and meet him at a certain spot, and she accordingly left her father's house and met

defendant, and the two travelled up to London together: this was held to be a 'taking' under the same A. Jervis C.J. said of the contention for defendant that the word 'take' must mean taking by force, actual or constructive, that the s. showed that that was not necessary. It was unimportant under that s. (substantially the same as s. 55) whether the girl consented or not; when he met the girl at the appointed place, there was 'a taking' of her; till that moment, the father had possession of her. 'The statute was framed for the protection of parents and others having lawful custody': see below.

In *Timmins,* 30 L. J. M. C. 45; Bell C. C. 276; 8 Cox C. C. 40, 1860: C. C. R., defendant induced a girl of fourteen years and a half to leave her father's house, and cohabited with her for three days, and then told her to go home. The jury found him guilty generally (under the same s.), but also found that he did not intend, when he took away the girl, to keep her away from home permanently. The conviction was affirmed, the court insisting on the length of the detention 'in a situation quite inconsistent with the father's possession' out of which it thought he had taken her, but guarding itself against the supposition that 'if the taking was intended to be temporary only or for a purpose not inconsistent with the relation of father and child,' it would be within the s. Cf. *Booth,* 12 Cox C. C. 231, 1871.

In *Handley,* 1 F. & F. 648, 1859, Wightman J. said, 'a taking by force is not necessary; it is sufficient if *such moral force was used as to create a willingness* on the girl's part to leave her father's home. If, however, the going away was entirely voluntary on the part of the girl, the prisoner would not be guilty of any offence under the statute.' It is not clear what the words in italics mean [unless it be 'constructive force,' as above], but the last sentence is quite in accord with *Jarvis,* 20 Cox C. C. 249, 1903, under s. 55, where Jelf J. said that if defendant 'yielded to her suggestion, taking no active part in the matter,' —not even persuading her—he must be acquitted. Cf. *Robb,* 4 F. & F. 59, 1864, under s. 55.

Claim of legal right] to the custody, if honest, though mistaken, entitles to an acquittal: *Tinkler,* 1 F. & F. 513, 1859, *per* Cockburn C.J.: *sed quære.*

Reception of the female] A man is not bound to return a girl under sixteen to her father's custody, when she has left home without any inducement and come to him. If, however, he has ever held out any inducement to her to leave, and if, when she has left, he avails himself of her having left to induce her to continue out of her father's custody, this is within the statute, whatever his wishes may have been about the particular time of her leaving. *Olifier,* 10 Cox C. C. 402, 1866, and *Robb,* above. Nor is keeping her secretly, if she come to him voluntarily, within s. 55: *L. Alexander,* 1912.

Fraud] A child engaged as a servant was missing after three months; the mistress gave conflicting accounts, but admitted that she had given her up to someone; it was held that this was sufficient *primâ facie* evidence of an unlawful detention by fraud. If defendant, said Stephen J., 'having got the child, kept her with the intention of handing over to someone else, and did so against the will of the parent, that is a detention, and as she did it by means of falsehoods the detention was fraudulent'; the falsehoods were the

different accounts defendant gave the mother, some of which were admittedly untrue—and which Hawkins J. and apparently the four other judges accepted as good evidence of the fraud: *Annie Johnson,* 15 Cox C. C. 481; 48 J. P. 759; 50 L. T. 759, 1884: C. C. R. The consent set up by defendant was a paper written by her, to which she got the mother, who could not read and knew nothing of the contents, to put her mark; it was not produced, but Hawkins J. held that this story was also evidence of fraud, *i.e.* in getting the consent (not, it seems, in the detention).

In *Bellis,* 17 Cox C. C. 660, 1893, where an infant of a few weeks was taken away by a fraud on the mother, the C. C. R. (overruling *Barrett,* 15 Cox C. C. 658, 1885) laid it down that the fraud—in s. 56—need not be on the child itself.

Conspiracy] In *Duguid* it was held that though any one claiming a right to the possession of a child could not be *prosecuted* under s. 56, for taking the child out of the possession, &c., yet whether a mother doing so out of lawful custody is or is not guilty of an offence under this s., any one conspiring with her to do so may still be guilty: 75 L. J. K. B. 470; 22 T. L. R. 506; 21 Cox C. C. 200; W. N. 100, 1906: C. C. R.

The possession of parent, guardian, &c.] In *Green and Bates,* 3 F. & F. 274, 1862, defendants found the girl, who lived with her father, in the street by herself, and invited her to go with them, giving her drink which made her dizzy, and then behaved immorally. Martin B. directed an acquittal on the ground that the girl was not taken out *of the possession of any one;* they might not have known that she had a father. No evidence appears to have been given of the purpose for which the girl had left home. The case might now be held to be an offence within 48-9 V. 69, 3 (3). In *Mycock,* 12 Cox C. C. 28, 1871, under s. 55, Willes J. followed *Olifier,* and added that unless the girl has given up the intention of returning to the father, she is still constructively in his custody. In *Mankletow,* Jervis C.J. said, 'So long as she continues a member of her father's family, and is under his control, she is in his possession.' 'If a girl leaves her father's house for a particular purpose with his sanction, she cannot legally be said to be out of her father's possession.' Maule J. seems to have ruled in the same way in *Kipps,* 4 Cox C. C. 167, 1850.

Where a girl lived with her father, and left home to go to a Sunday school, and defendant met her and seduced her, and then brought her back, not knowing who she was or whether she had a father, but not believing she was a girl of the town; it was held that there was no evidence to show that he had reason to know that the girl was under her father's protection: c. q.: *Hibbert,* L. R. 1 C. C. R. 184; 38 L. J. M. C. 61; 11 Cox C. C. 246, 1869.

A girl, just under sixteen, entitled to real property, came home to her mother's house for holidays. Her mother insisted that she should go to her grandmother's. On this she went to the house of her paternal uncle H. B., and when her mother heard where she was, she desired her to come home to her. The girl did not return to her mother's house, but, with the knowledge of her uncle H. B., went away with and was married to another uncle F. B. F. B. was indicted for fraudulently alluring the girl, and taking her out of her mother's possession, and H. B. for being an accessory before the fact. A

majority of the court held that these *facts* (*on the law* there was unanimity) did not sustain the conviction—which seems to mean that the alluring was not fraudulent: for there was 'abundant evidence,' *per* Martin B., of a fraud on the mother. *Burrell,* L. & C. 354; 33 L. J. M. C. 54; 9 Cox C. C. 368, 1863, under s. 53.

The principles of the above cases govern s. 7 of 48-9 V. 69. Where under that s. it was proved that the girl was employed as a barmaid at a distance from her father's home, it was held that she was not in the possession of her father (but in the lawful charge of her employer). *Henkers,* 16 Cox C. C. 257, 1886.

No consent of parent, &c.] The want of consent of the father must be presumed, if it appears that, had he been asked, he would not have consented: *Handley,* above. In *Hopkins,* Car. & M. 254, 1842, Gurney B. seemed to think that where a man by false and fraudulent representations, as by representing that he wished to place her in the service of a lady, induced the parents of a girl between ten and eleven years of age to allow him to take her away, such taking away was an abduction within rpd. 9 G. 4, 31, 20. This would be in accordance with the general principle that a consent obtained by fraud avails nothing. The point is now settled by s. 56; see *A. Johnson* and *Bellis;* and *Index.*

Of the consent of a temporary guardian (such as existed in *Hicks* v. *Gore*), East suggests that 'it deserves good consideration before it is decided, that an offender acting in collusion with one who has the temporary custody of another's child for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the statute. For then every schoolmistress might dispose in the same manner of the children committed to her care': P. C. 457. And so Amphlett B. and Coleridge C.J., at Leeds, March, 1875, ruled that by the fraud of the temporary guardian, the latter lost all right to possession of the child, which had reverted to its 'natural guardian' (10*th ed. of this work*).

'*Fraud vitiates consent*'] This proposition is 'too general': *per* Stephen J. in *Clarence,* 1888: it should be limited to deceit about the nature of the act or the identity of the person doing it.

Proof of age] In cases where the offence depends on the age this must be proved in the usual way, by a person who can speak to the date of the birth. A certified copy of the register is now admissible, and coupled with evidence of identity, is proof of age. *Weaver,* L. R. 2 C. C. R. 85; 43 L. J. M. C. 13; 12 Cox C. C. 527, 1873. In *Robins,* 1844, it was held that it was no defence that defendant did not know that the girl was under sixteen, or that from her appearance he might have thought that she was of greater age; followed by Willes J. in *Mycock,* and Bramwell B. in *Olifier,* or that he really thought she was of greater age: *Booth, ib.* The point was finally settled when fifteen judges out of sixteen held that defendant was rightly convicted, though he *bonâ fide* believed and had reasonable grounds for believing that the girl was over sixteen. *Prince,* L. R. 2 C. C. R. 154; 44 L. J. M. C. 122; 13 Cox C. C. 138, 1875. Brett J. was the only dissentient judge. 48-9 V. 69, 7, expressly provides that 'reasonable cause to believe,' &c., is a good defence. For the presumption of the age of child against whom certain offences are committed, see under *Children;* and *Cox, ib.*

Proof of the intent] Defendant, a married man, induced a girl of fifteen (whose age he did not know), by proposing marriage, to leave her home, in order to take her from a convent; he was of excellent character, and his motive was honest; Quain J. told the jury that 'his philanthropy' had nothing to do with the charge: guilty: eighteen months' imprisonment: *Booth,* 12 Cox C. C. 231, 1871, under s. 55. The only intent which it is necessary to prove under s. 55 is that of depriving the parent or other person of the lawful possession of the child: *Timmins.* 'The taking may be by a female with a good motive': *per* Bramwell B. and seven other judges: *Prince,* above; but see *Tinkler,* above.

Under s. 56, intent to steal from the child is enough.

Lucri causa] By 'motives of lucre,' in s. 53, in respect of the intent to marry, is meant, it seems, that he who carries off the woman has in view the advancement of his own pecuniary position, by using the legal rights of a husband over his wife's property. The mention there of an intent to know carnally has not always been understood; it seems to have been inserted to meet the case of a seducer, who not being able or willing to marry, wishes to 'blackmail' the woman—a crime which in 1861 was punished most severely under this s.—and that of the hired intermediary who assists the designs of another. It is clear that an offence without marriage is contemplated, for the end of the s. expressly provides a disqualification for such offence different from that when marriage has taken place. It is quite clear that carrying off an heiress from motives of lust only would not be an offence under this s.

The jury must be satisfied that the motive was lucre: *Barratt,* 1840, under rpd. s. 19 of 9 G. 4, 31, where the same words are used: verdict, assault (only).

Construction of ss. 53-4] Looking to the much more general provisions of s. 54, while probably the chief value of s. 53 is to make sure that the husband shall be deprived of any benefit from the wife's property, according to the last words of it, it should be noticed that s. 53 says 'against her will,' but s. 54 'by force.' Probably no distinction is intended, and the variance of the phrases is due to the fact that the two ss. repeat the words of the two or more ss. which they respectively amend and reproduce.

As 'motives of lucre' are not mentioned in the second class of offences in s. 53, it seems that fraudulently alluring, &c., a woman under twenty-one years of age, with intent to marry or carnally know her, would be felony, *whatever the motives might be,* provided she was 'such' a woman, namely, an heiress. But alluring a girl of no property or expectations, between the ages of sixteen and twenty-one, from the motive of lust, would be no offence at all *under that statute.* But by 48-9 V. 69, 7, it is up to eighteen.

Abduction is not triable at Q. S.

ABOMINABLE CRIME.

See *Sodomy.*

ABORTION.

Common law] An attempt to destroy a child *en ventre sa mère* appears to have been held to be a misdemeanour; see an actual precedent of indictment, 3 Chitt. Cr. Law, 798 *a*. See under *Murder,* and *Tinckler,* 1781.

If, however, with the attempt to procure abortion a person does an act whereby a living child is brought into the world immaturely, and dies in consequence, that would be murder in the person doing the act, and none the less if it was possible that the death might have been prevented: *West,* 2 C. & K. 784, 1848.

By statute] By 24-5 V. 100, 58: 'Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever, with the like intent, and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.'

By s. 59: 'Whosoever shall unlawfully supply, or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude.'

The administering] Where defendant gave prosecutrix a cake containing poison (without any design of abortion), which she merely put into her mouth, and spat out again without swallowing any; the judges held, that a mere delivery did not constitute an administering within 43 G. 3, 58, 1 (rpd. but substantially the same as s. 58 on this point), and that there was no administering unless the poison was taken or applied; but if any part is taken, it is not necessary that it should be swallowed. *Cadman,* 1 Moo. C. C. 114; Carr. Supp. 237, 1825. In *Harley,* 4 C. & P. 370, 1830, the report of *Cadman,* in 1 Moo., is stated to be the reverse of the fact, for the judges held that swallowing *was* essential; this is borne out by the report in *Carr.* But to constitute an administering there need not be an actual delivery by the hand of defendant. *Ib.*

Under a similar s. (7 W. 4 & 1 V. 85, 6: rpd.), it was proved that the woman requested defendant to get her something to procure miscarriage and took what she gave her, but not in her presence. It was held, nevertheless, that she had 'caused' the drug to be taken, within the s. *Wilson,* D. & B. C. C. 127; 7 Cox C. C. 190, 1856; *Farrow,* D. & B. 164, 1857. See *Fretwell,* 1862, distinguishing between s. 58 and s. 59.

The nature of the thing administered] The nature of the noxious thing must be proved. Where defendant was indicted under s. 59 for supplying 'a certain noxious thing,' and the evidence was, that the thing supplied was of a perfectly harmless character in itself, though if taken with the belief that it would procure a miscarriage, it might, by acting on the imagination, produce that effect: c. q. *Isaacs,* 1 L. & C. 220; 32 L. J. M. C. 52; 9 Cox C. C. 228, 1862. But where there was no evidence of the ingredients of the thing administered, or its character being harmless or otherwise, except that in fact it made the witness ill and produced miscarriage, it was held that there was evidence of its being a noxious thing. *Hollis,* 12 Cox C. C. 463, 1873: C. C. R.

Quantity of thing administered] If the drug be innocuous if taken in small quantities, but harmful if taken in large (with the intent to procure miscarriage) it is a noxious thing; but, *per* Field J. and 'possibly' *per* Stephen J., if it be a recognised 'poison,' it comes within the A. even if administered in so small a dose as to be innocuous. *Cramp,* 5 Q. B. D. 307; 14 Cox C. C. 401; 49 L. J. M. C. 44, 1880: C. C. R., following *Hennah,* 13 Cox C. C. 547, 1877, which was under s. 24, *ib.* 'Bitter apple' is such a substance; where there was no direction by defendant about the dose to be taken and the judge left the whole evidence to the jury with the question, 'did he mean her to take or cause her to take a noxious thing?' the C. C. A. upheld a conviction: *W. Turner,* 4 Cr. A. R. 203, 1910.

The statute is satisfied if the person who supplies the thing intends it to be used for the purpose of abortion, though the recipient had no intent to use it so. *Hillman,* L. & C. 343; 33 L. J. M. C. 60; 9 Cox C. C. 386, 1863; under s. 59.

Indictment] See under *Conspiracy.*

Attempt] The female herself may be guilty of this, if she believes what she takes is noxious, though in fact it is harmless; but the man who incites her to take it is not guilty (though, if he believed it was noxious, *semble,* he would be): *Brown,* 63 J. P. 790, 1899.

Evidence] An offence being charged on the 17th, evidence of the contents of a bottle given to a female on the 31st was admitted. The C. C. A. held that this was admissible because (i) her evidence showed that the same substance was given her on the 31st as on the 17th (the latter otherwise not being identified), and that some pennyroyal left over on the 17th had been put into the mixture of the 31st; (ii) it was evidence of the intent. 'These were a series of acts, and you merely look at them all to see what the intent was': *Palm,* 4 Cr. A. R. 253, 1910.

Bond, 1906, where the admissibility of similar acts is discussed at length, was a case under s. 58; this case is understood, 9 Halsbury, 597, thus: 'such evidence should be admitted with great caution. It should only be admitted where the prisoner has suggested that the administration of the drug or the use of the instrument was legitimate or accidental on his part, and not where the defence is a denial of the act itself. And proof of only one other similar case, without any special connection with the case charged in the indictment, ought not to be admitted,' the object only being to rebut legitimate action or accident.

Accomplices] Anyone assisting to procure a person to perform the illegal operation is clearly an accomplice: *Bovy*, 12 Cr. A. R. 15, 1916; and the female herself has been held to be an accomplice under the latter part of s. 58: *M. Sockett*, 1 Cr. A. R. 101; 72 J. P. 428; 24 T. L. R. 893, 1908; cf. *Cramp*, at 14 Cox C. C. 392.

Death ensuing] See *Unskilful Treatment* under *Murder*.

Sentence] Three years' penal servitude on the man who instigated the offence—which resulted in death—was held not to be excessive: *Bovy* and *Palm*.

When the female herself was convicted, a substantial difference was made between her and the woman who operated: *Sockett*.

ABSCONDING BANKRUPTS.

See *Bankrupts*.

ADULTERATION OF FOOD.

See *Cheating* and *Nuisance*.

AFFRAY.

An affray (*affrayer* = to terrify) is 'the fighting of two or more persons in some public place, to the terror of his Majesty's subjects; for if the fighting be in private, it is not an affray, but an assault.' 4 Bl. Com. 145. See under *Apprehension,* and *Timothy* v. *Simpson, ib.* It differs from a riot, in not being premeditated. Thus 'if a number of persons being met together at a fair or market, or church-ale, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it.' Hawk. P. C. 1, 65, 3. Two persons may be guilty of an affray, but it requires three or more to constitute a riot. Mere quarrelsome words will not make an affray (except in a church, &c.): 4 Bl. Com. 146; nor threatening: 1 Russ. Cri. 427.

To support an indictment, the prosecutor must prove—1, the affray, or fighting, &c.; 2, that it was in a public place; 3, that it was to the terror of the king's subjects; 4, that two or more persons were engaged in it.

An affray is not always indicted as such; four men were indicted for shooting at S. with intent to murder, to maim, to do grievous bodily harm, and for feloniously wounding with intent, &c.; the affray was in the course of a local 'vendetta'; the verdict was against M., B. and F. of shooting with intent to murder, and against *Connor* of striking with intent to do grievous bodily harm; the C. C. A. thought that a verdict against different persons of different acts of violence arising out of one affray was good, and accepted it on the grievous bodily harm, but quashed the finding *the judge had entered,* viz., the intent to murder, and varied sentence accordingly: *C. Connor,* 8 Cr. A. R. 152; 77 J. P. 247; 29 T. L. R. 212, 1913.

Prize-fight] The principals and seconds were indicted in one count for a riot, and in another for an affray. The evidence was that the two first defendants had fought together amidst a great crowd, and that the others were present aiding, &c.; that the place where they fought was at a considerable distance from any highway, and when the officers made their appearance the fight was at an end; defendants, on being required to do so, quietly yielded. Alderson B. said, 'As to the affray, it must occur in some public place, and this is to all intents and purposes a private one. As to the riot, there must be some sort of resistance made to lawful authority to constitute it, some attempt to oppose the constables who are there to preserve the peace. The case is nothing more than this:—Two persons choose to fight, and others look on, and the moment the officers present themselves, all parties quietly depart. The defendants may be indicted for an assault,

but nothing more.' *Hunt,* 1 Cox C. C. 177, 1845; and see *Brown,* Car. & M. 314, 1841; *Orton,* 1878; *Coney.*

Duel] 'The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case; for where there is any material aggravation, the punishment proportionably increases . . . as in a [deliberate] duel . . . though no mischief has actually ensued': 4 Bl. Com. 145; Hawk. P. C. 1, 63, 20: 'some cases make it so inconsiderable as scarce to deserve to be taken notice of.' See also *Disturbing Public Worship.*

Breaking in] See this title under *Murder.*

Statute of Northampton] By 2 E. 3, c. 3, bringing a 'force in affray of the peace,' 'going or riding armed . . .' are forbidden. The statutable misdemeanour is 'without lawful occasion *in terrorem populi,*' and the former phrase, at least, must be averred; perhaps only one of the public need feel *terror,* but the nuisance at common law of discharging a revolver on the highway cannot be proved when there is no one on the road capable of being alarmed': *R. Smith,* 2 Ir. Rep. 190, 1914: C. C. R.: c. q. An indictment under this statute for firing a revolver at the bedroom of a man with whom defendant had quarrelled was successful; as was also a count for the public nuisance: *Meade,* 19 T. L. R. 540, 1903. See *Going Armed.*

AGENTS, OFFENCES BY.

See p. 375.

AIDERS, ABETTORS, ACCESSORIES.

Misdemeanours] In misdemeanours there can be no accessories: Hale, 1 P. C. 613 (because in 'criminal but not capital' cases, 'as in trespass, mayhem or *praemunire*,' all accessories *before* are as principals, and those *after*, 'by receiving the offenders,' are only punishable if statutes 'expressly extend' to 'receivers or comforters'); 'all persons concerned therein, if guilty at all, are principals': 4 Bl. Com. 36; *Greenwood*, 2 Den. C. C. 453; L. J. M. C. 127; 5 Cox C. C. 521, 1852, overruling *Else*, R. & R. 142, 1808; and *Page*, 1841. Hence, when a woman indicted with a man convicted as a principal for indecent assault was found 'accessory after the fact,' c. q. (as in felony, *Fallon*): *Bubb*, 70 J. P. 143, 1906; and see *De Marny*.

Manslaughter—before] Also in manslaughter it has been said there can be no accessories *before* the fact, for the offence is sudden and unpremeditated—but cf. *Taylor*, 1875—and therefore, if A. be indicted for murder, and B. as accessory *before*, if the jury find A. guilty of manslaughter, they must acquit B.: 1 Hale, 437, 616, referring to *Bibithe*, 2 Rep. 43 *b*, 1597. In *Gaylor*, D. & B. C. C. 288; 7 Cox C. C. 253, 1857, where a wife voluntarily took poison, provided by the husband to procure abortion—in his absence—and he was convicted (rightly, according to the C. for C. C. R.) of manslaughter, the above passages in Hale were relied on, but Erle J. said 'the solution' of Hale's dictum seems to be—'If the manslaughter be *per infortunium* or *se defendendo*, there is no accessory [before or after],' 'there are other cases in which there may be accessories.' Hale certainly thought there could be accessories *after;* and so Hawk. II. 29, 24. Cf. 9 *Halsbury*, Laws, &c. 254.

After] With respect to them it is now settled: *Greenacre; Richards*, 2 Q. B. D. 311; 46 L. J. M. C. 200; 13 Cox C. C. 611, 1877: C. C. R.; that persons harbouring and receiving a person indicted for murder but convicted of manslaughter become accessories to the manslaughter. See that title.

Forgery] It is said generally in the older books that in forgery all are principals, 2 East, P. C. 973; 'but this must, I think, be understood of forgery at common law,' which is a misdemeanour.

Treason] See that title, and *Treason Felony*.

Felonies—'principals in the second degree'] Aiding and abetting a person to commit a felony is in itself a substantive felony, whether the felony be such at common law or by statute: *Tattersal*, 1 Russ. Cri. 109, 1801.

An aider and abettor, who is present, is also called 'a principal in the second degree': *The Coalheavers' case*, 1 Lea. 64, 1768; *Midwinter & Sims*, Fost. C. C. 428, 1749. To be a principal in the second degree

he must be *present: Soares,* 2 East, P. C. 974; Russ. & Ry. 25, 1802; *Davis, ib.* 113, 1806; *Badcock, ib.* 249, 1810; and other cases of forgery in the same report; see that title. By presence is meant such contiguity as will enable the abettor to render assistance to the main design; it 'need not always be an actual immediate standing by, within sight or hearing of the fact': 4 Bl. Comm. 34. See under *Murder* and *Completion of a Crime,* in Index.

Common design—its extent] See this title under *Manslaughter* and *Murder.* 'Bare being present can never amount to an aiding and abetting': *per* Raymond C.J., *Huggins,* 1730. Of what constitutes the presence that makes a principal in the second degree, it is said: 'Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him; some to commit the fact, others to watch at proper distances and stations, to prevent a surprize, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it.' *Foster,* C. C. 350. This is sometimes called 'constructive presence,' as by Blackstone, above. Thus, where A. waits under a window, while B. steals articles in the house, which he throws through the window to A., the latter is a principal in the offence. *Owen,* 1 Moody C. C. 96, 1825. There must be a participation in the act. 'If A. and B. be fighting, and a man of full age comes by chance, and is a looker on only, and assists neither, he is not guilty of murder or homicide as principal in the second degree, but it is a misprision for which he shall be fined, unless he use means to apprehend the felon': 1 Hale, 439; *Foster,* 350. Thus 'the master assaults with malice prepense, the servant, being ignorant of the malice of his master, takes part with his master and kills the other, it is manslaughter in the servant and murder in the master.' 1 Hale, 446. And there must be *felonious* participation in the design. Where a smuggler fired a gun while the king's officers were resisting the attempt, and killed an accomplice, it was held murder in all the smugglers if he intended to kill an officer, but not if he intended to kill the accomplice. 1 East, P. C. 258; *Plummer,* Kel. 109; 12 Mod. 627, 1700.

And, generally where several persons are in company together, engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in his guilt, unless the act done was in some manner in furtherance of the common intention. Several soldiers, employed by the messenger of the secretary of state to assist in the apprehension of persons, unlawfully broke open the door of a house where the person was supposed to be. Having done so, some of the soldiers began to plunder, and stole some goods: was this felony in all? Holt C.J. said, 'That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first. Yet all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door; for this reason, because they knew not of such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands.' *Anon.,* 1 Lea. 7 *n.,* 1664; 2 Russ. Cri. 113 *n.* See also *White, &c.,* R. & R. 99, 1806; *Hawkins,* 3 C. & P. 392, 1828; *Whittaker,* 1848. Three men went into a field to shoot with one rifle, and placed a target in a tree near some houses,

eight feet from the ground. They lay down on the ground, and each fired at it in turn. Their rifles were sighted to shoot 950 yards, and would probably be deadly at a mile. A boy in an apple-tree 393 yards off was killed by one of the shots; but it was uncertain which of defendants had shot him. They were all held to be guilty of manslaughter, no proper precautions having been taken. *Salmon*, 6 Q. B. D. 79; 50 L. J. M. C. 25; 14 Cox C. C. 494, 1880: C. C. R. It is perhaps open to doubt whether if only one had fired his rifle, all would have been equally guilty. L. Coleridge C.J. said, 'It was manslaughter in him who killed the boy—the death resulted from the *action* of the three, and they are all liable,' and Stephen J. said, 'all are responsible, for they unite to fire at the spot in question.'

Indictment] Where, as is generally the case, the punishment of principals in the first and second degree may be the same, indictments lay the fact generally as being done by all. For a case of rape where a woman was convicted as principal, see *Ram, &c.*

Principal not convicted] All who are present, aiding and abetting when a felony is committed, are principals in the second degree, and may be tried before the principal in the first degree has been found guilty, 'tho in point of discretion it is good to try them both together': 2 Hale, 223; and may be convicted, though the person so charged is acquitted. *Taylor*, 1 Lea. 360, 1785; *Benson* v. *Offley*, 2 Show. 510; 3 Mod. 121, 1688; *Wallis*, 1 Salk. 334, 1703; *Towle*, R. & R. 314; 3 Price, 145; 2 Marsh. 466, 1816. Cf. *Hughes*, 1860, followed in *Goodspeed*, 6 Cr. A. R. 133; 75 J. P. 232; 55 S. J. 273; 27 T. L. R. 255, 1911, where convictions for (1) being accessory (before) to a burglary, on a count for burglary, and (2) receiving property thereby stolen, were held not inconsistent.

Before the fact—bare concealment or permission—countermand] 'An accessary *before* is he that, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony, and it is an offense greater than the *accessary* after.' 1 Hale, P. C. 615. The bare concealment of a felony to be committed will not make the person concealing it an accessory before the fact, but 'guilty only of a misprision of felony.' 2 Hawk P. C. 2, 29, 23. So words amounting to a bare permission will not make B. an accessory, 'as if A. says he will kill J. S., and B. says, "you may do your pleasure for me."' 1 Hale, 616. The procurement must be continuing; for if before the commission of the offence by the principal, the accessory countermands him, and yet the principal proceeds to the offence, he who countermanded him will not be guilty as accessory, but had he not been in time he would still have been accessory. 1 Hale, P. C. 618. If the person was *present* when the offence was committed, he is not an accessory: *Gordon*, 1789; and he should be indicted as a principal. *Brown*, 14 Cox C. C. 144, 1878. Several persons may be convicted on a joint charge as accessories before the fact (uttering the will and inciting to forge it), though there is only evidence of separate acts done by each at different times and places. (*Barber*) *Fletcher, &c.*, 1 C. & K. 442, 1844; but this decision is criticised 1 Russ. Cri. 136 *n.* To promise to accompany burglars in breaking in is enough to constitute an accessory, and merely not doing so is not a countermand: *Goodspeed*, above. But lending a man a jemmy, with the knowledge that it was intended for burglary, with-

out knowing for what burglary (as the special verdict was), does not constitute the lender an accessory if the instrument is so used: *Lomas,* 9 Cr. A. R. 220; 23 Cox C. C. 765; 78 J. P. 152; 30 T. L. R. 125, 1913: c. q.; the C. C. A. expressed no opinion on the argument that 'assistance given with the knowledge that a crime is to be committed' makes an accessory. See under *Misprision of Felony.*

Before the fact—by intervention of a third person] A person may render himself an accessory by the intervention of a third person, without any direct communication between himself and the principal. Thus if A. bid his servant hire somebody to murder B., and furnish him with money for that purpose, and the servant hires C., a person whom A. never saw or heard of, who commits the murder, A. is accessory. 'It is a principle in law which can never be controverted that he who procureth a felony to be done is a felon.' If present he is a principal, if absent an accessory before the fact.' Fost. C. C. 125; see *Macdaniel, ib.* 121, cf. 130 and 131, 1755: this is not the case at 1 Lea. 44; 4 Hawk. P. C. 2, 29, 1, 11; *Cooper,* 1833.

Before the fact—degree of incitement] 'With respect to the measure of incitement and force of persuasion used, no rule is laid down; that it was sufficient to effectuate the evil purpose is proved by the result. In principle it seems that any degree of direct incitement with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessory; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed although the incitement had never taken place.' 2 Stark. Ev. 9, 3rd ed. Where a man furnished a woman with corrosive sublimate under strong pressure from her, which she took with intent to procure abortion, but he did not instigate her to take it, and his conduct was consistent with his having hoped that she would change her mind, it was held that, even if she was *felo de se,* he was not a principal nor an accessory in murder. *Fretwell,* L. & C. 161; 31 L. J. M. C. 145; 9 Cox C. C. 152, 1862. So a mere holder of prize-fight stakes, who was not present, but afterwards paid them over to the winner, was held not an accessory *after* to manslaughter of the man who was killed. *Taylor,* L. R. 2 C. C. R. 147; 44 L. J. M. C. 67; 13 Cox C. C. 68, 1875; and as, though he knew that there was to be a fight, he could not be accessory *before,* he was not guilty of any crime.

Encouragement by detectives, &c.—'traps' for criminals] See *Innocent Agent* in Index and *Bannen; Holden; O'Callaghan;* and *Titley.* Cf. *Inducement.*

Before the fact—felonies—principal varying from orders given him] The following rules are laid down by Sir Michael Foster. 'If the principal totally and substantially varieth, if being solicited to commit a felony of one kind, *he wilfully and knowingly* committeth a felony of another, *he* will stand single in that offence, and the person soliciting will not be involved in his guilt. . . . But if the principal in substance complieth with the temptation, varying only in circumstances of time, or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessary before the fact, if present, a principal. . . . A. commandeth B. to murder

C. by poison; B. doth it by a sword or other weapon, or by any other means; A. is accessary to this murder; for the murder of C. was the object principally in his contemplation, and that is effected.'

Probable consequence] 'So where the principal goeth beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised,* the person giving such orders or advice will be an accessary to that felony. A. upon some affront given by B. ordereth his servant to waylay him and give him a sound beating: the servant doth so, and B. dieth of this beating. A. is accessary to this murder. . . . A. soliciteth B. to burn the house of C.; he doth it, and the flames taking hold of the house of D., that likewise is burnt. A. is an accessary to this' felony. The principle in all these cases is, that though the event might be beyond the original intention of the accessory, yet, as in the ordinary course of things, that event was the probable consequence of what was done under his influence, and at his instigation, he is in law answerable. *Foster,* 369, 370; see also 1 Hale, P. C. 617 (who traces this doctrine to 1330); 4 Hawk. P. C. 2, 29, 18. Cf. under *Arson.*

But whether, where the principal *by mistake* commits a different crime, the party commanding or advising him shall stand excused, has been the subject of much discussion. It is said by Hale, *ib.* that if A. commands B. to kill C., and B. by mistake kills D., or else in striking at C. kills D., but misses C., A. is not accessory to the murder of D., because it differs in the person: citing 3 Inst. 51 and *Saunders,* Plow. Com. 473, 1573; see *Murder;* the facts of which case were: *Saunders,* to destroy his wife, by the advice of one Archer, mixed poison in a roasted apple and gave it to her to eat; she ate a small part of it, and gave the remainder to their child. Saunders making only a faint attempt to save the child, whom he loved and would not have destroyed, stood by and saw it eat the poison, of which it soon afterwards died. It was held that though Saunders was clearly guilty of the murder, yet Archer was not accessory to it.

On this point, Foster J., at 370, says: B. is an utter stranger to the person of C., and A. therefore takes upon himself to describe him by his stature, dress, &c., and acquaints B. when and where he may probably be met with. B. is punctual at the time and place, and D., a person in the opinion of B. answering the description, unhappily coming by, is murdered under a strong belief on the part of B. that he is the man marked out for destruction. Who is answerable? 'B. undoubtedly is: the malice on his part *egreditur personam.* And may not the same be said on the part of A.? The pit which he, with a murderous intention, dug for C., D., through his guilt, fell into and perished. For B., not knowing the person of C., had no other guide to lead him to his prey than the description A. gave of him. B. in following this guide fell into a mistake, which it is great odds any man in his circumstances might have fallen into. I therefore, as at present advised, conceive that A. was answerable for the consequences of the flagitious orders he gave; since that consequence appeareth in the ordinary course of things to have been highly probable.' Foster J. then proposes the following *criteria* of the cases. 'Did the principal commit the felony he standeth charged with, under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit

a felony of another kind or upon a different subject?' *Ib.* 372. See also 4 Hawk. P. C. 2, 29, 22.

Felony—before the fact—statute] By 24-5 V. 94, 1, 'Whosoever shall become an Accessory before the Fact to any Felony, whether the same be a Felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal Felon.' By s. 2, 'Whosoever shall counsel, procure or command any other Person to commit any Felony, whether the same be a Felony at Common Law, or by virtue of any Act passed or to be passed, shall be guilty of Felony, and may be indicted and convicted, either as an Accessory before the Fact to the principal Felony, together with the principal Felon, or after the conviction of the principal Felon, or may be indicted and convicted of a substantive Felony, whether the principal Felon shall or shall not have been previously convicted, or shall or shall not be amenable to Justice, and may thereupon be punished in the same Manner as an Accessory before the Fact to the same Felony, if convicted as an Accessory, may be punished.'

Soliciting and inciting a person to commit a felony is not a substantive felony under this s., unless the felony is actually committed, but only a misdemeanour, and it is doubtful whether soliciting and inciting is equivalent to 'counselling and procuring.' *Gregory,* L. R. 1 C. C. R. 77; 10 Cox C. C. 459; 36 L. J. M. C. 60, 1867.

It was decided on a rpd. s., in the same terms as s. 1, above, that an accessory *before,* so charged, may be convicted even though the principal be acquitted. *Hughes,* Bell C. C. 242; 29 L. J. M. C. 71; 8 Cox C. C. 278, 1860. The two first counts charged A. and B. with stealing, and the third, B. with receiving. No evidence was offered against A., who was acquitted and called as a witness. The evidence went to show that B. was an accessory *before,* and the jury found a general verdict of guilty. It was held that the conviction was good. Cf. *Taylor,* 1785.

To an indictment for being accessory before, an acquittal as principal is no bar. *Birchenough,* 7 C. & P. 575, 1836.

Felony—after the fact] An accessory after the fact is 'where a person knowing the felony to be committed by another receives, relieves, comforts, or assists the felon': 1 Hale P. C. 618; whether he be a principal, or an accessory before the fact. 4 Hawk. 2, 29, 1; 3 P. Wms. 475. But a *feme covert* does not become an accessory 'for the receipt of her husband for she ought not to discover him.' This, however, is the only relationship which will excuse such an act. The husband is liable for receiving the wife. 1 Hale, P. C. 621. So if a master receives his servant, or a servant his master, or one brother another, they are accessories, in the same manner as a stranger would be. Hawk. P. C. 2, 29, 34. If a husband and wife knowingly receive a felon, it shall be deemed to be the act of the husband only. 1 Hale, P. C. 621. But if the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband. *Ib.*

B. Levy, 1912, 1 K. B. 158; 81 L. J. K. B. 264; 22 Cox C. C. 702; 76 J. P. 123; 28 T. L. R. 93; 106 L. T. 192; 7 Cr. A. R. 61, was convicted of 'feloniously receiving, harbouring and maintaining' a coiner (convicted), on whose arrest she had removed a number of

articles from his workshop in order to prevent his conviction; on a case stated the C. C. A. confirmed the conviction as an accessory, citing: 'Generally, any assistance whatever given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape: or where one harbours and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him, and much more, where one harbours in his house and openly protects such a felon, by reason whereof the pursuers dare not take him.' Hawk. P. C. 2, 29, 26. So if one takes money of such a person to suffer him to escape. *Year Book,* 9 Hen. iv. p. 1 (3). See *Lee,* 6 C. & P. 536, 1834. So a man who employs another person to harbour the principal may be convicted as an accessory after, although he himself did no act to relieve or assist the principal. *Jarvis,* 1837. So it appears to be settled that whoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is guilty as accessory. 4 Hawk. P. C. 2, 29, 27; cf. s. 29. In the same manner conveying instruments to a felon, to enable him to break gaol, or to bribe the gaoler to let him escape, make one an accessory. 'But to relieve a felon in gaol with clothes or other necessaries is no offence, for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law.' 4 Bl. Com. 38. It is not enough to prove possession of money, the proceeds of a theft: *Chapple,* 9 C. & P. 355, 1840.

Aid must be personal] Merely suffering the principal to escape will not make the party an accessory after, for it amounts at most to a mere omission. 1 Hale, 619. See, generally, *Prison Breach.* So if a person speak or write, in order to obtain a felon's pardon or deliverance: 4 Year Books, Liber Ass. (E. 3), 26th year, 129, p. 47; or an attorney advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly: 3 Inst. c. 64, 139; 1 Hale, 620 (though it is a misdemeanour punishable by fine and imprisonment); or even if the witness is intimidated: *Chapple,* above; or even if the person injured agree for money not to give evidence against the felon: *Francis Moore's Rep.* 8 (29); or if one know of the felony, and do not discover it 'in convenient time': 1 Hale, 371, 618; none of these acts will make a person an accessory after the fact, though some are misprisions of felony.

Felony must be known] 'The felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not' [at common law] 'make him accessory to the homicide, for till death ensues there is no felony committed.' 4 Bl. Com. 38.

'For though the offender be for special reasons adjudged to some purposes guilty of homicide *ab initio,* yet he shall not be so esteemed in respect of any others but himself, for fictions of law shall never be carried farther than the reasons which introduce them necessarily require.' Hawk. P. C. 2, 29, 35.

In order to render a man guilty as accessory, he must have notice,

either express or implied, of the principal having committed a felony. 4 Hawk. P. C. 2, 29, 32.

Felony—after the fact—statutes] By 24-5 V. 94, 3, 'Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.' The 'substantive' felony of being accessory after the fact must be charged; it cannot be found on another indictment: *Fallon,* 32 L. J. M. C. 66; 1 L. & C. 217; 9 Cox C. C. 242, 1862: C. C. R.; nor such a misdemeanour: *Bubb.* Where a first count charges as principal, the second as accessory after, to the *same* felony, the prosecution must elect: *Brannon,* 14 Cox C. C. 394, 1880.

By 24-5 V. 94, 4, 'Every accessory after the fact to any felony (except where it is otherwise specially provided), whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable, at the discretion of the Court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour; and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognisances and to find sureties, both or either, for keeping the peace, in addition to such punishment: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.' Form 2 under the Inds. A. is for accessory after the fact to murder.

By s. 5, 'As to accessories generally: If any principal Offender shall be in anywise convicted of any Felony, it shall be lawful to proceed against any Accessory either before or after the Fact, in the same Manner as if such principal Felon had been attainted thereof, notwithstanding such principal Felon shall die or be pardoned, or otherwise delivered before Attainder; and every such Accessory shall, upon Conviction, suffer the same Punishment as he would have suffered if the Principal had been attainted.' S. 6: 'Any Number of Accessories at different Times to any Felony, and any Number of Receivers at different Times of Property stolen at One Time, may be charged with substantive Felonies in the same Indictment, and may be tried together, notwithstanding the principal Felon shall not be included in the same Indictment, or shall not be in custody or amenable to Justice.' Cf. s. 4 of the Indictments A.

Evidence] The proof of the principal's conviction 'is no evidence' of the accessory's guilt: *Phips.* 407. He may 'contest the guilt of his principal whether indicted with him or not, and avail himself of every matter of fact and every point of law tending to *his* acquittal.' *Foster,* C. C. 365; see *Turner,* 1832.

Larceny A. 1861] S. 98: 'In case of every felony punishable under this Act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the

first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act . . . shall, on conviction, be liable . . .' to imprisonment for two years with or without hrad labour; 'and every person who shall aid, abet, counsel or procure the commission of any misdemeanour punishable under this Act shall be liable to be indicted and punished as a principal offender.'

Larceny A. 1916] S. 35 reproduces the last sentence almost verbally, but substitutes for 'misdemeanour' there—'an offence punishable under this [1916] Act.'

Misdemeanours] 'In misdemeanours all parties are principals whether present or not': *Moland.* Aiding, &c. a misdemeanour is itself one: above. But it has always been the custom to indict principals in the second degree in misdemeanours, the same way as principals in the first degree. By 24-5 V. 94, 8, 'As to abettors in misdemeanours. Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanour, whether the same be a misdemeanour at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender.' In *Bubb*, L. Alverstone and Darling J. remarked that this s. could not cover an accessory *after*, the latter adding that it did not say that such a person could not be indicted at all. The same provision is repeated in the other 'Consolidation' Acts (*e.g.* s. 67, below, uses almost these words). See *De Marny.* On an indictment for aiding, &c. a felony, a verdict of aiding a misdemeanour may be found: *Waudby;* or of aiding the attempt: *Hapgood, &c.* For aiding, &c. a prize-fight, see *Coney,* 8 Q. B. D. 534; 51 L. J. M. C. 66; 15 Cox C. C. 46, 1882: C. C. R.

Punishment—before and after fact] By 24-5 V. 100, 67: 'In the case of every felony punishable under this Act, every principal in the second degree and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour. . . .' The felonies so punishable are: homicide, attempt to murder, sending letter, &c. threatening to murder, impeding, &c. any one endeavouring to escape from shipwreck, shooting or attempting to shoot or wound with intent to do grievous bodily harm, attempting to choke, &c. with intent to commit an indictable offence, using chloroform, &c. with that intent, administering poison, &c. so as to endanger life or do grievous bodily harm, causing bodily injury by gunpowder or making it explode or sending it to any one or putting it near a building with that intent, endangering safety on a railway in various ways, rape, abduction of woman or girl, forcible abduction with intent to marry, child-stealing, bigamy, attempt to procure abortion, unnatural offences.

Venue and jurisdiction] By 24-5 V. 94, 7, 'Where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory, either before or after the fact, to any such felony, may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act, by reason whereof such person shall have become acces-

sory, shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony, may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without; provided that no person who shall be once duly tried either as an accessory before or after the fact or for a substantive felony hereinbefore contained shall be liable to be afterwards prosecuted for the same offence.'

So by 46-7 V. 3, s. 5, any aider, abettor, or accessory of any crime under the A. is to be tried, &c. as if charged with that felony.

Abetting suicide] See that title under *Murder*.

Admiralty] See that title.

AGENTS, BANKERS, FACTORS, DIRECTORS, TRUSTEES, &c.— FRAUDS COMMITTED BY.

See also *Trustees*.

Fraud] 'It is impossible to lay down a definition completely comprehending fraud, and no rule can, from the very nature of the subject, be invariable. Fraud is infinite.' *Wharton*, Law Lex. 11th ed., where the meaning given is 'deceit in defrauding or endeavouring to defraud another of his right by artful device contrary to the rule of honesty.' Perhaps Sweet's is a more strictly legal definition: 'Fraud is used in many senses, but the point common to all of them is pecuniary advantage gained by unfair means.' Law Dict.

Conversion] By 6-7 G. 5, 50 (the Larceny A. 1916), 20: '(1) Every person who (i) being entrusted either solely or jointly with any other person with any power of attorney for the sale or transfer of any property, fraudulently sells, transfers or otherwise converts the property or any part thereof to his own use or benefit or the use or benefit of any person other than the person by whom he was so entrusted; or (ii) being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company; or (iii) being authorised to receive money to arise from the sale of any annuities or securities purchased or transferred under the provisions of Part V. of the Municipal Corporations Act, 1882, or under any Act repealed by that Act, or under the Municipal Corporation Mortgages, &c. Act, 1860, or any dividends thereon or any other such money as is referred to in the said Acts, appropriates the same otherwise than as directed by the said Acts or by the Local Government Board or the Treasury (as the case may be) in pursuance thereof; or (iv) (*a*) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or (*b*) having either solely or jointly with any other person, received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanour, and on conviction thereof be liable to penal servitude for any term not exceeding seven years. (2) Nothing in paragraph (iv) of sub-section (1) of this section shall apply to or affect any trustee under any express trust created by a deed or will or any mortgagee of any property, real or personal, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage.'

For practical purposes, Stephen J. (who admits the reluctance to define fraud) may be cited: 'there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur

in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. . . . A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud': 2 Hist. Cr. L. 121.

For a definition by Buckley J., see *In re London & Globe, &c.*

Sub-s. (iv) (*a*) was passed [in 1901] expressly to get rid of the distinction between a fraudulent intent at the time of *receiving* and that at the time of appropriation: *Greenwood,* 5 Cr. A. R. 114, 1910.

A debt-collector, paid by commission, is within sub-s. 1 (iv) (*b*): *Lord,* 69 J. P. 467, 1905: C. C. R. The sub-s. is not limited to cases where there is a contract between the owner and defendant, *e.g.* of master and servant: *Messer,* 1913, 2 K. B. 421; 82 L. J. K. B. 913; 23 Cox C. C. 59; 76 J. P. 124; 7 Cr. A. R. 49, where a taxi-cab driver who agreed to hand over 75 per cent. of his takings to the cab-owner, was convicted for not doing so; the s. applies whether there is a contract or not.

No trustee comes both under this s. and s. 21: they are mutually exclusive. A trustee under an express trust not created by deed or will, but by some instrument in writing, may come within this s.: *G. Davies,* 1913, 2 K. B. 573; 82 L. J. K. B. 47; 8 Cr. A. R. 179; 23 Cox C. C. 351; 77 J. P. 279; 29 T. L. R. 300, on the originals of these ss.

The *fiat* required under s. 21 is not required under this. But a man is not bound to keep money honestly deposited with him as security for good conduct; if he does not repay it when due, it is only a civil debt: *per* Bosanquet C.Sjt., *Hotine,* 68 J. P. 143, 1904, considered in *Noel,* 1914.

Where the property has been 'received' by or 'entrusted' to appellant as agent and managing director of a company, the interposition of the machinery of a limited company will not protect him if, in fact, he has had control of the property: *Grubb,* 1915, 2 K. B. 683; 84 L. J. K. B. 1744; 25 Cox C. C. 77; 79 J. P. 430; 31 T. L. R. 439; 11 Cr. A. R. 153 (five judges), where customers sent money to invest to a company which consisted in fact only of appellant (whom they did not know), and the money was paid into the company's bank, but the customers got no shares, &c. As appellant was not formally appointed, the case was similar to *Lawson,* 1905.

A 'purpose' within sub-s. (iv) (*a*) may be the promotion of a limited liability company, when defendant has received money therefor (though on a mere contract to sell shares the vendor would not be within the sub-s. if he only failed to deliver them): *Lawrens,* 11 Cr. A. R. 215, 1915.

Factors, &c. fraudulently obtaining advances] By s. 22: 'Every person who, being a factor or agent entrusted, either solely or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods contrary to or without the authority of his principal in that behalf for his own use or benefit, or the use or benefit of any person other than the person

by whom he was so entrusted, and in violation of good faith (i) consigns, deposits, transfers or delivers any goods or document of title so entrusted to him, as and by way of a pledge, lien, or security, for any money or valuable security borrowed or received or intended to be borrowed or received by him; or (ii) accepts any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to penal servitude for any term not exceeding seven years: Provided that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal and accepted by such factor or agent.'

Definitions] (2) (a) 'Any factor or agent entrusted as aforesaid, and in possession of any document of title to goods, shall be deemed to have been entrusted with the possession of the goods represented by such document of title; (b) Every contract pledging or given a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates; (c) Any such factor or agent as aforesaid shall be deemed to be in possession of such goods or documents whether the same be in his actual custody or are held by any other person subject to his control, or for him, or on his behalf; (d) Where any loan or advance is made in good faith to any factor or agent entrusted with and in possession of any such goods or document of title on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title, and such goods or documents of title are actually received by the person making such loan or advance without notice that such factor or agent was not authorised to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or documents of title and within the meaning of this section, though such goods or documents of title are not actually received by the person making such loan or advance till the period subsequent thereto; (e) Any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of this section; (f) Any contract or agreement, whether made direct with such factor or agent, as aforesaid, or with any person on his behalf, shall be deemed to be a contract or agreement with such factor or agent; (g) Any factor or agent entrusted as aforesaid and in possession of any goods or document of title to goods shall be deemed, for the purposes of this section, to have been entrusted therewith by the owner thereof, unless the contrary be shown in evidence.'

The prosecutors agreed by writing with defendant that he should draw bills and they should accept them, and that he should endeavour to get them discounted, and if he succeeded should pay them part of the proceeds, but that if he failed he should return the bills to them. The prosecutors accepted two bills without any drawer's name, which they handed to him; he filled in his name as drawer and discounted them and kept the proceeds. It was held that these acceptances were 'securities for the payment of money,' the expression in a rpd.' s. Ss. 20 and 22 are subject to s. 46 (1) (3) of the A., but *not* to s. 45.

Bowerman, 1891, 1 Q. B. 112; 60 L. J. M. C. 13; 17 Cox C. C. 151: C. C. R.

Terms] For 'property,' see *Larceny;* and for 'valuable security,' *Embezzlement* and *Document of Title.*

'*Compulsory process*'] By 24-5 V. 96, 85: 'Nothing in any of the last ten preceding sections of this Act [now represented by the ss. above and other ss.; see *Trustees*] contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency, and no person shall be liable to be convicted of any of the misdemeanours in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved. . . .'

Evidence] Ss. 20, 21, 22 of the 1916 A. are subject to s. 43 (3) thereof, which in words and effect is almost identical with s. 166 of the Bankruptcy A. 1914. When a witness voluntarily gives evidence and makes disclosures in cross-examination without making any objection, and at the order of the judge produces a pass-book which is used against him, he is not protected by this s.: *Noel,* 1914, 3 K. B. 848; 84 L. J. K. B. 142; 112 L. T. 47; 10 Cr. A. R. 255.

Older cases under rpd. ss. were: *Skeen,* 1 Bell C. C. 97; 28 L. J. M. C. 91; 8 Cox C. C. 143, 1859: fifteen judges; *Scott,* 1856; *Robinson,* L. R. 1 C. C. R. 80; 36 L. J. M. C. 78, 1867; *Widdop.*

By the word 'first' inserted in s. 85, above, all former doubt is removed. *Greaves's* Crim. Stat. p. 92, 1861. See *Gunnell,* 16 Cox C. C. 154; 55 L. T. 786; 57 J. P. 279, 1886: C. C. R.: c. q., where 'disclosure' is analysed; mere rumour that defendant has previously 'disclosed' is not enough to deprive him of protection.

'*Banker, merchant, broker, attorney, or other agent*'] On rpd. s. 75 of 24-5 V. 96, the words 'other agent' meant one 'whose business or profession it is to receive money, securities, or chattels for safe custody, or other special purpose,' and did not include persons 'who carry on no such occupation, but who may happen from time to time to undertake some fiduciary position, whether for money or otherwise.' *Portugal,* 16 Q. B. D. 487; 55 L. J. Q. B. 567, 1885; approved *Kane,* 19 Cox C. C. 658, 1900: C. C. R., *i.e.* 'agent' must be *eiusdem generis* as 'banker . . . &c.' 'And it seems that the person in s.' 20 (1) (i), above, almost identical with the rpd. s. governing those cases, 'must be an agent *eiusdem generis* with a factor': 2 Russ. Cri. 1409 *n.*

'*Safe custody*'] Money entrusted by a client to a solicitor to invest (apparently whenever he could) is not entrusted 'for safe custody' unless he had to hold the specific notes or cash entrusted until investment, or there were any specific directions about the custody of them. *Newman,* 8 Q. B. D. 706; 51 L. J. M. C. 87, 1882: C. C. R., following *Cooper,* L. R. 2 C. C. R. 123; 43 L. J. M. C. 89, 1874, where a solicitor

misappropriated a client's money which he had properly obtained for him as a loan on mortgage. But otherwise, where a solicitor, already in possession of the money of his client, was instructed to keep it by him until it could be invested. *Fullagar*, 14 Cox C. C. 370; 41 L. T. N. S. 448, 1879: C. C. R.

Jurisdiction] Q. S. cannot try an indictment under ss. 20—22 of 6-7 G. 5, 50, by s. 38 thereof.

Agent—corrupt transactions] See *Bribery*.

AGGRAVATED OFENCES

are, properly, graver forms of crimes for which more serious punishment is provided; see Index and under *Larceny*. But the term is sometimes applied to a second or later conviction when a statute enacts a severer or another kind of penalty.

ANGLING.

See under *Fish*.

ANIMALS, LARCENY OF (NOT CATTLE).

This subject is well summarised 1 Halsbury, 365: 'There is no absolute property in wild animals while living, and they are not goods or chattels (*Case of Swans,* 1592, 7 Co. Rep. 16 *a*). There may, however, be what is known as a qualified property in them, either (1) *ratione impotentiæ et loci,* (2) *ratione soli* and *ratione privilegii,* or (3) *per industriam,* which may be more properly described as an exclusive right to reduce them into possession': 'a man hath a mere property in some things that are tame by nature and yet in respect of the baseness of their nature' larceny cannot be committed, 'as of mastifs, bloodhounds, or of other kind, dogs or of cats, nor of some things that be wild by nature and made tame, as bears, foxes, apes, monkies, pole-cats, ferrets and the like, and yet no manner of felony can be committed on them in respect of their wild and savage nature,' and so 'of their whelps or calves or young, for it is a rule in law that if no felony can be committed of anything that is *ferum natura* and of age being reclaimed or made tame, that no felony can be of the young in the nest kennell or den': 3 Inst. 109.

I. Tame or *Domitæ Naturæ.*

Common law] See *Cattle, Dogs* and *Fish.*

There is no definition of the two classes, but *Stroud,* Judic. Dict. says: 'An animal (whether quadruped or not . . . and not absolutely *ferœ naturœ*) which either by habit or special training lives in association with man is a 'domestic animal.''

'Of domestic animals, as sheep, oxen, horses, &c., or of domestic fowls, as hens, ducks, geese, &c., and of their eggs, larciny may be committed at common law, for they are under propriety, and serve for food.' 1 Hale, P. C. 511; so Hawk. P. C. 1, 33 (1st part), 43. So 'of the eggs of such as be *domitœ natura* . . . turkies, pehens': 3 Inst. 109.

And 'it being felony to steal the animals themselves, it is also felony to steal the product of any of them, though taken from the living animals. Thus milking cows at pasture, and stealing the milk, was holden felony by all the judges.' *Anon.,* 2 East, P. C. 617, 1769. So pulling the wool from a sheep's back. *Martin, ib.* 618; 1 Lea. 171, 1777. 'The stealing a stock of bees seems to be admitted to be felony.' *Tibbs* v. *Smith,* Thos. Raym. 33, 1662; 2 East, P. C. 607.

Tame, *i.e.* reclaimed, pigeons, although unconfined, with free access at their pleasure to the open air, are the subject of larceny. L. Campbell C.J. said: 'We all think that tame pigeons may be the subject of larceny, although they have the opportunity of getting out and enjoying themselves in the open air.' *Cheafor,* 2 Den. C. C. 361; 5 Cox C. C. 367, 1851. When pigeons were stolen from ordinary cotes outside a house, it seems to have been necessary to prove that they always roosted there at night, and Mr. Greaves cites Bracton, b. II. s. 1 fol'g., that they and other animals must have the *animus revertendi* to be larcenable: *Brooks,* 4 C. & P. 131, 1829. See *Pigeons.* 'It seems

that it is not theft to take and carry away an animal which, though really tame, is wandering at a distance from its habitation as if it were wild, and when it is not known to be tame by the person who takes and carries it away': *Stephen,* Dig. Cr. L., Art. 333, citing Hawk. 1, 33, 40, which hardly goes so far. But East, 2 P. C. 607, says, 'if swans range out of the royalty it is no felony to take them though marked, because it cannot be known that they belong to any person.' So of tame pheasants. *Head,* 1 F. & F. 350, 1857. So of partridges three weeks old, and able to fly a little, reared in a coop since removed, so that the hen and they wandered freely about the owner's premises, but still returning to sleep under the hen's wings, and unable to escape: *Shickle,* L. R. 1 C. C. R. 158; 11 Cox C. C. 189; 38 L. J. M. C. 21, 1868.

Tame pheasants] See *Garnham,* 1861.

Eggs] Pheasants' eggs, if reduced into possession (which ought to be distinctly averred), clearly may be the subject of larceny: *Stride,* 1908, 1 K. B. 617; 77 L. J. K. B. 490; 72 J. P. 93; 21 Cox C. C. 563; 24 T. L. R. 243: C. C. R.

Of the eggs of hawks or swans (not even, apparently) though reclaimed, larceny cannot be committed, the reason of which is said to be, that a less punishment, namely, fine and imprisonment, is appointed by statute for that offence: 1 Hawk. 1, 33 (pt. 1), 42; 2 East, P. C. 607; 2 Russ. Cri. 1276. *A fortiori* of the eggs of pheasants and partridges and other birds *not* reclaimed; as the taking of the parents is not felony.

The indictment should state the species of eggs, so that it may appear that they are the subject of larceny. *Cox,* 1 C. & K. 494, 1844; doubted in *Gallears,* 1 Den. C. C. R. 501; 19 L. J. M. C. 13; 3 Cox C. C. 572, 1849, where 'one ham' was held a sufficient description and larcenable.

Captive] If merchandise, they are *actionable: Grymes* v. *Shack* (musk-cats, monkies, parrots), Cro. Ja. 262, 1611; but only larcenable as here stated.

Tamed or reclaimed] See first passage from *Coke,* above. 'On the other side, of some things that be *ferœ natura,* being reclaimed, felony may be committed in respect of their noble and generous nature and courage, serving *ob vitœ solatium* of princes and of noble and generous persons to make them fitter for great employments: As all kinds of faulcons and other hawks, if the party that steals them know they be reclaimed': 3 Inst. 109. This knowledge 'only amounts to a strict proof of the *animus furandi* . . . it is a question of evidence in each case': 1 Halsbury, 371. 'But if such as be wild that serve for the food of man be made tame as deer, wild bore, conies, cranes, pheasant, partridge or the like, larceny may be committed of them, so as he that stealeth them know that they be tame. But the deer, &c. being wild, yet when he is killed larceny may be committed of the flesh, and so of phesant, partridge or the like, and so note, a diversity between such beasts as be *ferœ natura,* and, being tame, serve for pleasure only, and such as be made tame, and serve for food, &c.' 3 Inst. 110.

Where animals *ferœ natura* 'are dead, reclaimed and known to be so, or confined, and may serve for food, it is' larceny 'even at common law' to take them. Thus 'of deer so inclosed in a park . . . fish in

a trunk or not, or, as it should seem, in any other inclosed place which is private property, and where they may be taken at the pleasure of the owner at any time; pheasants or partridges in a mew; young pidgeons, or old ones when shut up, young hawks in a nest, or even old ones, or falcons reclaimed, and known by the party to be so, larceny may be committed. The same as to peacocks.' 2 East, P. C. 607; pigeons shut up in their boxes every night: *per* Parke B., *Luke*, 1839, 7th edn. of this work: 'determined on the ground that the pigeons were reclaimed and not on the ground that they were shut up in their boxes at the time they were taken': 2 Russ. Cri. 1276 *r.*; young pheasants hatched by a hen in a coop in a field at a distance from the house are the subjects of larceny. *Cory*, 10 Cox C. C. 23, 1864; cf. 1 Hale, P. C. 511.

II. Wild—Feræ Natura.

a. *Alive.*

'Larceny cannot be committed of things that are *feræ naturæ*, unreclaimed, and *nullius in bonis*, as of deer or conies, tho in a park or warren, fish in a river or pond, wild fowl, wild swans, pheasants' (Hale, *ib.*), 'although any person may have an exclusive right *ratione loci aut privilegii*, to take them if he can in those places.' 2 East, P. C. 607; cf. 4 Bl. Com. 235, 6: all founded on 3 Inst. 109-10. So of flying swans, though marked, if they 'range abroad out of the precincts or royalty of the owner, it is not felony to kill and take them, because they cannot be known to belong to any.' Hale, *ib.* So of rooks in a rookery. See *Hannam* v. *Mockett*, 2 B. & C. 934; 4 D. & R. 518, 1824.

Ferrets though tame and saleable are not larcenable at common law: *Searing*, R. & R. 350, 1818, but are animals 'ordinarily kept in a state of confinement' within 24-5 V. 96, 21, 22: *per* Darling J., incidentally in *Sherriff*, 1903. 'Animals of a wild nature which are not fit for food are not the subject of larciny, although they be reduced into possession or reclaimed. This rule includes bears, foxes, apes, monkeys, polecats, cats and dogs, ferrets, thrushes, singing birds in general, parrots, squirrels, and animals kept merely for pleasure.' 1st Rep. Commissioners on Crim. Law, 1834, p. 22. The young of such animals are within this rule. *Ib.* p. 23.

Triable at Q. S.

b. *Dead.*

See 3 Inst. 110, above, where n.b. Coke's distinction between *tamed* animals fit for food *or* only for pleasure.

Hares, &c.] Rabbits or game on being killed by a wrong-doer or trespasser become the property of the owner of the soil: *Blades* v. *Higgs*, 11 H. L. C. 621; 34 L. J. C. P. 286, 1865; but see *Townley*, L. R. 1 C. C. R. 315; 40 L. J. M. C. 144; 12 Cox C. C. 59, 1870, where some poachers killed rabbits, and deposited them in bags, &c., in a ditch on the land where they had killed them. Defendant, one of them, afterwards returned and carried the rabbits away. It was taken as a fact that the poachers had no intention of abandoning the rabbits, but only deposited them for convenience: c. q.: because the 'taking must not be a continuous act with the severance; there must be a decided severance between . . . the killing and the . . . tak-

ing'; if there is an interval the goods may be said to be in the true owner's possession, which they are not if immediately taken: *per* Bramwell, B., for 1 Hale P. C. 510, which created a difficulty, dealt with here by Blackburn J., see *Fixtures*. In *Petch,* 14 Cox C. C. 116, 1878: C. C. R., the wrong-doer took the rabbits trapped to another part of the same land, instead of to the head keeper, as was his duty, and placed them in a bag, with the intention of appropriating and carrying them away; a keeper observing him, went and nicked some of them to identify them. There was no abandonment of possession on defendant's part, and he ultimately took them away; and the act of the keeper was not for the purpose of reducing them into the possession of the master. It was held that he could not be convicted of larceny, following *Read,* 1878: embezzlement of wild rabbits. Cf. *Roe,* 1870.

Indictment] An indictment for stealing a dead animal should state that it was dead, otherwise it will be intended that it was stolen alive. *Edwards,* R. & R. 497, 1823; cf. *Roe,* 11 Cox C. C. 554, 1870: C. C. R., where a dead partridge was alleged, but the proof was that defendant picked it up alive but dying: c. q., as it had never been reduced into possession. So an indictment for stealing two turkeys was held not to be supported by proof of stealing two dead turkeys. *Halloway,* 1 C. & P. 128, 1823. So on an indictment for stealing a pheasant, value 40*s*., of the goods, &c. of H. S., all the judges, after much debate, agreed that the conviction was bad; for in larceny of animals *feræ natura,* the indictment must show that they were either 'dead, tame, or confined, otherwise they must be presumed to be in their original state, and it is not sufficient to add 'of the goods and chattels' of such a one.' *Rough,* 2 East, P. C. 607, 1779. But where the indictment was for receiving a stolen lamb, and it appeared that it had been killed before it was received, the judges held a conviction good, on the ground that it was immaterial to the offence whether the lamb was alive or dead, his offence and the punishment for it being in both cases the same, and 'lamb' being the right name in either case.' *Puckering,* 1 Moo. C. C. 242; 1 Lew. C. C. 302, 1829.

Ownership] This may be illegal, *e.g.* there may be no licence to possess live pheasants. but there may be enough legal possession to support the indictment: *Jones,* 3 Burn's Just. (ed. 1845) 1102, 1809.

Eggs] See *Cox,* 1844, above. 'If any person upon the ground of any other doe take the egs of any faulcon, goshawk, lanner or swan out of the nest, this is not felony, but shall be' punished. *Coke, ib.*

Statute] By s. 1 (3) of the Larceny A. 1916: 'Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen: Provided that (b) the carcase of a creature wild by nature and not reduced into possession while living shall not be capable of being stolen by the person who has killed such creature, unless after killing it he has abandoned possession of the carcase.' See *Cattle.*

APPRENTICES, OFFENCES AGAINST.

See under *Servants.*

ARMS, UNLAWFULLY MAKING, SELLING, &c.

This misdemeanour at common law is committed when the purpose for which the arms are to be used is illegal, *e.g.* at a seditious public meeting to prevent its being lawfully dispersed: *J. Knowles; J. Morris*, 1 St. Tr. N. S. 497, 521, 1820: Parliamentary Reform. See *Unlawful Assembly.*

ARMY, OFFENCES IN.

See *Mutiny.*

ARREST, ILLEGAL.

This may be a form of assault and battery, which see. 'Arrest consists of the actual seizure or touching of a person's body with a view to his detention': 9 Halsbury, 296; mere words without touch are not an arrest unless the arrested 'submits . . . and goes with the arresting officer': *ib.* 'An infant under seven cannot, it seems, be arrested': *ib.*, citing *Marsh* v. *Loader*, 14 C. B. N. S. 535, 1863, where an infant recovered damages for arrest for felony.

ARSENAL, BURNING OF.

See *Arson.*

ARSON.

At common law] Arson, which is a felony at common law, is defined by Coke to be the malicious and voluntary burning the house of another, by night or by day. 3 Inst. 66; 1 Hale, P. C. 566.

The *setting fire* to the house of another, maliciously to burn it, is not at common law a felony, if either 'by some accident or timely prevention the fire takes not.' 1 Hale, P. C. 568.

Setting fire to ships of war, &c.] By 12 G. 3, 24, 1: 'If any person or persons shall, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire or burn, or otherwise destroy, or cause to be set on fire or burnt, or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning, or otherwise destroying of any of his Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his Majesty's dockyards, or building or repairing by contract in any private yards for the use of his Majesty, or any of his Majesty's arsenals, magazines, dock yards, rope yards, victualling offices, or any of the buildings erected therein or belonging thereto; or any timber or materials there placed, for building, repairing, or fitting out of ships, or vessels, or any of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places, where any such military, naval, or victualling stores, or other ammunition of war is, are, or shall be kept, placed or deposited; then the person or persons guilty of any such offence, being therefore convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy.' Cf. 7-8 G. 4, 28, 6-7: s. 6 abolished 'benefit of clergy.'

By s. 2: 'Any person who shall commit any of the offences before mentioned, in any place out of this realm, may be indicted and tried for the same, either in any shire or county within this realm, in like manner and form as if such offence had been committed within the said shire or county, or in such island, country or place where such offence shall have been actually committed, as his Majesty, his heirs or successors, may deem most expedient for bringing such offender to justice: any law, usage, or custom notwithstanding.' Cf. *Ships, &c.*

By 29-30 V. 109, 34, persons subject to that Act (Naval Discipline) are liable to death for setting fire to dockyards, ships, &c.

Setting fire to ships, &c. in London] By s. 104 of 39 G. 3, c. lxix., a local A. for the port of London: 'if any person or persons whosoever shall wilfully and maliciously set on fire any of the works to be made by virtue of this Act, or any ship or other vessel lying or being in the said canal [across the Isle of Dogs], or in any of the docks, basons, cuts, or other works to be made by virtue of this Act, every person so offending in any of the said cases shall be adjudged guilty of felony without benefit of clergy. . . .'

Churches, &c.] By 24-5 V. 97, the Malicious Damage A. 1861, 1: 'Whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house or other place of divine worship, shall be guilty of felony, and being convicted thereof, shall be liable to be kept in penal servitude for life,' or to be imprisoned, 'and, if a male under the age of sixteen years, with or without whipping.'

Dwelling-house] So by s. 2, of 'any dwelling-house, any person being therein.'

Houses, &c.] By s. 3: 'Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed, or fold, or to any farm-building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony,' &c., exactly as in s. 1.

Railway stations, their appurtenances, ports, docks, harbours, canals 'or other navigation'] S. 4 provides as s. 1.

Public buildings] S. 5 provides as s. 1, and includes buildings 'devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution.'

Other buildings] 'than such as are in this Act before mentioned,' s. 6 provides the maximum punishment of penal servitude for fourteen years, with alternatives exactly as in s. 1.

Goods in buildings] By s. 7: 'Whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building under such circumstances that if the building were thereby set fire to, the offence would amount to felony, shall be guilty of felony,' &c., as in s. 6.

Attempting to set fire] So by s. 8, of attempting 'by any overt act to set fire to any building or any matter or thing' mentioned in s. 7: punishment as in s. 6.

Crops of hay, grass, corn, grain, or pulse, any cultivated vegetable produce, whether standing or cut down, (part of) any wood, coppice, or plantation of trees, heath, gorse, furze, or fern, wheresoever the same may be growing] are within s. 16: punishable as in s. 6.

Stacks of corn, grain, hay, straw, wood, coals, peat, furze, gorse, &c.] are within s. 17. The same punishment as in s. 1.

Attempting to set fire to crops or stacks of corn, &c.] By s. 18, 'by any overt act' attempting to set fire to anything mentioned in ss. 16, 17, 'under such circumstances that if the same were thereby set fire to the offender would be under either of such sections guilty of felony, shall be guilty of felony.' The maximum punishment is penal servitude for seven years with alternatives as in s. 1.

Coal mines and 'other mineral fuel'] are within s. 26: punishment as in s. 1.

Attempt to set fire to a mine] is punished exactly as in s. 6 by s. 27, 'under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony.'

Ships or vessels] By ss. 42, 43: 'Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony,' or 'with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten, or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same': punishment as in s. 1.

Attempts on ships, &c.] S. 44 is framed exactly as s. 27 above, in respect of setting fire to, casting away, or destroying ships, and of punishment.

Malice against owner unnecessary] By s. 58: 'Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.'

Offender in possession of the property injured] By s. 59: 'Every provision of this Act not hereinbefore so applied, shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done.'

Intent to injure, &c. anyone] By s. 60: 'on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be).'

City of London Fire Inquest] See 51-2 V. c. xxxviii. s. 6.

'*Setting fire*'] 'To constitute arson at common law there must be an actual burning of the house or of some part of it, though it be not necessary that any part be wholly consumed, or that the fire should have any continuance, but be put out or go out of itself.' East, P. C. 1020; cf. 1 Hale, P. C. 569. In 9 G. 1, 22 (rpd.), the words 'set fire to' are used, and East observes, that he is not aware of any decision which has put a larger construction on those words than prevails at common law. And he afterwards remarks that the actual burning at common law, and the 'setting fire' under the statute, in effect mean the same thing. *Ib.* 1033. The words 'set fire to' are used in all the subsequent statutes, so that this passage and the following decisions are still applicable. Indictment under 9 G. 1, 22, for setting fire to an outhouse, commonly called a paper-mill: defendant had set fire to a large quantity of paper, drying in a loft annexed to the mill, but no part of the mill itself was consumed. The judges held that this was not a *setting fire* to the *mill* within the A. *Taylor,*

East, P. C. 1020; 1 Lea. 49, 1759. To constitute a setting on fire, it is not necessary that any flame should be visible. *Stallion,* 1 Moo. C. C. 398, 1834. So when a small faggot was set on fire on the boarded floor of a room, and was nearly consumed; the boards of the floor were 'scorched black, but not burnt,' and no part of the wood of the floor was consumed, Cresswell J. thought *Parker,* below, was the nearest case to the present, but distinguishable, and held that, as the wood of the floor was scorched, but no part of it consumed, the indictment could not be supported. 'We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all.' *Russell,* C. & M. 541, 1842. Where defendant was indicted under 7 W. 4 & 1 V. 89, 3 (rpd.), and the floor near the hearth was scorched; it was charred in a trifling way, and had been at a red heat, though not in a blaze; Parke B. thought that this 'would be sufficient,' but ultimately this evidence was held 'much too slight.' *Parker,* 9 C. & P. 45, 1839.

Indictment] It is necessary to prove the nature of the property set on fire, in order to show that it comes within one or other of the above sections, and which. See forms 14 and 15 in App. to Indictments A.

Whose house, &c. endangered] A man's burning his *own house* is no felony at common law, but such burning 'in a town, or so near to other houses as to create danger to them, is a great misdemeanour.' East, P. C. 1027; 1 Hale, P. C. 568. But it is a felony at common law if a man set fire to his own house with intent to burn that of another, or in such circumstances that the house of another will in all probability be burnt. East, *ib.* 1030; citing a case of *Probert,* 1799. Now, however, see s. 3, above.

'*House*'—'*building*'] The word *house,* at common law, includes such buildings as burglary may be committed in at common law; 'not only the bare dwelling-house, but all outhouses that are parcel thereof, though not contiguous thereto nor under the same roof, as barns and stables': 4 Bl. Comm. 221; this differentiates it from a 'dwelling-house' under the Larceny A. A building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was held not to be a *house, outhouse,* or *barn,* within 9 G. 1, 22, 7 (rpd.). *Elsmore* v. *Inhabs. St. Briavells,* 8 B. & C. 461, 1828. An unfinished structure, intended to be used as a dwelling-house when finished, is not a 'house'; but it seemed to be doubtful whether it could be properly described as a 'building' under s. 6. *Edgell,* 11 Cox C. C. 132, 1867. But where the walls and roof of an unfinished house and a considerable part of the flooring were finished, and the internal walls prepared for plastering, it was held to be a 'building' within s. 6. *Manning,* L. R. 1 C. C. R. 338; 41 L. J. M. C. 11; 12 Cox C. C. 106, 1871. There is no statutory definition of the word, but see s. 6, above.

Hannen J. said, 'It is very likely that a house can only mean a structure designed and sufficiently advanced for the habitation of man.' It has been held that setting fire to a common gaol is arson of a *house.* The entrance to the prison was through the dwelling-house of the gaoler (separated from the prison by a wall), and the prisoners

were sometimes allowed to lie in it. All the judges held, that the dwelling-house was to be considered as part of the prison, which was 'the house' of the corporation to whom it belonged. *Donnavan,* East, P. C. 1020; 2 W. Bl. 682; 1 Lea. 69, 1770. But where a constable hired a cellar, as a lock-up house, under a cottage, and the cellar was independent of the cottage in all respects, it was held that the cellar was not properly described (apparently under 9 G. 1, 22, 7) either as the dwelling-house of the constable, or as an outhouse of the cottage. *Anon.,* 1 Lewin C. C. 8, 1828.

A shed or cabin, though built of stone, roofed, and with low fireplace and window, does not in a case of arson constitute a house within 7 W. 4 & 1 V. 89, 3, rpd., where the building was erected not for habitation but for workmen to take their meals and dry their clothes in, and where some one had slept with the knowledge but without the permission of the owner. *England,* 1 C. & K. 553, 1844.

Homicide through arson] See *Death Consequent on Felony,* under *Murder.*

Outhouse] The following cases on 9 G. 1, 22, rpd., were decided: Defendant, who was indicted for setting fire to an 'outhouse,' had set fire to and burnt part of a building, situated in a yard at the back of a dwelling-house. The building was four or five yards distant from the house but not joined to it. The yard was enclosed on all sides, in one part by the dwelling-house, in another by a wall, and in a third by a railing, which separated it from a field, and in the remaining part by a hedge. The buildings in question consisted of a stable and chamber over it, used by the prosecutor as a shop for the keeping and dressing of flax. It was objected that this was part of the dwelling-house, and therefore not an outhouse; but the judges were of opinion that the conviction was right. It was observed that though, for some purpose, this might be part of the dwelling-house, yet in fact it was still an outhouse. *North,* East, P. C. 1021, 1795. Defendant was indicted in different counts for setting fire to an 'outhouse' and to a house. The premises burned consisted of a schoolroom, which was situated very near to the house in which the prosecutor lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tiles, reached over part of the roof of the school, which was thatched with straw; and the schoolroom, with a garden and other premises, together with a court which surrounded the whole, was rented of the parish by the prosecutor. There was a continued fence round the premises, and nobody but the prosecutor or his family had a right to come within it. It was objected that the building was neither 'a house' nor 'an outhouse'; but the judges were of opinion that this building was within the statute. *Winter,* R. & R. 295, 1815; 2 Russ. Cri. 963. In *Ellison,* 1 Moo. C. C. 336, 1832, under 7-8 G. 4, 30, 2, rpd., the place in question stood in an enclosed field, a furlong from the dwelling-house, and not in sight of it. It had been originally divided into stalls, partly open and partly thatched, capable of holding eight beasts. Of late years it was boarded all round, the stalls taken away and an opening left for cattle to come in of their own accord. There was neither window nor door, and the opening was sixteen feet wide, so that a waggon might be drawn through it. The back part of the roof was supported by posts, to which the side boards were nailed. Part of it internally was boarded and locked up. There was no distinction in the roof between the

enclosed and the unenclosed part, and the inhabitants and owners usually called it the cow-stalls. Park J. did not consider this 'an outhouse,' and six other judges agreed with him; but six were of opinion that this was within the statute. See also *Hiles* v. *Inhabs. of Shrewsbury,* 3 East, 457, 1803; *Woodward,* 1 Moo. C. C. 323, 1831.

Defendant was charged with setting fire to an 'outhouse.' The building in question was in a farmyard, and was three or four poles distant from the dwelling-house, from which it might be seen. The prosecutor kept a cart in it, which he used in his business of a poulterer, and also kept his cows in it at night. It adjoined another range of buildings which did not adjoin the dwelling-house. The dwelling-house and farm formed one side of the farmyard, and the three other sides were formed by a fence inclosing these buildings. The building in question was formed by six upright posts nearly seven feet high, three in the front and three at the back, which supported the roof: there were pieces of wood laid from one side to the other. Straw was put upon these pieces of wood, laid wide at the bottom and drawn up to a ridge at the top; the straw was packed up as close as it could be packed; the pieces of wood and straw made the roof. The front of the building to the farmyard was entirely open between the posts. The back adjoined a field and was a rail fence, the rails being six inches wide; these came four or five feet from the ground, within two feet of the roof, and this back formed part of the fence before mentioned. One of the witnesses for the prosecution said he should call the building an outhouse. All the judges present but one thought the erection an outhouse within 7-8 G. 4, 30, above, and that the conviction was right. *Stallion.*

Defendant was convicted for setting fire to an outhouse. The building set fire to was a pig-sty, thatched at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor; the back of the pig-sty formed part of the fence between his and the adjoining property. All the judges present were unanimously of opinion that the conviction was right under 7 W. 4 and 1 V. 89, 3, rpd. *Amos Jones,* 2 Moo. C. C. 308, 1844; 2 Russ. Cri. 964. See also *Haughton,* 1833.

'*Shed*'] In *Amos,* 2 Den. C. C. R. 65; 20 L. J. M. C. 103; 5 Cox C. C. 222, 1851, it was held that a building twenty-four feet square, with wooden sides, glass windows, slated roof, and commonly called 'the workshop,' used as a storehouse for seasoned timber, as a place for deposit of tools, and for the working up of timber, may be described as 'a shed' (and, perhaps, as a 'warehouse,' or 'office,' or 'shop,' or 'building used for carrying on a certain trade') under 7-8 V. 62, 1, rpd.

Stacks] A stack of flax with seed in it is 'grain' within 7 W. 4 and 1 V. 89, 10, rpd. *Spencer,* D. & B. C. C. 131; 7 Cox C. C. 189, 1856. In *Reader,* 4 C. & P. 245; 1 Moo. C. C. 239, 1830, the defendants were indicted under 7-8 G. 4, 30, 17 and 2, rpd., for setting fire to 'a stack of straw.' The stack in question was made partly of straw, there being two or three loads at the bottom, and the residue of 'haulm' (stubble). The judges held that this was not 'a stack of straw'; afterwards a count for 'a stack of straw called haulm' (s. 17) was not considered safe. See *Brown,* 4 C. & P. 553 *n.,* 1831; *Tottenham,* 7 C. & P. 237; 1 Moo. C. C. 461, 1835: 'haulm' in an indictment is not straw. It was held sufficient under 7-8 G. 4, 30 (above), if the

indictment charge the setting fire to a '*stack of barley*': *Swatkins,* 1831; or a '*stack of beans*': *Woodward,* the words of s. 17 being 'any stack of corn, grain, pulse, straw, hay, or wood.' In *Aris,* 6 C. & P. 348, 1834, defendant was indicted under that s. for setting fire to a 'stack of wood'; between the house of the prosecutor and the next house there was an archway under which carts went, and over which a sort of loft was made by means of a temporary floor, where there was a small quantity of straw and a score of faggots: the straw was burnt and some of the faggots, but no part of the building. Park J. was clearly of opinion that this was not a stack of wood within the s. A quantity of straw (22 cwt.) packed on a lorry left in the yard of an inn, on its way to market, is not a stack of straw within s. 17. *Satchwell,* L. R. 2 C. C. R. 21; 42 L. J. M. C. 63; 12 Cox C. C. 449, 1873.

Wood] In *Price,* 9 C. & P. 729, 1841, under 7-8 G. 4, 30, 17, rpd., defendants were convicted of setting fire to a wood; they set fire to a summer-house which was in the wood, and so to the wood. It was held they were properly convicted. Setting fire to a single tree is not arson within this s. *Davey,* 1 Cox C. C. 60, 1844.

Ships and vessels] A pleasure-boat, eighteen feet long, was thought by Patteson J. to be a vessel within the meaning of 7-8 G. 4, 30, 10, rpd., and therefore within s. 9, which deals with arson. *Bowyer,* 4 C. & P. 559, 1831. On an indictment for setting fire to a barge, a judge doubted whether a barge was within the same A. *Smith,* 4 C. & P. 569, 1831.

Goods in a 'house'] See s. 7, above. All that now need be said of *Lyons,* 28 L. J. M. C. 33; Bell C. C. 38; 8 Cox C. C. 84, 1858: C. C. R., under 14-15 V. 19, 8, rpd.—a very difficult case to understand —will be found in *Child,* below, which in effect overruled it. The facts in *John Child* were as follows:—defendant, from ill will to a lodger, broke up her chairs, tables, and other furniture, made a pile of them and her clothes on the stone floor of the kitchen of her lodgings, and lit them at the four corners, so as to make a bonfire of them. The building would almost certainly have been burned in consequence. had not some one succeeded in extinguishing the bonfire. Blackburn J. directed the jury that the first count ('maliciously, &c., setting fire to goods in a dwelling-house with intent to injure') was not good in law, s. 7 not making that a felony, *per se;* and that on the second ('under such circumstances that if the building had been thereby set fire to the offence would have amounted to felony'), the ultimate question was if the house had been set fire to, would it have been 'malicious' and 'with intent to injure' within s. 3, and on this he told them that if they thought defendant, though his object was not to hurt the house or the landlord, yet was aware of what he was doing, and that it would probably set the building on fire, or was at best reckless whether it did or not, they ought to find him guilty of the felony: otherwise not. The jury found him 'guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious.' It was held that the conviction was bad. Blackburn J. added: 'I thought the framers of' s. 7 'intended to include this case. But they have failed to express their intention. . . . 14-15 V. 19, 8, made it felony wilfully and maliciously to set fire to goods 'being in any building the setting fire to which is made felony,' &c. And under those words the prisoner might have been

convicted under both counts,' and cites Mr. Greaves's edition of the Consolidation Acts as an authority that s. 7 was advisedly substituted for the rpd. s. 8 'in consequence of . . . *Lyons*' and that 'the Committee of the Lords were satisfied that the new terms would include every case that could arise.' 'His opinion is that if you set fire to something under such circumstances that you are likely thereby to set fire to another thing, then if the setting fire to the one is malicious, the setting fire to the other is so too. . . . If that is good law, then the setting fire to the house here, if it had caught fire, would have been felony. But it is not law, and the framers of the Act have failed to express the meaning that they intended to express.' (There are discrepancies between the reports.) L. R. 1 C. C. R. 307; 40 L. J. M. C. 127; 12 Cox C. C. 64, 1871. It now seems clear that under s. 7 an intent to fire the house or at least a reckless indifference to such a result is necessary. *Nattrass,* 15 Cox C. C. 73; *Harris, ib.* 75, 1882, in both of which Hawkins J. ruled that the test was—did defendant know that the probable consequence of his act would be to set fire to the house?

'*Any person being therein*'] A stable which adjoined a dwelling-house was set on fire: the flames communicated to the dwelling-house, in which members of the family had been sleeping; but it did not appear whether the house took fire before they left the house or after. Alderson B. directed the jury to say by their verdict, should they convict, whether the house took fire before the family left the house or after. If they were of opinion that it was after the family were in the yard, he thought they ought to acquit of the capital charge, as to sustain that, in his opinion (though he seems to have doubted), it was necessary that the persons named in the indictment (under 7 W. 4 and 1 V. 89, 2, rpd., but the essential words are identical with s. 2, above), should be in the house at the very time the fire was communicated to it. *Warren,* 1 Cox C. C. 68, 1844. So *Fletcher,* 2 C. & K. 215, 1845. So where defendant is the only person in the house, *per* L. Coleridge C.J., *Pardoe,* 17 Cox C. C. 715, 1894; *sed quære,* and cf. *March,* 1 Moo. C. C. 182, 1828.

Possession—how to be described] The house burned should be described as being in the possession of the person who is in the actual occupation, even though that possession be wrongful. Thus where a labourer in husbandry was permitted to occupy a house as part of his wages, and after being discharged from his master's service, and told to quit the house in a month, remained in it after that period, it was held that, in arson, it was rightly described as being in the possession of the labourer. *Wallis,* 1 Moo. C. C. 344, 1832. Where the property was laid in no one, c. q. *Rickman,* 1789. It may be laid in 'persons unknown.' *Ib.* But 'under the statute . . . the averment of ownership is immaterial.' Under s. 60, above, the jury can find, within s. 3, an intent to defraud an insurance company, though no policy be produced, and to injure the owner, the landlord, though the premises are laid as 'of and belonging to' the defendant, the tenant: *Newboult,* L. R. 1 C. C. R. 344; 41 L. J. M. C. 63; 12 Cox C. C. 148, 1872.

Intent—'Malice'—Consequences—illegal act] See Index. If the burning be done under a *bonâ fide* belief in the existence of a right to burn, as where a woman set fire to some furze on a common, there is no criminal offence. *Twose,* 14 Cox C. C. 327, 1879; and where the

jury found that defendant was insane, and they did not believe that he was conscious that the effect of burning a hovel would be to injure any other person, Crompton J. ordered a verdict of not guilty to be entered. *Davies,* 1 F. & F. 69, 1858.

But a clearly *wilful* act is enough, without proof of *malice* in the popular sense, for that will be inferred from such act: *per* eight judges, in *Farrington,* R. & R. 207, 1811, under a rpd. s. requiring exactly the same 'intent' as in s. 60, above, where no motive was proved or suggested and defendant was of good character. So in *Philp,* 1 Moo. C. C. 263, 1830: arson of a ship by part owner, the intent, under another similar s. rpd., to prejudice co-owners was assumed, notwithstanding that he had insured the (whole) ship. And where a s. rpd. required no 'intent,' and the jury found that the arson of A.'s property was with intent to injure B. by throwing suspicion on B., the judges held that the indictment rightly alleged an intent to injure A., though they supported the conviction on a count alleging no intent. *Newill,* 1 Moo. C. C. 458, 1836.

It must be a wilful and malicious burning, otherwise it is only a trespass and not a felony. 1 Hale, P. C. 569. Therefore if A. shoot unlawfully at the cattle, &c. of B., whereby he sets the house of another on fire, it is not felony; for though the act he was doing was unlawful, he had no intention to burn the house. *Ib.* In this case, observes East, 'it should seem to be understood that he did not intend to *steal* the poultry, but merely to commit a trespass; for otherwise, the first attempt being felonious, the party must abide all the consequences.' East, P. C. 1019. But when defendant, intending to steal rum, carelessly set fire to it, and so the ship on which he was caught fire, it was held that he could not be convicted of arson: *Faulkner,* 13 Cox C. C. 550, 1877: C. C. R. Ir.: nine judges, who followed *Pembliton,* 1874, and held that whether the arson was a probable consequence of defendant's felony should have been put to the jury: c. a. See further under *Murder.* It is at least very doubtful whether the proposition laid down by East can now be considered law. If A. has a malicious intent to burn the house of B., and in setting fire to it without intending it burns that of C., it is felony. 1 Hale, P. C. 569; East, P. C. 1019. So if A. command B. to burn the house of C., and he do so, and the fire burns also another house, the person so commanding is accessory to the burning of the latter house. Plowd. 475; East, *ib.* It was said by Tindal C.J. in his charge to the Bristol grand jury, on the Special Commission in 1832: 'Where the statute directs, that to complete the offence it must have been done with intent to injure or defraud some person, there is no occasion that either malice or ill will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law, when a man wilfully does that which is illegal, and which, in its necessary consequence, must injure his neighbour, and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him; nor will it be necessary to prove that the house which forms the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shewn to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief he committed was wider in its conse-

quences that he originally intended.' 5 C. & P. 261 (and *Cooper, ib.* 536), *note* to *Pinney,* 3 St. Tr. N. S. 8, 1832.

But where two lads threw a lighted paper into a post-office letter-box, forming part of a house, whereby several letters were burnt, Williams J. said, that no doubt if they intended the fire to do its worst they would be guilty (under ss. 7, 8, above), but if they only set fire to the letters (for 'what is vulgarly called a *lark*'), and it was contrary to their intention to burn the house, they would not be guilty, even if the house had been burnt. *Batstone,* 10 Cox C. C. 20, 1864.

Evidence of similar acts] On an indictment for wilfully setting fire to a rick by firing a gun close to it, evidence was allowed to show that the fire was not accidental, that the day before defendant was seen near the rick—then also on fire—with a gun in his hand. *Dossett,* 2 C. & K. 306, 1846.

Two previous and abortive attempts to burn different parts of the same premises were held by Pollock C.B. to be admissible—to exclude the theory of accident—though defendant was not connected with either by the evidence: *Bailey,* 2 Cox C. C. 311, 1847.

In *Gray,* 4 F. & F. 1102, 1866, other claims by defendant on other insurance companies for fires were admitted by Willes J. to show that the fire in question was not by accident.

But 'the case turning on identity,' where defendant had been seen going away from a burning rick, the same judge refused to allow evidence that defendant and his wife had previously been seen laughing at another fire on the same premises and hindering water being thrown on it, apparently on the ground that such conduct did not tend to explain the charge then alleged: *Harris, ib.* 342, 1864. See generally, pp. 101-6, and *Taylor,* p. 102.

Motive] A woman indicted for arson with intent to defraud an insurance office was allowed to give evidence that she was in easy circumstances, and so had no pecuniary motive for the crime. *Grant,* 4 F. & F. 322, 1865.

Accessory before fact] A person may be convicted as an accessory before the fact to setting fire to a vessel of which he was at the time part-owner, though the principal had not been convicted. *Wallace,* Car. & M. 200; 2 Moo. C. C. 200, 1841.

Attempts] It is a sufficient 'overt act' to make a person guilty of attempting to set fire to a stack, if he go with the intention of setting fire to it, and light a match for that purpose, but abandon the attempt because he finds that he is being watched (or otherwise interrupted): *per* Pollock C.B., *Taylor,* 1 F. & F. 511, 1859.

Threats] See that title.

Arson is not triable at Q. S.

ASSAULT.

The following legal offences, in order of their penal gravity, must be carefully discriminated: 1. Common assault; 2. Assault occasioning actual bodily harm; 3. Inflicting grievous bodily harm *or* Wounding (a)—no intent being alleged; 4. Wounding (b) *or* causing any grievous bodily harm—intent being alleged.

There may be combinations of some of these offences or of them and others, *e.g.* forcing a person to take poison.

For assaults causing death, see *Manslaughter* and *Murder*.

Malice] is discussed under *Grievous Bodily Harm*.

On the sovereign] By s. 2 of 5-6 V. 51, the Treason A. 1842, discharging or aiming firearms 'at or near the person of' the sovereign, or discharging any explosive substance near thereto, or wilfully 'striking at' him or her 'with any offensive weapon or in any other manner whatsoever,' or throwing anything with intent to injure him or her, or 'with intent to break the public peace,' or to 'alarm' the sovereign, or having anything dangerous or destructive near with intent to injure—or any attempt to do any of these acts—is punishable by seven years' penal servitude and a public or private whipping.

In royal palaces, &c.] The special procedure of 33 H. 8, 12, though unrepealed, is now obsolete; see on it, 3 Inst. 140.

On person arresting] By s. 12 of 14-5 V. 19, the Prevention of Offences A. 1851, 'If any person liable to be apprehended under the provisions of this Act [which by repeals now relate only to offences by *night*], shall assault or offer any violence to any person by law authorised to apprehend or detain him, or to any person acting in his aid or assistance,' he shall be guilty of a misdemeanour and liable to *three* years' imprisonment with or without hard labour.

Statutes—Impeding a shipwrecked person] By 24-5 V. 100, Offences against the Person A. 1861, 17: 'Whosoever shall unlawfully and maliciously prevent or impede any person being on board of, or having quitted, any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person, as in this section first aforesaid, shall be guilty of felony, and being convicted thereof shall be liable to be kept in . . . penal servitude for life.' Not triable at Q. S.

Intent to do grievous bodily harm, &c.] By s. 18: 'Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms, at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some

other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony . . .' as in s. 17. See *Ward*, 1872. Not triable at Q. S.

For indictment, see Form No. 5, appended to Ind. A. 1915.

Loaded arms] By s. 19: 'Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this Act, although the attempt to discharge the same may fail from want of proper priming or from any other cause.'

Unlawful wounding] By s. 20: 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour . . .' maximum punishement: five years' penal servitude, which was imposed in *T. Peters*, 1 Cr. A. R. 141, 1908; but in *A. J. Thompson* three years' p. s. was reduced to eighteen months' imp. w. h. l. in view of the absence of intent: 13 Cr. A. R. 208, 1918. See under *Grievous Bodily Harm*.

For the *physical* meaning, see *Wounding*, 'which consists in giving another some dangerous hurt, and is only an aggravated species of battery': 3 Bl. Comm. 121.

Triable at Q. S.

For indictment, see Form No. 5, appended to Ind. A. 1915.

Garrotting, &c.] By s. 21: 'Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person, in committing any indictable offence, shall be guilty of felony' . . . as in s. 17. In addition the court may order the offender, if a male, to be once privately whipped, subject to: (1) if he is under sixteen, the number of strokes at each such whipping shall not exceed twenty-five, and the instrument used shall be a birch rod; (2) in any other case the number shall not exceed fifty; (3) the court in its sentence shall specify the number, and the instrument to be used. The whipping must be inflicted within six months after sentence. 26-7 V. 44, 1, the 'Garrotting' A. Not triable at Q. S.

On clergymen] By s. 36: 'Whosoever shall by threats or force obstruct or prevent or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same, or returning from the performance thereof,

shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.' Triable at Q. S.

On magistrates, &c.] By s. 37: 'Whosoever shall assault and strike or wound any magistrate, officer, or other person whatsoever, lawfully authorised, in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to' penal servitude for seven years. Triable at Q. S.

Intent to commit felony—Resisting peace officer and others] By s. 38: 'Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for' two years with or without hard labour. See *Smuggling*. Triable at Q. S.

Summary conviction a bar to further proceedings] By s. 45: 'If any person against whom any such complaint as in either of the last three preceding sections mentioned [for common assault, 'aggravated' assault on females or boys not more than fourteen] shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate [of dismissal], or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.' Except in these cases criminal proceedings are no bar to an action; where there were both for the same assault, the C. P. refused to order election: *Jones* v. *Clay*, 1 B. & P., 1798; but in *Mahon*, 4 A. & E. 575, 1836, the Q. B. declined to pass sentence for assault while an action was pending.

A discharge on giving security to be of good behaviour is a conviction for this purpose. To get the benefit of s. 45, on a dismissal, there must be a certificate. *Miles*, 24 Q. B. D. 423; 59 L. J. M. C. 56; 38 W. R. 334; 17 Cox C. C. 9, 1890: C. C. R.; see also *Blaby*.

A *matrimonial order*—see *Judgment*—can only be made by justices when the assault is 'aggravated.'

Actual bodily harm] By s. 47: 'Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to be kept in penal servitude . . .' and

Common assault] 'Whosoever shall be convicted upon an indictment for a common assault shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour.'

The phrase 'actual bodily harm' seems only to occur here and to refer to ss. 26, 35. 'Bodily harm' is not defined. It may mean internal as well as external injuries, and need not be permanent

nor dangerous, 'nor amount to maiming, disfigurement or disablement': 1 Russ. Cri. 854. See *Grievous Bodily Harm.*

Where defendant, indicted under s. 20 and this s. for throwing a corrosive fluid into a ballot box, hurt an official with it, she was convicted of common assault under this s.: *Chapin,* 22 Cox C. C. 10, 1909, following *Martin,* 1881. See *A. Cameron,* 1914. These assaults are triable at Q. S.

Indecent assault (i) *on females*] By s. 52: 'Whosoever shall be convicted of any indecent assault upon any female . . . shall be liable, at the discretion of the court, to be imprisoned for any term not exceed- two years, with or without hard labour.' Triable at Q. S.

(ii) *On males*] By s. 62: 'Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude for' ten years. For the application of ss. 42-3, 52, 62, to *children,* see that title. Triable at Q. S.

Assaults by poachers] See 9 G. 4, 69, 2, under *Game*, and that title generally.

With intent to rape or rob] See *Rape* and *Robbery,* respectively.

Children's Dangerous Performances Acts, 1879 *and* 1897] An employer may be indicted 'as having committed an assault'; see under *Children.*

Indictment and verdict] By 14-15 V. 19, 5: 'If upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding, charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing, or wounding.'

The misdemeanour here referred to is enacted in s. 4, rpd., of the same A.; its terms are partly almost identical with those of s. 20, above, and then continue 'or unlawfully and maliciously *cut, stab, or wound,* &c.' This explains the last words of s. 5.

In Ward, 1872, the fifteen judges were agreed that after 'unlawfully' '*and maliciously*' must be read, *i.e.* the wounding must still be *within* s. 20. In *R. Cox,* 1 F. & F. 664, 1859, Bramwell B. regarded s. 5 as making an exception to the rule of 'natural consequence,' and gave as an instance of *mere* unlawful wounding, shooting at a man 'at such a distance that you did not think' he would be reached, but he was.

On an indictment under 48-9 V. 69, 5, and for indecent assault, the jury may find guilty of common assault on either count: *per* Charles J., *Bostock,* 17 Cox C. C. 700, 1893. On indictments for incest, rape or a felony, under s. 4 of 48-9 V. 69, indecent assault may be found: see the titles in question. For indictments on which assault may be found, see Index, *Indictment.*

Sentence] See *Gorman*, 1909.

Matrimonial order against husband for assault] See *Sentence*.

Prosecution by guardians of union] See *Servants*.

Common law] All crimes of violence on the person obviously include an assault, and the nature of the crime frequently depends much more on the consequences of the act than any peculiarity of the act itself. Sentence is provided by s. 47, above.

No actual contact] 'An assault is any attempt or offer with force and violence to do a corporal hurt to another, whether from malice or wantonness; as by striking at him, or even by holding up one's fist at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability of using actual violence against his person; as by pointing a weapon at him within the reach of it.' East, P. C. 406. The threat or attempt must be of 'immediate . . . injury': 1 Russ. Cri. 879. The immateriality of an actual *stroke* is insisted on in assaults on judges when sitting: 3 Inst. 140; but if one 'make an assault, strike not' a *juror* in court, the punishment is less: *ib.* Striking at another with a 'hatchet,' although without touching him, 2 Roll. Abr. 545, l. 45 (citing a case in 1349: *Liber Assisarum*, 22 Ed. 3: f. 99, pl. 60); 'presenting a gun at him at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him, or by any other such like act done in an angry, threatening manner' is an assault. Hawk. 1, 62, 1. If a person puts a deleterious drug as cantharides into coffee, in order that another may take it, if it be taken, he is guilty at common law of an assault on the taker. *Button*, 8 C. & P. 660, 1838. But in *Dilworth*, 2 Moo. & R. 531, 1843; *Walkden*, 1 Cox C. C. 282, note *b.* 1845; and *Hanson*, 2 C. & K. 912, 1849, the contrary was held; but the point is now of little importance; see *Poisoning*. Nevertheless if death ensue, it would be manslaughter. 1 Hale, P. C. 431; 1 East, P. C. 264; Parke B. in *Walkden*, above.

Although for an assault there must be a present ability to inflict an injury, yet if a man is advancing in a threatening attitude to strike another, so that the blow would almost immediately, 'within a second or two of time,' reach him if he were not stopped, this is an assault. *Stephens* v. *Myers*, 4 C. & P. 349, 1830: damages one shilling. See *Halliday*, 1889, and the other cases.

It is an assault to point a loaded pistol at any one, provided it is so loaded that it can go off: *James*, C. & K. 530, 1844; and it would seem that it is an assault to present a pistol at another whether loaded or not, unless it is done secretly; for if it so near that, if it went off it might do injury, that causes fear or alarm. *St. George*, 9 C. & P. 483, 1840: *per* Parke B. This *dictum* still stands, although the decision was expressly overruled in *Duckworth*, 1892, 2 Q. B. 83; 17 Cox C. C. 495; 56 J. P. 473; 66 L. T. 302; 40 W R. 448: C. C. R., where it was held to be within s. 18, above, to point a loaded revolver, though an attempt to pull the trigger was frustrated by bystanders.

On child—at common law] So, it has been said, there may be an assault by exposing a child of tender years, under the control and dominion of the defendant, to the inclemency of the weather. *Ridley*,

2 Camp. 650, 1811; and, possibly, by *non-feasance, e.g.* withholding food. *Ib.* Where the defendants took a newly-born child, put it into a bag, and hung it on to some park palings at the side of a footpath, this was held to be an assault on the child. *March,* 1 C. & K. 496, 1844.

Non-feasance] But a mere omission to do an act (unless there be a duty to do it) cannot be construed into an assault. Thus where a man kept an idiot brother, who was bedridden, in a dark room in his house, without sufficient warmth or clothing, it was ruled that these facts did not amount to assault or imprisonment; for although there had been negligence, yet mere *non-feasance,* without a duty, would not create an indictable offence. *Smith,* 2 C. & P. 449, 1826; cf. *Ridley,* above. See *Servants,* &c.

Imprisonment] An unlawful imprisonment is also an assault: Hawk. 1, 60, 7; and so is a battery: *ib.* 1, 62, 1.

It has been frequently said that every imprisonment includes a battery. B. N. P. 22, citing *Oxley* v. *Flower,* 1800, from Selw. N. P. Imprisonment, I. But this doctrine was strongly denied. *Emmett* v. *Lyne,* 1 N. R. Bos. & P. 255, 1805. Mere imprisonment without any belief in the legal right of the imprisoner (and, perhaps, with it), though there be no assault or battery, is indictable: *per* Bosanquet C.Sjt., *Linsberg,* 69 J. P. 107, 1905, where relatives locked an *accoucheur* in a room to await the delivery of a woman. See *Arrest* and *False Imprisonment.*

Fighting on challenge] If 'two persons go out to strike one another, and do so,' it is an assault in both, and it is quite immaterial which strikes the first blow. *Lewis,* 1 C. & K. 419, 1844: *per* Coleridge J. Such a contest is not in self-defence: *Knock,* 14 Cox C. C. 1, 1877.

Sport] 'The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and that an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize-fight is clearly an assault; but playing with single sticks or wrestling does not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Orton,*' 1878: *per* Cave J. in *Coney,* 1882; the whole court agreed that consent was not a defence, and a majority that a spectator, by *merely* being present at a prize-fight, was not guilty of a common assault. See further under *Misprision of Felony.*

Words] Although it was formerly doubted, it is now clear, that no words whatsoever can amount to an assault. Hawk. P. C. 1, 62, 1; 1 Bac. Ab. Assault (A). But words may sometimes be an important ingredient in ascertaining what is the intention of the party, *e.g.* when a man touches another 'in discourse.' *Tuberville* v. *Savage,* 8 Mod. 3; 2 Keb. 545; 1 Vent. 256, 1670; and see *Provocation* under *Murder.*

Consent at common law] See above, and *Abduction* and *Rape.* An attempt is sometimes made to treat that as an assault which is

consented to on the part of the assaulted. But on examination it will be found that there is no authority for such a position. Thus in *Nichol,* a conviction of a common assault, R. & Ry. 130, 1807, which is sometimes quoted in support of such a doctrine, a master took indecent liberties with a female scholar which she did not resist, Graham B. distinctly told the jury that there was some evidence to show that his acts were against the girl's will, as she swore. And in *Day,* 9 C. & P. 722, 1841, a similar case, Coleridge J. said, 'every *consent* involves a *submission;* but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting; on the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law': verdict, common assault. So where two boys of eight years were ignorant of the moral nature of the act done to them, it was held that mere submission to an indecent act was not consent to the assault. *Lock,* 42 L. J. M. C. 5; L. R. 2 C. C. R. 10; 12 Cox C. C. 244, 1872. It is otherwise if they willingly and intentionally consent. *Wollaston,* 12 Cox C. C. 180, 1872: C. C. R., under s. 62. See below.

It has also been said, though the law is not so clear on this point, that where the act is in itself unlawful, it will, though consented to, be punishable as an assault—see *Lewis* and *Coney,* above; in the latter eleven judges agreed that the consent of the two pugilists did not prevent them or their abettors being guilty of assault—and even actionable. For according to B. N. P. 16, in an action for assault and battery, it was held that it is no defence that the parties fought by consent, for the fighting being unlawful, the plaintiff would still be entitled to a verdict for the injury done him: *sed quære.* But in *Christopherson* v. *Bare,* 17 L. J. Q. B. 109, 1848, the Q. B. held that a plea of leave and licence to an action of assault, amounted to a plea of not guilty.

Sports] See above. 'Any hurt done to another by playing at cudgels, or such like sport by consent,' is not an assault, 'because the intent of the parties seems no way unlawful, but rather commendable in tending mutually to promote activity and courage.' But, it seems, 'no consent can make so dangerous a diversion' as fighting with naked swords 'lawful.' Hawk. 1, 60, 26.

Lawful chastisement] If a parent in a reasonable manner chastise his child, or a master his servant or apprentice, or a schoolmaster his scholar—females 'in a decent manner': 9 Halsbury, 608—'or even a husband his wife, as some say' (or a gaoler 'his unruly prisoners,' *Dalton,* Ch. 121), in such circumstances it is no assault. Hawk. P. C. 1, 60, 23; Com. Dig. *Pleader* (3 M. 19), under 'Due correction,' 'wife' is included. 'Such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilised country,' *per* Halsbury C.: *The Queen* v. *Jackson,* 1891, 1 Q. B. 679; '—that a husband has a right to beat his wife. I do not believe this ever was the law,' *per* L. Esher M.R., *ib.* 682. In *all* cases of chastisement it must, in order to be justifiable, be reasonable, as in *e.g.* self-defence or arrest: East, P. C. 406; and children 'corrected' must be old enough to be capable of appreciating correction (and not

infants only two and a half years old). *Griffin,* 11 Cox C. C. 402, 1869: *per* Martin B. and Willes J. The chastisement of servants by noblemen and royal officers, expressly permitted by 33 H. 8, 12, 6, 12, in royal palaces, is carefully limited, and is not protected if the person struck dies within a year. See also *Index.*

Self-defence—of person] See under *Murder.* A blow or other violence *necessary* for the defence of a man's person is not a battery. Thus if A. lift up his stick, and offer to strike B., it is a sufficient assault to justify B. in striking A.; for he need not stay till A. has actually struck him. B. N. P. 18. But every assault will not justify every battery; it must be 'proportionable to the assault'; an assault may indeed be of such a nature as to justify a *mayhem* ['the deprivation of a member proper for defence in fight,' Wharton]; and where it appeared that A. had in a scuffle 'ran his finger' towards B.'s eye, it was held a justification ('*son assault demesne,*' *i.e.* his, plaintiff's own original wrong) for B.'s biting off A.'s finger. *Cockroft* v. *Smith,* 2 Salk. 641; 1 L. Raym. 177, 1704; B. N. P. 18. If one use violence more than necessary to repel the assault, he may be convicted of an assault. *Mabel,* 9 C. & P. 474, 1840: resisting a policeman's unjustified 'collaring'; and see *Odgers,* 1843. An attack with fists must not be met with wounding by a razor: *Morse,* 4 Cr. A. R. 50, 1910. In assault, as in other cases of trespass, the attacked ought not, in the first instance, to beat the assailant, unless the attack is made with such violence as to render the battery necessary. *Weaver* v. *Bush,* 8 T. R. 78, 1798. It is not the law that 'no more than warding off a blow must be attempted by any one attacked'; 'a battery in return for an assault which missed being a battery' is justified: *Deana,* 73 J. P. 255; 25 T. L. R. 399; 2 Cr. A. R. 75, 1909: c. q.

Where a man strikes at another within reaching distance, the latter is justified in using such a degree of force as will prevent a repetition (but no more): *per* Parke B., *Anon.,* 2 Lewin, C. C. 48, 1836. But a blow struck after all danger is past, is an assault: *Driscoll,* Car. & M. 214, 1841: *per* Coleridge J., who said, 'It is a common error to suppose that one person has a right to strike another who has struck him, in order to revenge himself,' and passed sentence for such an assault of fifteen years' transportation.

Of property] A man may justify an assault (without wounding) in defence of his house or other property. 2 Roll. Abr. 548-9; Hawk. below. And if the trespasser use force (*e.g.* burglary, smashing a door), then the owner may oppose force to force, and 'need not request him to be gone . . . for it is but returning violence with violence.' *Green* v. *Goddard,* 2 Salk. 641, 1706; *Weaver* v. *Bush.*

Firing to frighten] and hitting a supposed burglar without intending to, is not within s. 18: *Dennis,* 69 J. P. 256, 1905: *per* Fulton R.

Defence of others] It would seem that a person has no right to commit an assault merely in defence of other persons, unless he stand in a particular relation to them. Such reciprocal relations are husband and wife, *Leward* v. *Basely,* 1 L. Raym. 62; Salk. 407, 1696, and parent and child. A servant may assault in defence of his master, and, perhaps, *vice versâ. Dalton's Justice,* ch. 121; though he treats the last point as doubtful. 'Neither can the farmer or tenant justify such

an act in defence of his landlord, nor a citizen, &c., in defence of the mayor (or bailiffs) of the city or town corporate where he dwelleth.' *Dalton, ib.*, whom *Hawkins*, 1, 60, 23-4, follows. See *Malicious Injury*.

Prevention of unlawful acts] Before using the force which is necessary to effect this object, any one must commence with a request to the offender to desist, then if he refuses he may gently lay hands on him to restrain him; and if he still resist, then he may with force compel him to submit. To this effect, *Hawkins*, above, s. 23. In every case it is a question for the jury whether or not the degree of force actually used was excessive or not; the slightest imposition of hands if not justified is an assault.

Extent of force used in arresting] See under *Murder*.

Provocation by assault] See under *Murder*.

'Aggravated' assault] For the phrase, see s. 43, above. Sometimes the consequences are sufficient to subject defendant to a more serious punishment, *e.g.* under s. 47, above, even though the jury think that 'an aggravated assault' was made 'without premeditation'; it is still inflicting 'grievous bodily harm' under a rpd. s. which identifies the two. *Sparrow*, 30 L. J. M. C. 43; 8 Cox C. C. 393, 1860: C. C. R. On an indictment for 'inflicting grievous bodily harm,' 'unlawful wounding,' and an assault occasioning 'actual bodily harm,' under that s., a conviction may be had for a common assault. *Yeadon;* cf. *Grievous b. h.* So in *Taylor*, L. R. 1 C. C. R. 194; 38 L. J. M. C. 106; 11 Cox C. C. 261, 1869, where the former two were charged, 'the jury may find the prisoner guilty of any lesser misdemeanour that is necessarily included in the offence as charged.' See under *Rape*.

Autrefois acquit *or* convict *after charge of common assault*] See s. 45, above, and *Index*.

Certificate of dismissal] The granting of the certificate by the justices is not discretionary (the only ground on which *Robinson*, below, can be supported) nor a judicial act, but ministerial only, and it is valid, although not applied for nor drawn up in the presence of the parties —but the person entitled may demand it 'forthwith.' 'I think that' it 'may be given at any time when the party entitled to it chooses to demand it': *per* L. Campbell C.J., *Hancock* v. *Somes*, 8 Cox C. C. 172; 28 L. J. M. C. 196, 1859: Q. B. So *Costar* v. *Hetherington, ib.* 175 and 198. In the former case the Q. B. did not approve of the judgments in *Robinson*, 10 L. J. M. C. 9, 1840 (except that forty-two days after the hearing is not 'forthwith,' and that the application should be made soon after the hearing), but nothing was said of the doctrine that

'Not proved'] when the certificate is granted because the justices think the charge 'not proved' (s. 44), this is not tantamount to *not guilty: per* L. Denman C.J., Williams and Coleridge JJ. But on the other hand—*since* that s.—the hearing must be 'upon the merits,' and where the prosecutor did not attend and offered no evidence, it was held that the magistrate had no jurisdiction to grant a certificate, and a certificate so granted was no bar under s. 45. *Reed* v. *Nutt*, 24 Q. B. D. 669; 59 L. J. Q. B. 311; 17 Cox C. C. 86, 1890, where

L. Esher M.R. also thought (but L. Coleridge C.J. doubted whether) a county court judge trying the assault had power to consider the validity of the certificate and the jurisdiction of the magistrate.

Assault on peace officer] See *Apprehension.* The fact that defendant did not know that the man whom he assaulted was a peace officer (as he was in plain clothes) in the execution of his duty is no defence under s. 38, if in fact he was on duty. *Forbes,* 10 Cox C. C. 362, 1865: *per* Gurney, Recorder of London, followed *D. Maxwell,* 2 Cr. A. R. 27; 73 J. P. 176, 1909.

In *Prince,* 1875, Brett J. in commenting on *Forbes,* seems to think that the conviction was wrong unless defendants (who certainly had strong ground to suspect, if not to believe, that they were striking a policeman) were taken to know it; but Bramwell B. cited the case with approval, saying, that the act of assaulting a police officer in the execution of his duty was a wrong in itself, and knowledge did not matter.

In trade disputes] See *Conspiracies in Restraint,* &c.

Civil process] 'S. 38 [above] is not limited to assaults on a peace officer, but extends (i) to persons acting in aid of such officer (in the due execution, &c.); and (ii) to any person' assaulted while arresting 'for any offence (whether indictable or not). Head (i) applies whether the duty being executed relates to civil or criminal matters; but head (ii) is limited to the case of lawful arrests for a criminal matter. . . . The words 'peace officer . . . &c.' are wide enough to include the sheriff or his officers, when concerned in executing civil process, and the bailiffs of county courts. The words are not restricted to arrests for crimes and are wide enough to cover acts relating to civil proceedings, *e.g.* the service of summonses relating to civil matters within the jurisdiction of justices and to revenue proceedings, *e.g.* attending to prevent the use of violence to a tax collector': 1 Russ. Cri. 895.

On revenue officers] See *Smuggling.*

Indecent assault on females] See s. 52. There is no definition of this offence.

Consent] See '*Defectives.*' By 43-4 V. 45, 2, the consent of a person under thirteen is not a defence to an indecent assault. But when consent is a good defence, even though it is not set up, the jury must not be led to believe that they may convict if they think there was consent: *Horn,* 1912; where that defence was not rebutted, c. q. on that and other grounds: *W. Hart,* 10 Cr. A. R. 176, 1914.

Counsel] In *Wann,* indecent assault, c. q., Alverstone L.C.J. said that if the judge tells the jury that consent is not set up, when it is or is not waived, counsel ought to correct him at once. 'In cases of this kind it is of great importance that the prisoner should be defended by counsel.' In *J. May,* 8 Cr. A. R. 66, 1912, the same judge went 'further. I always will have counsel in this kind of case. Counsel can often take a point the prisoner does not know'; and *per* Avory J.: 'It may be the duty of the court to protect a prisoner against himself in cases of this character.'

Indictment] It is not necessary to aver the female's age: *J. Stephenson,* 1912, 3 K. B. 341; 82 L. J. K. B. 287; 76 J. P. 408; 23 Cox C. C. 214; 8 Cr. A. R. 36. Cf. *S. Jones,* 1914.

Direction] In *J. May* five judges held that, on this charge, if the jury may reasonably infer consent, they should be directed thereon; otherwise there is no necessity, especially if in the actual conduct of the case that defence has been treated as a secondary matter: 1912, 3 K. B. 572; 82 L. J. K. B. 1; 23 Cox C. C. 327; 77 J. P. 31; 29 T. L. R. 24. When there is a count for a common and one for indecent assault, though consent may not be a defence for the latter, it may be for the former, and therefore it may save confusion to make the matter clear on each count: *G. Stevens,* 9 Cr. A. R. 132, 1913. See also *J. West,* 1910.

Communicating disease] The communication of a venereal disease to a wife by her husband at a time when he was aware of his state, but she was not, and would not have consented to the intercourse if she had been, has been held by nine judges to four not to constitute an assault either within s. 20 or s. 47. *Clarence,* 22 Q. B. D. 23; 58 L. J. M. C. 10; 16 Cox C. C. 511; 53 J. P. 149; 59 L. T. 780; 37 W. R. 166, 1888: C. C. R.

If it appears that the consent of the woman was obtained by fraud such consent has been held to constitute no defence: *Saunders,* 8 C. & P. 265, 1838: assault found, on indictment for rape, *under a statute; Case,* 1 Den. C. C. 580; 19 L. J. M. C. 174; 4 Cox C. C. 220, 1850; *Bennett,* 4 F. & F. 1105, 1866: venereal disease communicated: verdict, indecent assault; *O'Shay,* 19 Cox C. C. 76, 1898. See *Index.*

Evidence] In indecent assault, the woman may be cross-examined on connection with other men; but she need not answer. If she does, and in the negative, her answer is conclusive, and no evidence can be given to contradict her. The same rule prevails in cases of rape and carnal knowledge, notwithstanding several decisions to the contrary. *Holmes,* 1871. Otherwise concerning previous connection with defendant: *Riley,* 1887.

Where there were two counts for indecent and common assaults and a conviction for the latter, defendant sought to set it aside on the ground that he had given evidence which by s. 20 he could do on the former charge, but not on the latter: conviction confirmed: *Owen,* 20 Q. B. D. 829; 57 L. J. M. C. 46; 16 Cox C. C. 397, 1888: C. C. R. See *Chapin,* above. See further under *Grievous b. h.* S. 52 is within the schedule of the Criminal Evidence A.

Offender under fourteen] If he is too young to be convicted of carnal knowledge, he may be convicted of indecent assault: *Williams, &c.,* 1893.

Early complaint of indecent assault] See under *Hearsay* and *Rape.*

ATTEMPTS TO COMMIT OFFENCES.

At common law] every attempt to commit a felony or misdemeanour is in itself a misdemeanour. 'By the common law, no intention to commit a felony amounts to the same crime; though it does in some cases by particular statutes': 4 Bl. Comm. 221. See East, P. C. 214-5 under *Burglary*. 'So long as an act rests in bare intention it is not punishable by our laws; but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done,' *per* L. Mansfield, *Scofield,* Cald. 397, 1784. 'Any one unlawful step necessary or useful towards a . . . misdemeanour wilfully taken, is a misdemeanour.' *Chapman,* 1849. So also *Roberts,* below. And it makes no difference whether the offence attempted be one at common law or by statute: *per* Parke B., *Roderick,* 7 C. & P. 795, 1857.

By statute] Many attempts to commit offences are thus provided for. Most of them would be offences at common law, but, by statute, severe penalties are attached to them—some on summary conviction, *e.g.* by 24-5 V. 100, 14, 15, 18, 21, 62.

Some are made independent felonies by 24-5 V. 97, 8, 10, 18, 27, 38, 44: arson. Sometimes the statute puts *attempts* in the same position as the offence itself, *e.g.* 35-6 V. 33, 3: elections, &c.; 1-2 G. 5, 28, 4: official secrets.

Attempts are not within the Vexatious Ind. A.

Indictment—verdict] By 14-15 V. 100, 9: 'if on the trial of any person charged with any felony or misdemeanour it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same, and thereupon' he may be punished as if indicted for the attempt, and he cannot be prosecuted for it again. The attempt so found is a misdemeanour: *Connell,* 1853.

It has been suggested (in a note to *Bain,* L. & C. 129, 1862, which was under 24-5 V. 96, 57, rpd. and replaced by s. 27 of Larceny A. 1916) that this s. applies to offences created by statutes passed subsequently to that A., and that on an indictment for one felony there cannot be a conviction for an attempt at another, or if the indictment is at common law, there cannot be a conviction for the attempt. (If that is so, defendant could be separately indicted for the attempt to commit the common law felony.) But the words of the statute are very general, and *Hapgood,* below, is an authority against that view. If there was any doubt about the point, it was removed by *J. White,* 1910, which see.

What is an attempt?] It is not easy always to decide whether or not an *indictable* attempt has been committed. In *Laitwood,* 4 Cr. A. R. 248, 1910, the C. C. A. approved a definition 'practically the same as' Stephen's (Dig. Art. 50), which is: 'An attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case. An act done with intent to commit a crime, the commission of which in the manner proposed was, in fact, impossible, is an attempt to commit that crime. The offence . . . may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.' In *Carr,* R. & Ry. 377, 1819—attempt to discharge a loaded blunderbuss with intent to murder—the jury found that the gun was loaded, but not primed when the trigger was drawn; held that there could not be a conviction. So where the touch-hole was plugged, so that it could not be fired. *Harris,* 5 C. & P. 159, 1831 (and *Lewis,* 9 C. & P. 523, 1840, practically overruled in *Brown,* 1883). In *Williams,* 1 Den. C. C. 39, 1844, defendants were indicted for attempting to administer poison; they had delivered poison to E., and desired him to put it into Y.'s beer; E. gave up the poison to B. and told him all that had passed; but it was held that on this indictment the conviction was wrong. See *Inciting:* 'the line between inciting . . . and 'attempting' . . . is not very clearly defined': 1 Russ. Cri. 203. See *Duckworth,* 1892, and *St. George,* 1840, and *Taylor,* 1859, where Pollock C.B. said: 'It is clear that every act committed by a person with the view of committing the felonies' mentioned in a statute 'is not within' it; 'as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature.'

Attempt and intention] It would seem now—on the authority of *Brown,* 1889, which overruled *Collins,* L. & C. 471; 10 L. T. N. S. 581; 9 Cox C. C. 497; 33 L. J. M. C. 177, 1864, where it was held that a pickpocket who put his hand into a woman's pocket, assumed to be empty, could not be convicted of an attempt at larceny—that a person may be convicted of an attempt to commit an offence which, as a matter of fact, he could not have committed. An attempt to pick a pocket was punished in 'a case in *Godbolt*' (between 1574 and 1638), cited in *Kinnersly,* 1719: *per* Powys J. It is not necessary to show that the attempt might have succeeded: *Ring,* 17 Cox C. C. 491, 1892: C. C. R., a very similar case to *Collins.* The principle seems to be that if a man intends to commit an offence, and does all that lies in his power towards its committal, he is not excused, because there is some impediment of which he is unaware which would prevent his attempt from being successful. On this principle a man might, it is submitted, be convicted of an attempt to shoot with a gun which as a matter of fact could not be discharged. See *per* L. Coleridge in *Duckworth,* 1892, and *Jackson,* 17 Cox C. C. 104, 1890. under 24-5 V. 100, 14 (cf. s. 19); and *Attempts to Murder* and *Shooting.*

'*Proximate' act*] Defendant had procured certain dies for the purpose of making counterfeit Peruvian dollars, but (the jury found) only intended to make a few dollars in England as samples, and then—if it answered—to send the apparatus out to Peru. He had procured some of the necessary 'plant' to complete the coining, and had negotiated for more, but was not proved to have actually got much of it. A conviction for making and attempting to make counterfeit foreign coin, and on other counts, was upheld. The only question argued was, whether the attempt was sufficiently closely connected with the offence to constitute an attempt to commit a felony under a rpd. A., and the court held that it was, as the procuring the dies was sufficiently proximate to the offence, and sufficiently showing the clear criminal intent. *Roberts,* D. & P. C. C. 539, 1855. 'It is difficult and perhaps impossible,' said Jervis C.J. '. . . to define what is and what is not such an act done in furtherance of a criminal intent, as will constitute an offence. . . . Many acts, coupled with the intent, would not be sufficient. For instance, if a man intends to commit a murder, and is seen to walk towards the place of the contemplated scene, that would not be enough'; but here no one could doubt the express purpose. 'I quite agree,' said Parke B., 'with the law . . . in *Eagleton* [1854], that an attempt at committing a misdemeanour is not an indictable attempt unless it is an act directly approximating to the commission of an offence, and I think this act is a sufficient approximation.' 'Every case must be taken with its own peculiar circumstances,' *per* Wightman J. In *Eagleton* the last act in the fraud (obtaining money by false pretences) was getting credit in an official's book. The court said if any other act had been required to get the money, they would not have held this 'proximate.' As it was the last act 'dependent on himself,' it ought to be considered as an attempt.

That case was followed in *Harry Robinson,* 1915, 2 K. B. 342; 84 L. J. K. B. 1149; 79 J. P. 303; 31 T. L. R. 313; 24 Cox C. C. 726; 11 Cr. A. R. 124, where appellant pretended to have been bound and robbed by burglars; the fraud was discovered before he could claim the sum assured on his stock; he was convicted of the attempt: c. q. as the acts proved were too remote.

In *Laitwood,* above, 'appellant went to two' persons, 'made false representations as to his business being flourishing and tried to get them to apply for situations . . . in that business, telling them that they would have to invest 100*l*. . . . They did not apply and were not asked directly to supply the 100*l*. But what was he making these representations for? They were not mere preparation. He must have made them to get the 100*l*.': *per* Pickford J., who applied the definition above.

Defendant was servant to a contractor for a supply of meat; the contractor used to send the meat to a quartermaster-sergeant, who with the assistance of some servant of the contractor weighed the meat with his own weights and scales; defendant removed one of the weights supplied by the sergeant, and substituted for it a short weight of his own. By this means the quantity remaining over, which would in due course have been carried away by the contractor, was about 45 lbs. more than it ought to have been, but the fraud was detected before the weighing was completed. The jury found that he intended to steal the difference. On these facts his conviction for attempting to steal the 45 lbs., the property of his master, was upheld. Erle C.J. observed, 'It is said that the evidence here does not show any such

proximate overt act as is sufficient to support the conviction for an attempt to steal the meat. In my opinion there were several overt acts which brought the attempt close to completion. These were the preparation of the false weight, the placing it in the scale, and the keeping back the surplus meat. It is almost the same as if the prisoner had been sent with two articles, and had delivered one of them as if it had been two. To complete the crime of larceny there only needed one thing, the beginning to move away with the property.' Blackburn J. observed, 'There is no doubt a difference between the preparation antecedent to an offence and the actual attempt, but if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.' *Cheeseman,* L. & C. 140, 1862.

See further cases under specific offences.

Aiding in an attempt] Where one defendant was charged with committing a rape and another with aiding, &c. him, and the jury found the former guilty of an *attempt* and the other of aiding therein, it was held (without argument or reasons given) that the latter was within 14-15 V. 100, 9. *Hapgood and Wyatt,* L. R. 1 C. C. R. 221; 39 L. J. M. C. 83; 11 Cox C. C. 471, 1870.

Sentence] Except by statute, penal servitude cannot be imposed for an attempt: *E. Hirst,* 10 Cr. A. R. 282, 1914.

Attempted suicide] is not an attempt to commit murder within 24-5 V. 100, and is triable at Q. S.: *Burgess,* L. & C. 258; 52 L. J. M. C. 55; 9 Cox C. C. 247, 1862. But it is a felony and hard labour could always be imposed for it: *J. W. Mann,* 1914, 2 K. B. 107; 83 L. J. K. B. 648; 78 J. P. 200; 24 Cox C. C. 140; 30 T. L. R. 310; 9 Cr. A. R. 31, where, however, that part of the sentence (six months, after two previous convictions for the same offence) was quashed. Killing in an attempt to commit suicide may be murder: *Hopwood,* 8 Cr. A. R. 143, 1913. Sentence of eight months' imp. w. h. l., after one of four months', six months previously, for this offence was reduced to ten weeks' (with h. l.): *A. Wilson,* 9 Cr. A. R. 32, 1913 See also *H. Crisp,* 1912.

Admiralty jurisdiction] See under *Venue.*

Suspicious behaviour] See *Suspects.*

BAIL, INDEMNIFICATION OF.

See *Perversion of Justice.*

BAILEES—OFFENCES BY.

See *Agents,* &c. and Index.

BALANCE SHEET, FALSIFYING.

See *Companies.*

BALLOT, OFFENCES CONNECTED WITH.

See *Elections.*

BANKERS—OFFENCES BY.

See *Agents.* 'The position of a banker differs from that of an ordinary trader. The ordinary trader by the mere fact that his premises are open and that his business is being carried on does not represent that he is solvent. In the case of a banker the mere fact of his keeping his doors open for business and carrying on business may afford some evidence from which a jury may find that he impliedly represents that he is solvent': *Parker, &c.*, 25 Cox C. C. 145, 159; 80 J. P. 271, 1916, following *Gurney,* 1869, and *Carpenter,* 1911.

BANKRUPTS—OFFENCES BY.

Bankruptcy offences] The Bankruptcy Acts, 1883-1914, are: 46-7 V. 52; 47-8 V. 9; 48-9 V. 47; 49-50 V. 12; 50-1 V. 66; 51-2 V. 62; 53-4 V. 71; 3-4 G. 5, 34; 4-5 G. 5, 59. By 46-7 V. 52, 149 (2). references to the rpd. 1869 A. were replaced by the corresponding provisions of the 1883 A., and by s. 163 (2) the (now rpd.) provisions of the Debtors A. 1869, about offences by bankrupts, are to apply to any person, *whether a trader or not*, in respect of whose estate a receiving order has been made. All these (1883) ss. are rpd. and practically the whole bankruptcy criminal code is to be found in the 1914 A.

Fraudulent debtors] By s. 154 of 4-5 G. 5, 59, the Bankruptcy A. 1914: 'Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made shall in each of the cases following be guilty of a misdemeanour:—

Failure to make full discovery] 1. If he does not to the best of his knowledge and belief fully and truly discover to the trustee all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless he proves that he had no intent to defraud:

To deliver up property] 2. If he does not deliver up to the trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud:

To deliver up books, &c.] 3. If he does not deliver up to the trustee, or as he directs, all books, documents, papers and writings in his custody or under his control relating to his property or affairs, unless he proves that he had no intent to defraud:

Concealment of property or debts] 4. If after the presentation of a bankruptcy petition, by or against him, or within six months next before such presentation, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debt due to or from him, unless he proves that he had no intent to defraud:

Removal of property] 5. If after the presentation of a bankruptcy petition by or against him, or within six months next before such presentation, he fraudulently removes any part of his property to the value of 10*l.* or upwards:

Omission in statements] 6. If he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud:

False debts] 7. If, knowing or believing that a false debt has been proved by any person under the bankruptcy, he fails for the period of a month to inform the trustee thereof [*i.e.* a month after the trustee's appointment: *Beaumont,* 12 Cox C. C. 183; 26 L. T. 587, 1872: C. C. R.]:

Preventing the production of books, &c.] 8. If, after the presentation of a bankruptcy petition by or against him, he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law:

Concealment, falsification, &c. of books, &c.] 9. If, after the presentation of a bankruptcy petition by or against him, or within six months next before such presentation, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law:

*** *N.B.*—For the purposes of 9, 10 and 11, the period, in the case of books of *account,* is two years: see s. 158, below.

False entries] 10. If, after the presentation of a bankruptcy petition by or against him, or within six months next before such presentation, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law:

Fraudulently parting with, altering books, &c.] 11. If, after the presentation of a bankruptcy petition by or against him, or within six months next before such presentation, he fraudulently parts with, alters, or makes any omission in, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs:

Fictitious losses] 12. If, after the presentation of a bankruptcy petition by or against him, or at any meeting of his creditors within six months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses:

Obtaining credit by fraud] 13. If within six months next before the presentation of a bankruptcy petition by or against him, or in the case of a receiving order made under s. 107 of this A., before the date of the order, or after the presentation of a bankruptcy petition and before the making of a receiving order, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same:

By false pretence of carrying on business] 14. If within six months next before the presentation of a bankruptcy petition by or against him or in the case of a receiving order made under s. 107 of this A., before the date of the order, or after the presentation of a bankruptcy petition and before the making of a receiving order, he obtains, under the false pretence of carrying on business, and, if a trader, of dealing

in the ordinary way of his trade, any property on credit and has not paid for the same, unless he proves that he had no intent to defraud:

Pledging, &c. property obtained on credit] 15. If within six months next before the presentation of a bankruptcy petition by or against him, or in the case of a receiving order made under s. 107 of this A., before the date of the order, or after the presentation of a bankruptcy petition and before the making of a receiving order, he pawns, pledges, or disposes of any property which he has obtained on credit and has not paid for, unless in the case of a trader such pawning, pledging or disposing is in the ordinary way of his trade and unless he proves that he had no intent to defraud:

[The form of this paragraph meets the difficulty felt in *Boughton*, 22 Cox C. C. 599, 1911.]

False representation, &c.] 16. If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to an agreement with reference to his affairs or to his bankruptcy.

For the purpose of this section the expression 'trustee' means the official receiver of the debtor's estate or trustee administering his estate for the benefit of his creditors.

Undischarged bankrupt obtaining credit] By s. 155: 'Where an undischarged bankrupt—(a) either alone or jointly with any other person obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt; or (b) engages in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt; he shall be guilty of a misdemeanour.'

Though security for a debt is given, there may be a conviction within (a): 'no credit is given at all . . . when an exceptionally valuable jewel is pledged for a sum which is obviously less than its value. But where a man obtains goods on the faith of a bill of exchange and on the security of a deposit of shares not of undoubted value, it is clear that credit is given; there is a personal trust in him none the less, though it is not to the extreme extent': *Fryer*, 7 Cr. A. R. 183, 1912. Borrowing money is 'clearly a credit' within the s.: *Salomon*, L. J. newspaper, Dec. 23, 1893: *per* Div. Ct. An agreement to pay house-rent by future instalments is obtaining credit within (a): *A. W. Smith*, 11 Cr. A. R. 81, 1915.

Frauds] By s. 156: 'If any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made—

(a) In incurring any debt or liability has obtained credit under false pretences, or by means of any other fraud;

(b) With intent to defraud his creditors, or any of them, has made or caused to be made any gift or transfer of, or charge on his property;

(c) With intent to defraud his creditors, has concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him, he shall be guilty of a misdemeanour.'

N.B.—By s. 164 (1), below, maximum sentence under this s. is one year's imp. w. h. l.

A fictitious transfer is within (b): *Richman*, 4 Cr. A. R. 233, 1910; but not the sale (of part of the bankrupt's property) at an undervalue, though creditors may be prejudiced: *Re Cranston*, 9 M. & W. 160, 1892: Div. Ct.

Gambling, &c. leading to insolvency] By s. 157 (1): 'Any person who has been adjudged bankrupt, or in respect of whose estate a receiving order has been made, shall be guilty of a misdemeanour if, having been engaged in any trade or business, and having outstanding at the date of the receiving order any debts contracted in the course and for the purposes of such trade or business—(a) he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling or by rash and hazardous speculations, and such gambling or speculations are unconnected with his trade or business; or (b) he has, between the date of the presentation of the petition and the date of the receiving order, lost any part of his estate by such gambling or rash and hazardous speculations as aforesaid; or (c) on being required by the official receiver at any time, or in the course of his public examination by the court, to account for the loss of any substantial part of his estate incurred within a period of a year next preceding the date of the presentation of the bankruptcy petition, or between that date and the date of the receiving order, he fails to give a satisfactory explanation of the manner in which such loss was incurred: Provided that, in determining for the purposes of this section whether any speculations were rash and hazardous, the financial position of the accused person at the time when he entered into the speculations shall be taken into consideration.

(2) A prosecution shall not be instituted against any person under this section except by order of the court. . . .

(3) Where a receiving order is made against a person under s. 107 of this Act this section shall apply as if for references to the presentation of a petition there were substituted references to the making of the receiving order.'

Not keeping proper accounts, after a previous bankruptcy, &c.] and not *preserving* such books, for two years (at most) preceding the petition, is by s. 158 (1) a misdemeanour: 'Provided that a person, who has not kept or has not preserved such books . . . shall not be convicted of an offence under this section if his unsecured liabilities at the date of the receiving order did not exceed one hundred pounds or if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable.' (2) is identical with s. 157 (2), above. (3) enacts the *minimum* requirements of 'proper books.' By (4), 'two years' before the petition is to be read in the application of 9, 10 and 11 of s. 154, above, to account-books. (5) is identical with s. 157 (3), above.

Absconding with property] By s. 159: 'If any person who is adjudged bankrupt, or in respect of whose estate a receiving order has been made, after the presentation of a bankruptcy petition by or against him, or within six months before such presentation quits England and takes with him, or attempts or makes preparation to quit England and take with him. any part of his property to the amount of 20*l.* or upwards, which ought by law to be divided amongst

his creditors, he shall (unless he proves that he had no intent to defraud) be guilty of felony.'

Where a debtor shortly before his bankruptcy executed a deed of assignment of 'all his property' for the benefit of his creditors, having at the time 120*l.* with which he absconded from England a day or two afterwards, he was rightly convicted under a s. framed like this s. as it was 'his' property and not the trustee's. *Humphris,* 1904, 2 K. B. 89; 20 Cox C. C. 620: C. C. R.

False claims, &c.] By s. 160: 'If any creditor, or any person claiming to be a creditor, in any bankruptcy proceedings, wilfully and with intent to defraud, makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanour, and shall on conviction on indictment be liable to imprisonment with or without hard labour for a term not exceeding one year.'

Prosecution by order of court] By s. 161: 'Where an official receiver or a trustee in a bankruptcy reports to any court exercising jurisdiction in bankruptcy that in his opinion a debtor who has been adjudged bankrupt, or in respect of whose estate a receiving order has been made, has been guilty of any offence under this Act, or any enactment repealed by this Act, or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the debtor has been guilty of any such offence, the court shall, if it appears to the court that there is a reasonable probability that the debtor will be convicted, order that the debtor be prosecuted for such offence: Provided that it shall not be obligatory on the court in the absence of any application by the official receiver for such an order to make an order under this section for the prosecution of an offence, unless it appears to the court that the circumstances are such as to render a prosecution desirable.'

Discharge, &c. no defence] By s. 162: 'Where a debtor has been guilty of any criminal offence he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved.'

Committal for trial] By s. 163, a bankruptcy court, if it thinks that 'the bankrupt or any other person' has been guilty of a statutory *bankruptcy* misdemeanour, may commit for trial, and for this purpose it has 'all the powers of a stipendiary magistrate'; but no instance of this jurisdiction seems to be known.

Sentence] By s. 164 (1): Unless otherwise provided, the *maximum* for *any* offence, including felony, under this A. is, *on indictment*, two years' imp. w. h. l.; on summary conviction, six months'. By (2) there can be no summary proceedings 'after one year from the first discovery' of the offence by official receiver, trustee or creditor, nor 'after three years from the commission of the offence.'

Vexatious Indictments Act] By s. 164 (3): 'Every misdemeanour under this Act shall be deemed to be an offence under and subject to the provisions of the Vexatious Indictments Act, 1859, and any Act

amending that Act; and when any person is charged with any such misdemeanours before a court of summary jurisdiction the court shall take into consideration any evidence adduced before them tending to show that the act charged was not committed with a guilty intent.'

Indictment] (4) anticipates the policy of the Indictments A. 1915, in respect of form and is therefore not set out here: Forms (24 and 30) for offences of this sort are appended to the Indictment Rules.

Public prosecutor to act under order of court] By s. 165, it is usually the duty of the Director of Public Prosecutions to carry on the prosecution, but in some cases the Board of Trade may act.

Compulsory admissions] See p. 174.

Evidence] See *Credit* and *Privilege of Witnesses.*

By s. 137 (1): 'A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

(2) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date.'

By s. 138 (1): 'A minute of proceedings at a meeting of creditors under this Act signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

(2) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had.'

By s. 139: 'Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.'

By s. 141: 'In the case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.'

By s. 142: 'Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of any such court, in all legal proceedings.'

By s. 143: 'A certificate of the Board of Trade that a person has been appointed trustee under this Act, shall be conclusive evidence of his appointment' (and of its date: *Beaumont,* above).

By s. 144 (1): 'All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the

Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence and deemed to be such orders or certificates without further proof unless the contrary is shown.

(2) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act, of the Board of Trade, shall be conclusive evidence of the fact so certified.'

If any of the documents put in contain erasures and interlineations they will not thereby be rendered inadmissible in evidence, although no proof be given when they were made; the presumption in such cases being against fraud and misconduct. *Gordon,* 1855.

Where the copy of the Gazette was not produced, Lush J. admitted an order of adjudication under the seal of the court to prove the fact of the debtor being 'adjudged bankrupt': s. 154, above; and said the provision about the Gazette is only cumulative, and the bankruptcy may be proved by the Gazette or otherwise. *Thomas,* 11 Cox C. C. 535; 22 L. T. 138, 1870. A page, only part of a Gazette, was held to have been wrongly received, though it came filed with other documents from the Bankruptcy Court. *Lowe,* 52 L. J. M. C. 122; 15 Cox C. C. 286, 1883: C. C. R.: c. q.

Married woman] By s. 125 (1): 'Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a *feme sole*.'

Infant] Since 37-8 V. 62, the Infants' Relief A. 1874, an infant cannot be convicted of appropriating any part of his property 'which ought by law to be divided amongst his creditors'—s. 159, above—where the debts proved against his estate are only trade debts and it does not appear there are any debts for necessaries supplied to him. *Wilson,* 5 Q. B. D. 28; 49 L. J. M. C. 13; 14 Cox C. C. 378, 1879: C. C. R. See also *Ex parte Jones,* 18 Ch. D. 109; 50 L. J. Ch. 673, 1881: C. A., where Jessel M.R. seems to think that even if the infant trader had expressly represented to the petitioning creditor that he was of full age an adjudication could not be made, although an 'equitable liability' would be created.

Failure to disclose] A disclosure under no. 1 of s. 154, above, is not restricted to property in possession at the commencement of the bankruptcy. See *Michell,* 50 L. J. M. C. 76; 14 Cox C. C. 490, 1880: C. C. R., where the evidence on which the conviction was affirmed related to transactions respecting property disposed of some twelve months previously: how far back the disclosure is to go is not definitely laid down, probably as far back as the fraud alleged: *per* L. Coleridge C.J. With respect to the non-disclosure of his property by the bankrupt, in order to bring him within the statute, it must appear that there was a criminal intent in his refusing to disclose his property. Thus where he was convicted under 5 G. 2, 30, rpd., for not 'freely and truly disclosing and discovering,' &c., and the evidence was, that on the last day of examination he appeared before the commissioners and was sworn and examined, but about certain parts of his property refused to give any answer, stating that this was not done to defraud his creditors, but under legal advice to dispute the validity of the commission, the judges held the conviction wrong. *Page,* R. & Ry. 392; 1 B. & B. 308, 1819.

Concealment] If on his examination he give up a book, as containing a full and true discovery of his estate, &c., it is incumbent on the prosecution to produce that book, or to account for its non-production; for otherwise it cannot be known whether the effects have been concealed or not. *Evani,* 1 Moo. C. C. 70, 1825. But there was no evidence that the book was lost or that there had been a search, and in a proper case secondary evidence would be given. It is not necessary that the concealment should have been effected by his own hands, or that he should be shown to have been in the actual possession of the goods concealed, after bankruptcy; it is sufficient if another person, having the possession of effects as his agent, and holding them subject to his control, conceals them with his privity: *ib.* A secreting by him of his goods is sufficient to constitute a concealment under a rpd. s., although a full disclosure is afterwards made to the commissioners before the bankrupt's last examination. *Courtivron* v. *Meunier,* 6 Ex. 74; 20 L. J. Ex. 104, 1851, overruling *Walters,* 5 C. & P. 138, 1831. But the concealment must be with intent to defraud: *ib.*

Removal of effects] Where defendant executed an assignment of the property on his farm to trustees for the benefit of his creditors which was not registered as a bill of sale, and afterwards, remaining in possession as bailiff of the trustees, fraudulently removed stock from the farm to the extent of 10*l.* and then liquidated his affairs by arrangement, and a trustee was accordingly appointed, it was held that he could not properly be convicted under no. 5 of s. 154, above. The assignment, not having been registered as a bill of sale, was void as against the trustee in liquidation; but was (then) otherwise in force, so that the property in the stock removed was not his within the s., but the (first) trustees' under the assignment. *Creese,* L. R. 2 C. C. R. 105; 43 L. J. M. C. 51; 12 Cox C. C. 539, 1874, distinguished from *Humphris,* above, in the latter.

Pledging goods 'on approval'] is not an offence within a rpd. A., now s. 154 (15), above. *J. Lyons,* 9 Cox C. C. 299, 1863.

'Ordinary way of . . . trade'] No. 15 of s. 154 speaks of 'disposing . . . in the ordinary way of his trade,' and on these words it was ruled that the disposing by bill of sale of a portion of a trader's goods not paid for was clearly within the s. *Thomas,* 1870. But where defendant, within the statutory period, had disposed of goods obtained on credit, but it was proved that he had always done so in the whole course of his business, it was held that he was not within no. 15. *Juston,* 61 J. P. 505, 1897. Where a trader, shortly before his insolvency, purchased goods on credit, and shipped them, and obtained advances by pledging the bills of lading, it was held that in the absence of any evidence of having obtained the goods on false representations, his conduct did not constitute an offence under nos. 13, 14, or 15 of s. 154. *Ex parte Brett, In re Hodgson,* 1 Ch. D. 151; 45 L. J. Bank. 17; 13 Cox C. C. 128, 1875: C. A.; though he gave no explanation of what had become of the money, 'the mode in which' he 'applied the money cannot make any difference.'

Undischarged bankrupt] In order to convict under s. 155, above, it is not necessary that it should be part of a contract to grant credit; it is sufficient if credit in fact is obtained. Defendant, living in New-

castle-on-Tyne, bought by letter a horse from the prosecutor in Ireland, who by the former's direction delivered it on board a steamer; no agreement was made about time or mode of payment, and defendant did not disclose that he was undischarged. He paid for the carriage of the horse on its delivery, and immediately sold it, and refused to pay the price to the prosecutor. A conviction was upheld. *Peters,* 16 Q. B. D. 636; 53 L. J. M. C. 173; 16 Cox C. C. 36, 1886: C. C. R.

The ten pounds are reckoned on what the bankrupt keeps, not on what he orders. *Juby,* 16 Cox C. C. 160; 55 L. T. 788, 1886: C. C. R., where defendant having goods of less than the statutory value kept (though he had not ordered) goods bringing his debt over that amount. *Peters,* followed.

Intent to defraud] See *Credit.* In every case under s. 154, above. the *onus* is on defendant to rebut this intent (possibly under no. 7, intent is immaterial, as in s. 155). See *Thomas,* 1870; *Bolus,* 11 Cox C. C. 610, 1870; *Cherry,* 12 Cox C. C. 32, 1871. Before bankruptcy, defendant called a meeting and disclosed to his creditors the disposal of his property, for not disclosing which after bankruptcy he was convicted under nos. 1, 2, 4, 6, above; held, that he was entitled to prove what took place at this meeting to disprove the intent—which might or might not have been enough to satisfy the jury. *Wiseman,* 20 Cox C. C. 144; 9 Mans. 12, 1901: C. C. R.: c. q. This intent is not a material ingredient of the offence under s. 155, above. *Dyson,* 1894, 2 Q. B. 176; 63 L. J. M. C. 124; 18 Cox C. C. 1: C. C. R., where Hawkins J. said, 'the offences created by' the Debtors A. 'are created by sections in which the words 'fraudulently' or 'unless the jury is satisfied, &c.,' or equivalent words are used. In framing the Act of 1883, the legislature had the provisions of the Act of 1869 before them, and it is impossible to suppose that they were unaware of the importance of limiting the offence to cases where there has been an intent to defraud and excluding those cases where the jury might think there had been no such intent.'

The following authorities on earlier statutes have some application to the present law. In *Gordon,* 25 L. J. M. C. 19; D. & P. C. C. 586; 7 Cox C. C. 9, 1855, an indictment, under a rpd. s., for not surrendering, the jury found that there was no evidence that defendant had actual knowledge of the adjudication and the summons to surrender, but that he had left this country before the adjudication, believing that he would be made bankrupt, and stayed abroad with the intent to defraud his creditors, by depriving them of their rights to examine him and make his responsible: conviction affirmed. In *Ingham,* 29 L. J. M. C. 18; 8 Cox C. C. 240, 1859: C. C. R.—false entries under a rpd. s., the jury found that the false entries were made with intent to deceive a bankrupt's creditors about the state of his accounts, and to prevent the examination, &c. of them in due course, and to save him from having to account for a deficiency which appeared in the genuine account; but they also found that it was not done to defraud the creditors of any property, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him. C. q. on the ground that, though there might be an intent to deceive, the jury had expressly negatived an intent to defraud. Pollock C.B. said to 'defraud' meant to cheat a person out of something. Cf. *Intent* under *Forgery,* and *Hughes,* 1 F. & F. 726, 1860.

Venue] An indictment, under a rpd. s., for not surrendering at a district court cannot be sustained in a different county, that, for instance, in which the bankrupt was a trader, and committed an act of bankruptcy; the offence is committed where the district court is: *Milner,* 2 C. & K. 310, 1846. In *Peters,* 1886, it was held that the offence was committed in Newcastle-on-Tyne. So where a bankrupt by means of false pretences made orally in Glasgow, obtained goods and credit for goods delivered in the county of Durham, a conviction in Durham is good; the offence is committed where the goods for which credit is given are obtained. *Ellis,* 1899, 1 Q. B. 230; 68 L. J. Q. B. 103; 62 J. P. 838; 79 L. T. 532; 19 Cox C. C. 210: C. C. R. In *Dawson,* 16 Cox C. C. 556; 53 J. P. 280, 1888: C. C. R., an undischarged bankrupt, while in Suffolk, purchased a quantity of fish on credit, part of which he disposed of in Suffolk, and the remainder he sent into Lincolnshire. On indictment in Lincolnshire, it was held that credit was obtained in Suffolk: c. q. Cf. under *False Pretences.*

Indictment] Where the offence is within a s. in which the time is material, *e.g.* no. 11 of s. 154, above, that time must be strictly averred; it cannot be amended after verdict. Nor, in *Harris,* 1 Den. C. C. R. 461; 19 L. J. M. C. 11; 3 Cox C. C. 565, 1849, could an indictment which was held bad for repugnancy (and quashed)—on a point which could hardly arise at the present day.

Q. S. has jurisdiction.

BARRATRY.

A BARRATOR* is defined to be 'a common mover, exciter, or maintainer of suits or quarrels either in courts or in the country, and it is said not to be material whether the courts . . . be of record or not, or whether such quarrels in the country relate to a disputed title of possessions or not; but that all kinds of disturbances of the peace, and the spreading of false rumours and calumnies, whereby discord and disquiet may grow among neighbours, are as proper instances of barratry as the taking or keeping the possession of lands in controversy. But it hath been holden that a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right. However, if such actions be merely groundless and vexatious, without any manner of colour . . . I do not see why a man may not as properly be called a barrator for bringing such actions himself, as for stirring up others to bring them. But it seems that an attorney is in no danger of being judged guilty of an act of barratry in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy.' Hawk. P. C. 1, 81, 1-4, following 8 Co. Rep. 36 *b;* 1 Russ. Cri. 585.

Barratry is a cumulative offence, and the party must be charged as a *common barrator*. It is, therefore, insufficient to prove the commission of one act only. Hawk. *ib.* s. 5; cf. p. 107. For this reason the prosecutor is bound, before the trial to give without any demand the defendant a note of the particular matters intended to be proved, without which the trial will not be permitted to proceed. *Ib.* s. 13; Car. Supp. 322. See especially *per* L. Hardwicke C. (passage partly cited under *Nuisance*). The prosecution will be confined to these particulars. *Goddard* v. *Smith,* 6 Mod. 262; Case 374, 1705.

Evidence] 'The prosecutor may prove any number of particular facts; but it is usual to give notice of the acts intended to be relied upon on the trial, and if this is not done, a judge will make an order for particulars. The impossibility of giving such notice with respect to the prisoner's conduct would exclude such evidence, even if it were not excluded by general rules of policy': *per* Willes J. in *Rowton,* 1865.

The punishment is by fine and imprisonment, and being held to good behaviour, and in persons of 'any profession relating to the law, they ought also to be . . . disabled to practise for the future.' Hawk. *ib.* s. 14; 34 E. 3, 1, still in force.

By 12 G. 1, 29, 4: 'if any person . . . convicted of forgery or common barratry shall . . . act or practice as an attorney, or solicitor, or agent, in any suit or action' in 'England, the judge or judges of the court where such suit or action . . . shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way

* The word is of doubtful origin; perhaps from Gk. *prattein*, to do, be busy about.

in open court; and if it shall appear . . . that the person complained of . . . hath offended contrary to this Act,' the judge 'shall cause such offender to be transported for seven years.' This s. is still alive, but the statute is cited by *Craies* on Statute Law, 2nd ed. p. 362, as one never acted on since it was passed, and apparently only remaining unrepealed because forgotten. Stephen J. calls it 'perhaps the most iniquitous in the statute book.' Dig. Cr. L. xxxiv. 1st edn.

BATTERY

is 'an assault whereby any the least actual force is actually applied to the person of another or to the dress worn by him, directly or indirectly. Provided that such acts as are reasonably necessary for the common intercourse of life are not assaults or batteries if they are done for the purpose of such intercourse only and with no greater force than the occasion requires.' Thus there is no assault or battery when 'a crowd of people going into a theatre push and are pushed against each other.' Steph. Dig. Cr. L. art. 262. See *Assault.*

BESTIALITY.

See *Sodomy.*

BETTING, OFFENCES CONNECTED WITH.

See *Gaming.*

Betting-houses] Gaming-houses include betting-houses by s. 2 of 16-17 V. 119, the Betting A. 1853. S. 1 is: 'No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner or occupier or keeper thereof or any person using the same or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid or any of them is hereby declared to be a common nuisance and contrary to law.'

'*House, office, room, or other place*'] By s. 3: 'Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep or use the same for the purposes hereinbefore mentioned or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid' may be sentenced to six months' imp. w. h. l. without the option of a fine, which may be of one hundred pounds, and costs; imprisonment for *non-payment* is not regulated by this s. (S. J. A. 1884, schedule), but by the *scale* in S. J. A. 1879, as in *Perkins*, below.

'*Business*'] means that 'of a betting-house keeper' and not 'of a lawful business': *per* Hawkins J., *Cook*, 51 L. T. 21; 48 J. P. 694; 32 W. R. 796: Q. B. D., where the manager of a bicycle ground on which a huge crowd was watching races, must have known (and perhaps seen) that there was betting, which he could not wholly have stopped, but with which he had nothing to do: c. q.

'*Received*'] See *Boulton* v. *Hunt*, below.

Game of skill] An automatic machine, though giving scope for skill in its use, may, in effect, create a bet between its owner, a shopkeeper,

and his customers who use it: *Peers,* and *Taylor* v. *Caldwell,* 25 Cox C. C. 325, 1915: K. B. D., Lush J. dissenting; approved in *Peers and Brown,* 86 L. J. K. B. 797; 81 J. P. 143; 12 Cr. A. R. 210, 1917; thus the s. is not limited to an event which the parties to the bet take no share in determining. 'The true test is one of fact,' and therefore for the jury.

'*House,*' *&c.*] In *Davis* v. *Stephenson,* 24 Q. B. D. 529, 1890, the mere deposit by a bookmaker in a house of packets of money, with instructions, &c., for bets received outside the house was not such a using of the house as to bring it within s. 1; but see *Bond* v. *Plumb,* 1894, 1 Q. B. 169 (occupier (i.) betting with persons 'resorting thereto'; (ii.) receiving deposits on bets there); *Worton,* 1895, Q. B. 227; 64 L. J. M. C. 74: C. C. R. (deposits received by bookmaker inside); *Downes* v. *Johnson,* 1895, 2 Q. B. 203; 64 L. J. M. C. 238 (bets made between members only at a *bonâ fide* club, not within the A., but see below).

In a public-house] The relations between the occupier of a public-house and a bookmaker frequenting it are conveniently summarised in *Deaville,* two cases, and in *Simpson,* 1903, 1 K. B. 468; 20 Cox C. C. 389; 72 L. J. K. B. 272: C. C. R.; unless the landlord knows of and permits the betting, the bookmaker cannot be convicted under this A., but the landlord may be convicted if he knew without giving any explicit permission. And his knowledge may be inferred from his opportunities of knowing: *Lee* v. *Taylor and Gill,* 23 Cox C. C. 220, 1912. Cf. *Belton* v. *Busby,* below. Using a place for the purpose of paying bets made elsewhere is not within that A. *Bradford* v. *Dawson,* 1897, 1 Q. B. 307; 66 L. J. Q. B. 191: five judges.

On horse races] Defendant owned a newspaper, each number of which included a coupon giving the possessor the right to take part in a competition for money-prizes for naming the winners of horse races, all guesses after the first being paid for by him. It was held that he was properly convicted of keeping and using the newspaper office for receiving money as a consideration for undertaking to pay on the subsequent event of the races. *Stoddart,* 1901, 1 Q. B. 177; 19 Cox C. C. 587; 70 L. J. Q. B. 189: C. C. R.; distinguishing *Stoddart* v. *Sagar,* 1895, 2 Q. B. 474; 64 L. J. M. C. 234.

Advertisements of information about bets not to be made in any office or place, &c., are not within this A. or 37-8 V. 15. *Cox* v. *Andrews,* 12 Q. B. D. 126, 1883.

A sweepstake on a horse race is not betting within 16-17 V. 119 (though it may be a lottery, and therefore illegal). *Hobbs,* 1898, 2 Q. B. 647; 19 Cox C. C. 154; 67 L. J. Q. B. 928: C. C. R.: c. q.; defendant was a mere organiser and not a subscriber; using the house he occupied is not within the s. But it is strongly argued, 9 Halsbury, 297, that *Hobbs* is irreconcilable with *Stoddart,* and that the latter is correct.

See on this point and that of the next paragraph, *Stoddart* v. *Hawke,* 20 Cox C. C. 111, 1901: K. B.; *Mackenzie* v. *Hawke, ib.* 305; *Hawke* v. *Mackenzie, ib.* 314, 324, 1902; *Fielding* v. *Turner, ib.* 513; *Ashley* v. *Hawke, ib.* 559, 1903; *Thompson* v. *Mason, ib.* 641, 1904; *Derby* v. *Bloomfield, ib.* 674, 1904.

In *Bradley, &c.,* 1 Cr. A. R. 146, 1908, the C. C. A. said of a club, to which admittedly members resorted for betting at racing hours and made 'books,' that it was clearly a case for the jury whether this was

a 'genuine social club, the members of which incidentally betted with one another, or whether the whole concern was got up especially by these three defendants as a blind for the bookmaking business carried on by' two of the defendants, who 'held the controlling interest in the company and were habitually there doing their business, and if permission was necessary had given it to themselves. Bradley'—who was secretary and auditor, and had signed the agreement for the tape machine at 100*l.* a year (which sum did not appear in 'the company's' accounts), but there was no evidence that he ever made a bet or any profit out of the 'books' (he was charged with 'assisting in conducting, &c.')—'was present,' sitting 'at the table' with the two other defendants when the raid was made. His presence on that occasion might have been capable of explanation, but none was forthcoming. Could he be sitting at that table without knowing what was going on and giving the sanction of his presence to this 'use of the premises'?: convictions affirmed. In *Hitchin, &c., ib.* 181, there was also a count for 'unlawfully acting in conducting the business of a certain place, to wit a room . . . which said place then was a common gaming-house within . . . the Gaming A. 1845,' where the wording follows s. 4 of that A., but was held sufficiently to charge 'conducting' within s. 3, in view of s. 2, above.

But user of a place by one not the owner or occupier for betting is not within s. 3 unless the sanction of someone in authority is proved; the sanction of barmen forbidden by the landlord to allow betting would be enough to convict, but the jury must be directed on it: *I. Moss,* 4 Cr. A. R. 112; 74 J. P. 204; 26 T. L. R. 323, 1910.

A deposit account with the object of making bets up to but not exceeding the amount accepted and acted on is within the s., and if there is other evidence of a betting business, even though it be a credit business, being carried on at the place where the deposit is made, a single illegal transaction such as that may constitute an user of the premises within the s. (assuming that the postal orders sent in this case were 'money'): *B. Mortimer,* 80 L. J. K. B. 76; 27 T. L. R. 17; 5 Cr. A. R. 198, 1910. For the meaning of 'deposit' in s. 4 (of a non-indictable offence), see *Boulton* v. *Hunt,* below.

A shopkeeper's manager and assistant and himself were respectively convicted of using the shop and 'apparently of 'assisting'' and permitting it to be used for betting; the bets were not made between the former and the customers, but between the latter and the bookmaker, who did not 'resort' thither, and to whom they looked for payment, the manager having no pecuniary interest in the bets; both convictions were held right, the fact that the manager was a mere 'agent' not taking him out of the s., and the shopkeeper consequently being also guilty: *Wyton,* 5 Cr. A. R. 287, 1910.

Club] See *Downes* v. *Johnson,* above. In *Corrie and Watson,* 63 J. P. 294; 20 T. L. R. 365, 1904: C. C. R., the jury found that there was 'a *bonâ fide* club, but as a blind for betting purposes. If,' said L. Alverstone C.J., 'this had been a case of members of a club resorting to the club for the purpose of betting one with another, I am of opinion that there would have been no case to go to the jury. But here there is some substantial evidence that the members of the club were not betting with another, but were divided into two classes,' the defendants 'being the bookmakers, and the others going there to bet with them.' The two often sat in the same place and used the tape; one especially laid the odds habitually (though occasionally other members did the

same). He, too, was a bookmaker, *i.e.*, a person who might be there for the purpose of carrying on his business. Channell J. attached most weight to the finding that 'defendants had the exclusive control of a particular portion of the room.'

'*Place*'] The meaning of 'place' was fully considered, and the controversy relative to its application to racecourse enclosures finally closed by the House of Lords (by a majority of eight to two) in *Powell* v. *The Kempton Park Racecourse Company, Limited,* 1899. A. C. 143; 68 L. J. Q. B. 392; 19 Cox C. C. 265; 80 L. T. 538; 47 W. R. 585; 63 J. P. 260, which decided: 'An inclosure on a racecourse to which bookmakers in common with the rest of the public, and on the same terms, are admitted and carry on their business, and the owners of which have no interest in any betting, is not a place which the Betting Act, 1853, forbids to be opened, kept, or used for the purposes therein mentioned. To constitute such a place there must be a business of betting conducted by an owner, occupier, manager, keeper, or some other person vested with the authority of an owner. . . . *Eastwood* v. *Miller,* 43 L. J. M. C. 139; L. R. 9 Q. B. 440, 1874; *Haigh* v. *Sheffield Corporation,* 44 L. J. M. C. 17; L. R. 10 Q. B. 102, 1874; and *Hawke* v. *Dunn,* 66 L. J. Q. B. 364; 1897, 1 Q. B. 579, overruled' (L. J.). These three cases were overruled by the Court of Appeal, 1897, 2 Q. B. 242, &c.—*per* L. James of Hereford in H. L. above—by five to one, and so by the House of Lords confirming the judgment of the Court of Appeal, to the effect that the 'place' contemplated by the Act is a place which is analogous in its character and use to a betting '*house, office,* or *room.*' See also *Doggett* v. *Catterns,* 19 C. B. N. S. 765, 1865, Ex. Ch.—habitual use of a spot in a public park does not make it a 'place'; *Shaw* v. *Morley,* L. R. 3 Exch. 136, 1868—temporary desks outside an enclosure are 'places'; *Bows* v. *Fenwick,* L. R. 9 C. P. 339, 1874—umbrella on a racecourse is a 'place'; *Humphrey,* 1898, 1 Q. B. 875; 67 L. J. Q. B. 534: C. C. R.—an archway in a street is a 'place.'

'*Localisation*'] Since *Powell* v. *Kempton Park, &c.*, 'sufficient localisation of the business' has been taken as the test, *Brown* v. *Patch,* and *Belton* v. *Busby,* both in Q. B. D. in 1899; 19 Cox C. C. 330 and 392; *Deaville,* above; *Fisher, &c.*, 9 Cr. A. R. 104, 1913: it is a question of fact for the jury; one defendant only had the right to use the 'place,' a common passage to a common stair, to go to his room thereon. The mere fact that bets are completed outside a house does not prevent there being a 'receiving' in the house, because the papers and money are taken thither without the knowledge of the bettors: *Boulton* v. *Hunt,* 23 Cox C. C. 526; 77 J. P. 337, 1913.

'*Resorting*'] It is unnecessary under s. 1, above, to show that there has been a physical 'resorting,' if it be shown that the house was kept opened and advertised as a betting-house. But where the only evidence of the purpose for which it is kept is that of *resorting* it is not enough to show that letters and telegrams were sent to the house; there must be evidence of physical resorting. *Brown,* 1895. This may exist without 'actual entry,' as where the bookmaker employed two touts, one just within and the other just without the house (which he never entered), and the latter passed betting slips from passers-by to the former, inside, who forwarded them to their employer: *Taylor* v. *Monk,* 24 Cox C. C. 156, 1914.

Sentence] 'Fines in these cases are often no punishment': *per curiam: Wyton,* above.

If the trial is by Q. S. it has 'power under s. 3 of 16-7 V. 119 to impose imprisonment in default of payment of a fine on the scale fixed by s. 5 of the S. J. A. 1879, and the scale of imprisonment is regulated by the sum of the fine and the fixed costs': *W. Perkins,* 6 Cr. A. R. 248, 1911.

The Street Betting A.] By s. 1 (1) (c) of 6 E. 7, 43: 'Any person frequenting or loitering in streets or public places on behalf either of himself or of any other person for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, or paying or receiving or settling bets, shall . . . in the case of a third or subsequent offence, or in any case where it is proved that the person whilst committing the offence had any betting transaction with a person under the age of sixteen years, be liable on conviction on indictment to a fine not exceeding fifty pounds or to' a maximum of six months' imprisonment with hard labour; 'and shall in any case be liable to forfeit all books, cards, papers and other articles relating to betting which may be found in his possession.' By (2) a constable may arrest, &c. without warrant; (3) *primâ facie* the Court is to decide whether a person is under sixteen; (4) 'street' and 'public place' are defined; the latter includes 'every enclosed place (not being a public park or garden) to which the public have a restricted right of access, whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited by the owners or persons having the control of the place a notice prohibiting betting therein.' By s. 2, the A. has no application 'to any ground used for the purposes of a racecourse for racing with horses or adjacent thereto on the days on which races take place.'

'*Frequenting*'] A man walking up and down in a street 'in a space of some fifteen to twenty yards' for a quarter of an hour, 'and taking money and slips from eleven different men on a certain day, that being long enough to carry out his betting operations, was frequenting the place': *per* L. Alverstone C.J. in *Jones* v. *Scott,* 1906, cited *Airton* v. *Scott,* 22 Cox C. C. 18, 1909.

So distributing handbills for a bookmaker in a public street is within the s.: *Dunning* v. *Swetman,* 22 Cox C. C. 93, 1909.

Cheating in betting] See under *Cheating.*

There is a right to trial by jury under 42-3 V. 49, 17. These offences are within the Vexatious Indictments A., as a betting-house is a gaming-house.

Advertising] See 37-8 V. 15.

A bet may be a bribe: see *Bribery.*

Visitors to betting-houses] Any person found in a betting-house and arrested on a warrant may be bound over under 33 H. 8, 9, 14, to play, &c. no more at any gaming-house, though he was merely found there: *Murphy* v. *Arrow,* 1897, 2 Q. B. 527; 66 L. J. Q. B. 865; 18 Cox C. C. 662.

Betting with infant] See 6 E. 7, 43, 1 (1) (c), above.

Inciting infant to bet] By 55-6 V. 4, 1: (1) 'If any one for the purpose of earning commission, reward, or other profit, sends or causes

to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person, or at any place with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanour, and shall be liable if convicted on indictment to imprisonment with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine. . . .

(2) If any such circular, notice, advertisement, letter, telegram or other document as in this section mentioned, names or refers to any one as a person to whom any payment may be made, or from whom information may be obtained for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of the sending of such document.'

S. 3 provides that if any such document as is mentioned in the former sections is sent to an infant 'at any university, college, school, or other place of education . . . the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.'

A bookmaker instructed his clerk not to send circulars to anyone at an university, but he sent one to an undergraduate at Cambridge addressed to him at his licensed lodging; Channell and Bray JJ. quashed the master's conviction because he could not be presumed to know whether an undergraduate lived there or not; but L. Alverstone C.J. thought that licensed lodgings were clearly within s. 3, and the infant living there, 'at' the university, and dissented: *Milton* v. *Studd*, 1910, 2 K. B. 118; 79 L. J. K. B. 638; 26 T. L. R. 392; 74 J. P. 219.

These offences are not within the Vexatious Indictments A.

BIGAMY.

Statute] This offence was originally only of ecclesiastical cognisance, but was made a felony by 1 Jac. 1, 11, rpd. by 9 G. 4, 31, 1 (and 74, 125; India).

By 24-5 V. 100, 57: 'Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England, or Ireland, or elsewhere, shall be guilty of felony, and being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding seven years'; 'and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended, or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place: Provided, that nothing in this section contained shall extend [1] to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty, or [2] to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or [3] shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or [4] to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.' For the old law on the second 'marriage,' see 1 Hale P. C. 692; East P. C. 465.

Proof] The prosecution must prove: 1. The marriage and the second ceremony; 2. The identity of the parties; 3. That the first spouse is alive; and if he or she has been absent for seven years, then, 4. That defendant knew he or she was alive.

I. *The two 'Marriages.'*

Validity of either] Very considerable difficulty occurs, in some cases, in ascertaining how far either or both marriages must be shown to be valid. With regard to the validity of the second marriage, but for the existence of the first marriage, considerable doubt used to exist, for it was thought that it was necessary to prove such a legal marriage as would, but for the first marriage, have been a binding marriage for all purposes. But it was held, that where a woman already married, and having a husband alive, marries with the widower of her deceased sister, she was guilty of bigamy, though by 5-6 W. 4, 54, 2 (rpd. in so far as the marriage is 'a civil contract' by 7 E. 7, 47), such a marriage is declared to be 'null and void to all intents and purposes whatsoever.' *Brawn* and *Webb*, 1 C. & K. 144, 1843, where L. Denman C.J. said: 'It is the appearing to contract a second marriage and the going through the ceremony which constitutes . . . bigamy.' And in *Allen*, L. R. 1 C. C. R. 367; 41 L. J. M. C. 97; 12 Cox C. C. 193,

1872, where a man in the lifetime of his second wife married a niece of his first, it was held by sixteen judges, confirming the above decision, and disapproving of *Fanning,* 17 Ir. C. L. 289; 10 Cox C. C. 411, 1866, that where a person already bound by an existing marriage goes through a form of marriage known to and recognised by the law as capable of producing a valid marriage, that will be a bigamous marriage, although invalid by reason of some legal disability in the parties. If, however, the form of marriage gone through is not proved to be one recognised by the law, it is not a bigamous marriage. *Burt* v. *Burt,* 29 L. J. P. & M. 133; 2 Sw. & Tr. 88, 1860, where without *formal* proof of the law of Australia the Divorce Court declined to say that a marriage there was valid (though there was no reason to doubt it). This case was not doubted in *Allen,* where Cockburn C.J. said *Burt* was one of a form of marriage 'unknown to the law.'

Where in a marriage before a registrar defendant, who had been previously married, gave a false name, whether with or without the knowledge of the woman there was no evidence, it was held that this would not acquit him of the bigamy. *Rea,* L. R. 1 C. C. R. 365; 41 L. J. M. C. 92; 12 Cox C. C. 190, 1872. Kelly C.B. said that as the ss. regulating marriages on a registrar's certificate, viz. 6-7 W. 4, 85, 4 and 42 (latter partly rpd., 61-2 V. 58, 15), followed those by banns (see below), they must receive the same construction, and cases under them must be decided on the same principles. Therefore the knowledge of irregularity must be that of both parties; as that was not shown here, 'and the presumptions in favour of marriage clearly throw the burden of proof of invalidity upon the party alleging it,' the conviction was affirmed. He would not say that even if both parties knew of the misnomer there would have been no bigamy. Cf. *Allen,* and *Wroxton,* below.

Valid marriage—not presumed] A marriage in fact must be proved by the *prosecution;* whereas 'general reputation is usually admissible to establish the fact of parties being married,' *i.e.* in *civil* cases. T. s. 578. 'An action for criminal conversation is the only *civil* case where it is necessary to prove an *actual* marriage.' L. Mansfield, *Birt* v. *Barlow,* which see; and bigamy the only criminal case: *Morris* v. *Miller,* Burr. 2057; 1 W. Bl. 632, 1767. *Smith* v. *Huson,* 1 Phill. at 313-14, 1811.

It is not sufficient to prove cohabitation and marriage by reputation. *Catherwood* v. *Caslon,* 13 M. & W. at 265, 1844. Nor by a copy of the certificate of marriage without evidence of the identity of the parties, although it can be proved that defendant cohabited with a person of the same name immediately afterwards. *Simpson,* 15 Cox C. C. 323, 1883. Cf. *Atkinson,* 1814; *Lindsay,* below.

'But a marriage in fact may be sufficiently established by proving that the ceremony took place between the parties without proving the preliminary notices, licences, banns or consents or residence for the prescribed period, or that the place of solemnisation was one where the ceremony might lawfully be performed, or the celebrant a person competent to officiate': 1 Russ. Cri 982; see *Cresswell,* below.

Defence] If defendant sets up a valid subsisting marriage of the person supposed to be his or her 'real' spouse at the time of the bigamous marriage charged, he or she will be allowed to prove that previous marriage by evidence of cohabitation and reputation, although the *prosecutor* is bound to prove the true marriage he sets up strictly,

for 'the prisoner is in the position of an innocent third party,' and 'a crime cannot be presumed' in favour of the prosecutor or against defendant. *Wilson,* 3 F. & F. 119, 1862, where A. indicted for bigamy in 1858, showed *in this way,* that when she was 'married' in 1848 to B., B. was already married, and his reputed wife was alive in 1851; B.'s marriage before 1848, in Canada, was only proved by reputation; and Compton J. thought that though there might be 'some technical difficulty' in proving it, if there was reasonable doubt there ought to be an acquittal.

Where 'the evidence tended rather to shew concubinage, after a' Gretna Green ceremony, an acquittal was directed, although a writer to the signet proved that it was a good marriage by the law of Scotland: *Graham,* 2 Lew. 97, 1834: the officiating innkeeper's 'certificate' was rejected. And perhaps the defence of a marriage reputedly good by foreign—or, at least, non-Christian—law, is not open; see *Naguib,* below.

Valid marriage—defendant's admission] In *Newton,* 2 Moo. & Rob. 503, 1843, Wightman J. held that defendant's admissions, deliberately made against his own interest, of a previous marriage in a foreign country are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of that country. S. C. *Simmonsto,* 1 C. & K. 164. But in *Flaherty,* 2 C. & K. 782, 1847, where a man went to a police station and stated that he had committed bigamy, and when and where the real marriage took place, and while in custody signed a statement to the same effect, Pollock C.B. thought this, though *some* evidence, of the marriage, was not sufficient: not guilty. And in *Savage,* 13 Cox C. C. 178, 1876, Lush J. declined to follow *Newton;* in *Lindsay,* 18 T. L. R. 761; 66 J. P. 505, 1902, Walton J. accepted *Savage:* the evidence of the good marriage was the certificate of the marrying priest, the deposition of a daughter that it referred to her parents, and an admission by defendant on arrest, 'that's all right, but I did not know that my former wife was alive': the certificate of the registrar for the district would have been admissible.

These decisions do not touch defendant's admissions on oath; nor is such strictness now always observed: see *Birtles,* below.

Spouse-witness] By 4-5 G. 5, 58, 28 (3): 'The wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence, and without the consent of the person charged'; the last words are discussed under this title.

Valid marriage in England] It is clear that unless there has been a valid marriage, bigamy cannot be committed. When the marriage takes place in England, otherwise than by special licence, it may be celebrated either in (i.) any place licensed by the bishop for divine service (4 G. 4, 76, 13; 5 G. 4, 32), or 'a church or chapel in which marriages may be solemnised according to the rites of the Church of England' (6-7 W. 4, 85, 39); or (ii.) 'a separate building certified according to law as a place of religious worship' when 'registered for solemnising marriages therein' (*ib.* s. 18); or (iii.) a registry office (*ib.* s. 21); or (iv.) any place which is 'according to the usages' of Quakers and Jews (*ib.* s. 2, amended 23-4 V. 18, 1).

Evidence—register] In all these cases it is sufficient to call a person who was present at the ceremony, and it will be presumed to have been

in all respects duly performed; or, without calling any person who was present at the marriage, it will be sufficient, coupled with evidence of the identity of the parties to produce either the register (if any) or an examined copy of the register, or a certified copy of the register from the general registry office, which is made evidence by 6-7 W. 4, 86, 38; and see now 14-15 V. 99, 14. See for *non-parochial* registers, 3-4 V. 92, 17; 21-2 V. 25, 3. Hence, in bigamy, the original must be produced from Somerset House, to prove a marriage: 1 Russ. Cri. 993; for licensing by a bishop, 6-7 W. 4, 85, 26.

The other requisites of a valid marriage must be sought in the Marriage Acts: see (Index and) *Geary* on Marriage (1892), or *Eversley and Craies,* The Marriage Laws of the British Empire (1910). The effect of 49-50 V. 14 (except on the marriage usages of Quakers and Jews), is that 'it is still felony to solemnise a marriage except between 8 a.m. and 3 p.m. without' a special licence from the Archbishop of Canterbury. *Chitty's* Statutes, 5th ed., by Lely, 'Marriage,' p. 62 *x.* See *Clergymen.* The certificate, under s. 38, above, was held to be sufficient *primâ facie* evidence of the marriage having been duly performed in *Hawes,* 1 Den. C. C. 270; 2 Cox C. C. 432, 1847; though the proof of a person present at the marriage was sufficient *primâ facie* evidence without it; but it has nevertheless been the general practice in respect of class ii. above, under s. 18, to adduce some evidence both of the presence of the registrar, for which, by 61-2 V. 58, 4, a 'duly authorised person' is substituted, and that the chapel was duly registered. In *Manwaring,* D. & B. C. C. 132; 7 Cox C. C. 192, 1856, however, at least four judges out of five were of opinion that oral proof that the marriage was celebrated in a chapel, in presence of the registrar, being aided by the presumption *omnia rite esse acta* was sufficient without proving that the chapel was registered; and this was followed by Willes J., after consulting Pollock C.B. in *Cradock,* 3 F. & F. 837, 1863.

Validity presumed] While the parish church was under repair, divine service had been several times performed by a clerk in holy orders in a chamber at a private hall, and the marriage of defendant was solemnised there. Though there was no evidence that the chamber was licensed for the performance of divine service or for marriages, it was presumed in favour of the marriage. L. Coleridge C.J. said: 'We are of opinion that the marriage service having been performed in a place where divine service was several times performed, the rule 'omnia presumuntur rite esse acta' applies, and that we must assume that the place was properly licensed, and that the clergyman performing the service was not guilty of the grave offence of marrying persons in an unlicensed place.' *Cresswell,* 13 Cox C. C. 127; 1 Q. B. D. 446; 45 L. J. M. C. 77, 1876: C. C. R.

The validity of the ceremony is presumed on the production of the certificate of the registrar, under 6-7 W. 4, 86, 35, 37. See *Hawes,* above, and *Geary* on Marriage, p. 125 (ch. 3, s. 1 *c*); but cf. *Nokes* v. *Milward,* 2 Add. at 390, 1824, for 'irregular' marriages. In *Edwards,* 1814, the second ceremony was proved by defendant's signature of the register and his written note for the publication of the banns, but it was also proved that he had acknowledged the 'marriage.'

Valid marriage in Scotland] is subject to the same *general* considerations as marriages abroad. Cf. *Dicey,* below, at 78 *n.*[1] But by 19-20 V. 96, 1: 'After the 31st day of December, 1856, no irregular

marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, custom, or usage, to the contrary notwithstanding.'

Valid marriage in Ireland] Marriages in Ireland are now regulated by 7-8 V. 81 (to meet the decision in *Millis*, below); 8-9 V. 54, 5; 9-10 V. 72; 23-4 V. 18; 26-7 V. 27; 26-7 V. 90; 33-4 V. 110, 4, 32-42. sched.; 34-5 V. 49, 2, 21-9, sched.; 35-6 V. 10; 36-7 V. 16; 62-3 V. 27; and other statutes, for which see Index to the *Statutes in Force*. See also 19-20 V. 119, 7.

Valid marriage in colonies] 'Colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony.' 1 Black. Com. 108. From *Lautour* v. *Teasdale*, 8 Taunt. 830, 1816, it appears that 'the matrimonial law of the colonies is identical with that prevailing in England before the first Marriage A. (L. Hardwicke's, 26 G. 2, 33), except when it has been regulated by enactments or ordinances of their own municipal law, as by Orders in Council. *Vide Catterall* v. *Catterall*, 1 Robert. 580, 1847.' *Tarring*, Law of the Colonies, 4th ed. (1913), ch. 1—which see—p. 6, *n.* 4.

Valid marriage abroad] The question of validity of such marriages is often very difficult. It is fully treated under Rules 172-73, *Dicey*, Conflict of Laws, 1908, ch. 27, and *Westlake*, Private International Law, 1912, ch. 5. One *general* rule with regard to marriages in a foreign country, in respect of *forms of celebration*, is, that, if contracted according to a form which would constitute a valid marriage in the place where it is celebrated, it is a valid marriage here. And some foreign law, at any rate, must be strictly proved: *Naguib*, below.

Another *general* rule is, that a marriage according to a form which would not constitute a valid marriage in the country where it was celebrated is invalid. But *capacity* of the parties to marry or intermarry according to English law can never be lost sight of. See below. A., a member of the Established Church in Ireland, was married by C., a 'regularly placed minister' of the Presbyterians, to B., duly according to the religious rites of the Presbyterians, in C.'s house in Ireland, and A. and B. lived together for some time. A. afterwards married X. in England, while B. was alive, and on a special verdict in Ireland was found not guilty of bigamy, the Q. B. being equally divided on the validity of the marriage with B., one judge withdrawing his judgment; on error, the House of Lords was equally divided, and, therefore, that marriage was held invalid, and there was judgment for the defendant. *Millis*, 10 Cl. & F. 534, 1844. Mr. Dicey, above, at 621 *n.*[1], says the authority of this case is 'to a certain extent doubtful. . . . It is, however, clearly binding on English Courts.' It is severely criticised 2 Pollock & Maitland, Hist. Eng. L. 370, which cites the opinion of Willes J. in *Beamish* v. *Beamish*, 9 H. L. Cas. 274, 1859, as 'the best criticism of the victorious doctrine.'

Valid marriages of Jews] In a Jewish marriage a written contract not being an essential part of the ceremony, such contract need not

be produced and proved (*Althausen*, 17 Cox C. C. 630, 1893, below; and *Nassilski*, 61 J. P. 520, 1897, being cases of marriage abroad and 'not good law . . . in England': *Eversley & Craies*, p. 30 (*g*)).

Valid marriage on H.M. ships on foreign stations] is, when one of the parties is British, regulated by s. 12 of 55-6 V. 23, the Foreign Marriage A. 1892, which consolidates the law of British subjects' marriages outside the United Kingdom.

Naval Marriages Acts, 1908 *and* 1915] are 8 E. 7, 26, and 5-6 G. 5, 35.

Common law marriage] Proof of this 'in England is not sufficient for the purposes of an indictment for bigamy. But when the marriage is at sea or within the British lines by a chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad or where no local authority can celebrate a valid marriage, a common law marriage between British subjects seems to be regarded as valid': 1 Russ. Cri. 985.

Preliminary ceremonies] It is a general rule that where a marriage is shown to have been regularly celebrated, the performance of the preliminary conditions will be presumed; and it is for the party who seeks to repudiate the marriage to show that they were not fulfilled. *Althausen.*

Void marriages] There are many marriages which for civil purposes are *voidable*, but not *void—i.e.* they are valid until some step has been taken to annul them. But many such marriages might be valid for the purposes of bigamy: *e.g. Jacobs*, 1 Moo. C. C. 140, 1826, where defendant might have avoided a marriage, on the ground of nonage, under a statute, but had not. Whether or not a marriage is void for the purposes of bigamy is sometimes a very difficult question. It is clear that all marriages 'within the prohibited degrees of consanguinity or affinity' are invalid, by 5-6 W. 4, 54, 2; except since 1907 one between a man and his deceased wife's sister. Formerly, if a man so 'married' in her lifetime, married another woman, he was not guilty of bigamy (even though one of the sisters was illegitimate). *Chadwick*, 11 Q. B. 173 and 205; 17 L. J. M. C. 33; 2 Cox C. C. 381, 1847. But it appears that in the converse case he was guilty: above.

Lunatics, &c.] Although it was formerly held that the marriage of an idiot was valid, yet, according to modern law, the marriage of a lunatic, not in a lucid interval, is void. 1 Bl. Com. 438, 439. And by 51 G. 3, 37, if persons found lunatic 'by any inquisition,' or committed to the care of trustees by any A., marry before they are declared of sound mind by the Lord Chancellor, &c., or the majority of such trustees, the marriage shall be totally void.

Void marriages by banns] By 4 G. 4, 76, 22: 'If any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence . . . or shall knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and wilfully consent to or acquiesce in, the solemnisation

of such marriage by any person not being in holy orders, the marriage of such person shall be null and void. . . .'

Misdescription] (1) The real marriage. Where the banns were published in the name of *William*, the real name being *William Peter*, and that always used being *Peter*, and the suppression was for the purpose of effecting a clandestine marriage with a minor, the marriage was declared null and void. *Pouget* v. *Tomkins*, 1 Phill. 499; 2 Hag. Consist. 142; 3 M. & S. 262, 1812. See also *Fellowes* v. *Stewart*, 2 Phill. 257, 1815; *Meddowcroft* v. *Gregory*, *ib.* 365, 1816; *Wiltshire* v. *Prince*, orse. *Wiltshire*, 3 Hagg. Ecc. R. 332, 1830. So it was where the wife at the time of her marriage personated another woman in whose name banns had been previously published for an intended marriage with her husband. *Stayte* v. *Farquharson*, 3 Addams, 282, 1826, under 26 G. 2, 33, rpd. See *Midgley* v. *Wood*, 30 L. J. P. M. & A. 57, 1860. To render a marriage without due publication of banns void under this s., it must appear that it was contracted with a knowledge by *both* parties that no due publication had taken place. In *Wroxton, Inhabs. of*, 4 B. & Ad. 640, 1833, the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that fact until after the solemnisation of the marriage; it was held to be a valid marriage. So in *C. W. Clarke*, 10 Cox C. C. 474, 1867, the C. C. R. said that as it was not proved that 'the parties wilfully intermarried with knowledge that no due publication of the banns' took place, the marriage was valid. Defendant went through the ceremony of marriage with a woman whose surname was Abel. In order to conceal the fact he published her banns in the surname of Anderson, but, except that she signed the register in the name of Anderson, there was no evidence to show that she knew of the misdescription until after the solemnisation of the marriage. In her lifetime he 'remarried.' To prove the marriage with Abel valid the prosecution was bound to show—affirmatively, it was held—that she was unaware of the want of due publication, and *Wroxton* showed that her signing the register in the false name was no proof of knowledge at the moment of solemnisation: an acquittal was directed. *Kay*, 16 Cox C. C. 292, 1877. In the absence of fraud, a reputed name acquired by use (*e.g.* G. S. for A. L., the baptismal name), not only does not avoid the marriage, but may be the proper one, to prevent deception. *Billingshurst, Inhabs. of*, 3 M. & S. 250, 1814; *Burton-on-Trent*, both under 26 G. 2, 33, 8, rpd.

(2) The second ceremony. No one can take advantage of his own fraud in the second ceremony. Where defendant procured the banns to be published in a wrong name, he was not allowed to object that the indictment charged the false name he had himself given. *Edwards*, R. & Ry. 283, 1814: C. C. R.; 1 Russ. Cri. 690. This principle was followed in *Penson*, 5 C. & P. 412, 1832, where the woman was a party to the fraud, Gurney B. saying, 'parties cannot be allowed to evade punishment . . . by contracting a concertedly invalid marriage.' Where defendant and the woman contracted the second 'marriage' in the maiden names of their mothers, it was unanimously resolved, on a reference to the judges, that he had been rightly convicted. *Palmer*, 1 Deacon's Dig. C. L. 147, 1827.

Otherwise than by banns] But this does not apply to marriage by licence, 'in many cases' of which 'marriages in false names have been held valid': *e.g.* *Lane* v. *Goodwin*, 4 Q. B. 361, 1843, where L.

Denman C.J. said: 'The reason for which banns are held invalid on this account does not extend to licences'; *per* Swinfen Eady J., *In re Rutter, Donaldson* v. *Rutter,* 1907, 2 Ch. 592; 77 L. J. Ch. 34; 24 T. L. R. 12, where there was a fraudulent misdescription of the woman's surname, &c., to the knowledge of both parties: the marriage at a registry office was held valid; *Plummer* v. *Plummer,* 1917, P. 163; 86 L. J. P. 145; 117 L. T. 321; 33 T. L. R. 417: C. A. There are even instances of marriage by banns in a false name being held good, as *Mayhew* v. *Mayhew,* 2 Phillim. 11, 1812, where both parties were over age and knew of the fraud which affected none but themselves. The fraud must be on the Marriage Acts: Index. Where the licence was in the man's name of repute in actual use (he having concealed his real name, as he was a deserter), the marriage was held valid. *Burton-on-Trent, Inhabs. of,* 3 M. & S. 537, 1815; see *Billingshurst,* and *Beavan* v. *M'Mahon,* 30 L. J. P. M. & A. 61, 1861.

Minors] The marriage by licence of a minor without the consent of his father, then living, has been held valid under 4 G. 4, 76, 16, that s. being directory only. *Birmingham, Inhabs. of,* 8 B. & C. 29; 2 Man. & Ry. 230, 1828.

6-7 W. 4, 85, 10, also regulates such consent.

Under rpd. 1 Jac. 1, 11, a boy under fourteen or a girl under twelve, and so not 'within age of consent' (s. 3), were not guilty of bigamy. 1 Bl. Com. 436; *Gordon,* R. & R. 48, 1813. Subsequent statutes do not contain this exception. But probably a marriage within that age would be considered as wholly void, the presumption being that the parties are incapable of sexual intercourse.

Void marriages abroad] See above. 'English courts will, of course, hold invalid a marriage by any person who is prohibited from entering into it by English law.' *Dicey,* Conflict of Laws, 27, at 631, n. 3, which consult further on this subject. It must be borne in mind that in a trial for bigamy proof of marriage must be strict (though see *Griffin,* below).

Foreign law] See Index. In order to prove the French law of marriage, the French vice-consul in London was called, who produced a copy of the *Cinq Codes,* which, he stated, contained the customary and written laws of France, and was printed under the authority of the French government, though it had not been given to him officially, but he had bought it privately. Abbott C.J. said that the general rule certainly was, that the written law of a foreign country must be proved by an examined copy, before it could be acted on in an English court, but, according to his recollection, printed books on the subject of the law of Spain 'were referred to and acted upon' in argument in *Thomas Picton,* 30 How. St. Tr. at 510-14, 1806, as evidence of the law of that country, and therefore (though he doubted), he acted on that authority, and received the evidence (the objection being waived). *Lacon* v. *Higgins,* Dowl. & Ry. N. P. C. 38; 3 Stark. 178, 1822. But this is certainly not the law now. In *Povey,* 1 D. & P. C. C. 32; 22 L. J. M. C. 19; 6 Cox C. C. 83, 1852, it was held that, in order to prove that a marriage in Scotland was valid, the witness must be one conversant with the law of Scotland on marriages, though not necessarily a lawyer; *e.g. Dent,* 1 C. & K. 97, 1843: this case, said Lyndhurst C., in the *Sussex Peerage case,* by 'the universal opinion both of the judges and the lords . . . is not law,' but not apparently

on this point, as the H. L. accepted the evidence of a Roman Catholic bishop on the law of Rome on the ground that he was *peritus virtute officii*. A witness said that she was present at a ceremony performed in a private house in Scotland by a minister 'of a congregation, but whether of the Kirk she did not know,' that she herself was married in the same way, and that people always married in Scotland in private houses. She was held not to be sufficiently skilled: c. q. In *Savage*, 1876, Lush J. refused to accept the law (of Scotland) from a Roman Catholic priest who had performed the ceremony since 1831, relying on the *Sussex Peerage case*, 11 Cl. & F. 134; 8 E. R. 1034. In *Griffin*, 4 L. R. Ir. 497; 14 Cox C. C. 308, 1879, a marriage contracted between two British subjects, Roman Catholics, according to the rites of the Roman Catholic Church, after publication of banns in Illinois, and followed by cohabitation, was presumed by four judges of the Irish Court for C. C. R. against two to be good without positive proof of the law of that state: the only witness being the second 'wife.'

From *Naguib*, 1917, 1 K. B. 359; 86 L. J. K. B. 709; 81 J. P. 116; 116 L. T. 640; 25 Cox C. C. 712; 12 Cr. A. R. 187, it would seem that a valid foreign marriage must be strictly proved by expert evidence. The defence to the bigamy charged in 1914 in England was that the alleged English marriage in 1903 was void because defendant had married an Egyptian woman in Egypt, where both were domiciled, in 1898; the only evidence of this and of his having divorced her in 1913 was his own sworn testimony at the trial. [The fact that 'even if a marriage in Egypt was formally proved, it was a polygamous marriage and would not therefore be regarded as valid in this country —*per* the L.C.J.—was not the *ratio decidendi*.] In 1912 a county court judge refused an application by the 1903 wife against defendant on the ground that she was not his wife; so that Avory J. pointed out that there was 'some evidence of repute about the marriage in Egypt, and the judgment of a court of record.' *Griffin*, above, was cited to the court as another instance of an absence of evidence on the foreign law, but there the evidence of a legal ceremony was much better than that in this case. *Wilson*, above—the Canadian case—was not cited; there, too, the evidence of a reputed valid marriage was good. The C. C. A. relied on *Povey*, *Savage* and *Lindsay*, above, and referred to *Lloyd* v. *Guibert*, L. R. 1 Q. B. 129, 1865: Ex. Ch.: 'a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court and to establish it in proof. Otherwise the court not being entitled to notice such law without judicial proof must proceed according to the law of England': *per* Willes J. The simplest explanation of *Naguib* is that the jury disbelieved him.

II. *The Identity of the Persons.*

The identity of the persons named in the indictment must be proved. It was proved by a person who was present at defendant's second 'marriage,' that a woman was then married to him as Hannah Wilkinson, the name in the indictment, but there was no other proof that the woman in question was, in fact, Hannah Wilkinson (the second 'wife' apparently not being called). Parke J. held the proof to be insufficient, and directed an acquittal; and expressed 'a decided opinion that he was right'; and added, that to make the evidence sufficient, there should have been proof that defendant 'was then and there married to a certain woman *by the name of, and who called herself, Hannah Wilkinson*,' because the indictment undertakes that Hannah Wilkinson

was the person, whereas, in fact, there was no proof that she had ever before gone by that name; and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. *Drake,* 1 Lew. C. C. 25, 1830. A certificate of the marriage of Ann R. with a man of the same name as appellant was produced, and there was evidence that he had spoken of her as his wife: 'the two facts together are some proof of the identification of' appellant with the person mentioned in the certificate: *Birtles,* 6 Cr. A. R. 177; 75 J. P. 288; 27 T. L. R. 402, 1911.

If there be a discrepancy between the Christian name of the real wife in the indictment, and that stated in the marriage certificate produced, there must be an acquittal; *unless* that discrepancy can be explained, or it can be shown that she was known by both names. *Gooding,* Carr. & M. 297, 1841. For identification by photograph, see *Tolson,* 1864.

III. *Proof that Spouse is Alive.*

It is essential to show that the real spouse is alive at the time of the second 'marriage.' Although the statute sanctions a presumption that a person who has not been heard of during seven years is dead, yet there is no presumption of *law* that when a person has been seen or heard of within the seven years, he or she is alive—he or she must be shown to be alive as a matter of *fact* or inference from the circumstances of the case (*e.g.* that he was alive and well shortly before the date in question). *Lumley,* L. R. 1 C. C. R. 196; 38 L. J. M. C. 86; 11 Cox C. C. 274, 1869; *Phené's Trust,* L. R. 5 Ch. App. 139; 39 L. J. Ch. 316; 22 L. T. 111; 18 W. R. 303, 1869. Defendant was convicted of bigamy with D. in 1880. He had previously been convicted of bigamy with B. in 1868—having first married A. in 1864. The question was whether A. was alive in 1879; he proved that she was in 1868. It was proved that he was married to C. in 1879, and that she was alive in 1880. The trial judge held this must be presumed (or rather should be inferred by the jury) to be a good marriage, as there was no evidence that A. was alive in 1879—which defendant must show, to be acquitted. Thus, in the absence of all evidence, there were two conflicting presumptions:—1st. One of innocence—that the marriage in 1879 was a good one; 2nd. Of the continuance of A.'s life—that it was not a good marriage. It was held to be a question for the jury which should have the greater weight, and as it had not been left to them, c. q. It may be observed that there was nothing to show that the 1880 marriage was not valid, as A. may have died after the marriage with C., and before that with D. *Willshire,* 6 Q. B. D. 366; 50 L. J. M. C. 57; 14 Cox C. C. 541, 1881: C. C. R. See below.

IV. *Proof after Absence of Seven Years.*

Exception (2) *in s.* 57] Where the spouses were proved to have separated and been continually absent for seven years, and it was equally probable that defendant knew and did not know that his wife was alive at the time of the second ceremony, it was on the prosecution to show not only that she was, but that he knew it. *Curgerwen,* L. R. 1 C. C. R. 1; 35 L. J. M. C. 58; 10 Cox C. C. 152, 1865. But within the seven years such knowledge need not be proved affirmatively; the jury must be satisfied of it. *Jones,* 11 Cox C. C. 358; 21 L. T. 396, 1869: C. C. R. But where there is no evidence of a separation

the presumption is that it has not taken place, and to displace this there must be evidence. *Jones,* 11 Q. B. D. 118; 52 L. J. M. C. 96; 15 Cox C. C. 284; 47 J. P. 535; 48 L. T. 768, 1883: C. C. R. To reconcile *Willshire,* above, with *Curgerwen,* it must be taken that in the former there was no evidence of a separation in or after 1868.

Curgerwen thus disposes of the point left unsettled in *Cullen,* 9 C. & P. 681, 1840; *Jones,* Carr. & M. 614, 1842; *Mary Briggs,* D. & B. C. C. 98; 7 Cox C. C. 175, 1856, all under 4 G. 4, 31, rpd.; viz. whether defendant was bound actively to seek information whether the spouse was alive or not.

Within seven years] It was held by nine judges to five a good defence that defendant at the time of the second ceremony honestly and on reasonable grounds believed that her husband was dead, even within the seven years. *Tolson,* 23 Q. B. D. 170; 58 L. J. M. C. 97; 16 Cox C. C. 629, 1889: C. C. R. But not only must defendant believe that the first spouse is dead or was not lawfully married to him or her—the defence in *Thomson,* 70 J. P. 7, 1906, followed in *Connatty,* Law Times, March 15, 1919—but he must do so 'after making due and proper and reasonable inquiries which would justify him in acting as he did': *per* Bosanquet C.Sjt.

'*Continually absent*'] even by desertion. After a marriage in 1883, defendant was continually absent, and after 1885 wholly so, though he several times went to Leicester, where his wife lived; in 1902 he went through the form of marriage with another woman; Kennedy J. directed an acquittal, as the prosecution must do more than show that he had the means of knowledge; they must show actual knowledge, and that he knew his wife was alive he would not ask the jury to infer from visits to a town of 200,000 inhabitants: *Faulkes,* 19 T. L. R. 250, 1903.

Venue] See 24-5 V. 100, 57.

A British subject resident in England committed bigamy; both ceremonies took place in Scotland; it was held that he might be indicted and convicted of bigamy in England under rpd. 9 G. 4, 31, 22. *Topping,* 25 L. J. M. C. 72; 7 Cox C. C. 103, 1856: C. C. R.

Other defences under the exceptions in s. 57] Defendant may prove under the first exception that he or she is not a subject of the crown, *and* that the second marriage was not contracted in England or Ireland.

(1) *Not a subject of the crown*] But the proviso does not make it necessary that the indictment must allege that the accused is a subject of the crown; it is for him to prove that he is not. *Audley,* 1907, 1 K. B. 383; 23 T. L. R. 211; 76 L. J. K. B. 270; 71 J. P. 101; 21 Cox C. C. 374: C. C. R. (and *E. Russell,* 20 Cox C. C. 51, there cited); for an enactment by proviso is distinct from an exception in the enacting part; cf. *James,* 1902. Indictment Rule 5 (2) settles the law in accordance with *Audley.*

(3), (4) *Divorce*] Another exception is, where the person, at the time of the second marriage, has 'been divorced from the bond of the first marriage.' A divorce *a vinculo matrimonii* must be proved. It

is not always sufficient to prove a divorce out of England, where the first marriage was in this country. Defendant was indicted for bigamy under 1 Jac. 1, 11, rpd. He had been married in England, and went to Scotland, where, before his second marriage, his wife procured a divorce *a vinculo matrimonii,* on the ground of adultery, in Scotland. This, it was insisted, for him, was a good defence under the third exception in 1 Jac. 1, 11; but the judges were unanimously of opinion that no sentence or act of any foreign country could dissolve an *English* marriage *a vinculo matrimonii,* for ground on which it was not liable to be dissolved *a vinculo matrimonii* in *England,* and that no divorce of an ecclesiastical court (as this was) was within the exception in s. 3 of 1 Jac. 1, 11, 'unless it was the divorce of a court within the limits to which 1 Jac. 1 extends.' *Lolley,* R. & Ry. 237; 2 Cl. & F. 568, 1812. But it is now settled 'That the court of the existing *bonâ fide* domicil for the time being of the married pair has jurisdiction over persons originally domiciled in another country to undo a marriage solemnised in that other country': *per* Collins M.R., *Bater* v. *Bater,* 1906, P. 209, 232: C. A., wherein was cited with approval the judgment of the P. C. in *Le Mesurier* v. *Le Mesurier,* 1895, A. C. 517, 527-8, in which it was pointed out that in 1812 'the law of England did not allow a marriage to be judicially dissolved,' and endorsed L. Westbury's view (*Shaw* v. *Gould,* L. R. 3 H. L. 85, in 1868) that a foreign tribunal having divorce jurisdiction over its own subjects is competent to exercise it 'between English subjects who were married in England but who before, and at the time of, the suit are permanently domiciled within' such jurisdiction, 'such decree being made in a *bonâ fide* suit without collusion or concert'—thus distinctly dissenting from *Lolley.* *Dicey,* Conflict of Laws (1908), Rules 86, 87, pp. 381-5. 'The court, moreover, of the country where the parties are domiciled at the time of the proceedings for divorce has jurisdiction to grant a divorce on any ground for which a divorce may be granted under the laws of such country, even though such ground, *e.g.* incompatibility of temper, is not a cause for which divorce could be obtained in the country, *e.g.* England, where the parties were domiciled at the time of the marriage. It may now, in short, be taken to be the established rule of English law that domicil is the true test of divorce jurisdiction.' *Ib.* 'A fraudulent pretence that the parties . . . are domiciled in the foreign country . . . will in England invalidate the divorce. . . . *Bonaparte* v. *Bonaparte,* 1892, P. 402.' *Ib. n.* 3. 'In spite of some doubts which have been expressed . . . it must be taken now as clearly established that the Scotch courts have, as regards, at any rate, any effects in England, no power to dissolve an English marriage where the parties are not really domiciled in Scotland; and further, that the same doctrine applies to all foreign courts.' *Ib.* Hence the foreign divorce in *E. Russell's* case was not a good defence: 1 Russ. Cri. 980 (*m*). See especially *ib.* note 3, Appendix, p. 797.

Fraud] Another exception is, where the former marriage has been 'declared void by the sentence of any court of competent jurisdiction'; the words in 1 Jac. 1, 11, 3, were, 'by sentence in the ecclesiastical court declared to be void'; and under these it was held by all the judges that a sentence of a spiritual court against marriage, in a suit of jactitation of marriage, was not conclusive evidence, so as to stop the crown from proving the marriage, the sentence having decided only 'collaterally' and 'incidentally' on the validity of the marriage, and this may be impeached at the trial as having been obtained by fraud or collusion,

even supposing the sentence to be conclusive on the indictment. *Duchess of Kingston's case.* One reason is that the crown is not a party in the spiritual court. See 2 *Smith,* L. C. 754, 12th ed.

Accessory before] An unmarried person who knowingly goes through a marriage, bigamous in the other party, is clearly within 24-5 V. 100, 67, and guilty at common law. *Brawn* and *Webb.*

'There is no doubt . . . that he [or she] is a principal in the second degree. 1 Russ. Cri. 980.

Sentence] See remarks by judges in *Spargo,* 1918. Bray J. thought that in a bad case twelve months' imp. w. h. l. was the proper sentence on a man when the offence was rife, and imposed fourteen, of which the C. C. A. approved.

BLACKMAILING.

See *Threats.*

BLASPHEMY.

Blasphemous words may be spoken or written; if written they are a blasphemous libel—under which head, consequently, they are more conveniently treated; see there especially 9 W. 3, 35, 2. It is believed that there has never been a prosecution under this statute: it does not alter the common law.

BODILY HARM, CAUSING.

See *Assault.*

BORROWING MONEY.

I. By False Representations.

It is obtaining by false pretences to grant a bill of sale with a declaration that the furniture is unencumbered even if it be not pledged to its full value. *Meakin,* 11 Cox C. C. 270, 1869: C. C. R.

II. Inciting Infant to.

By s. 2 of 55-6 V. 4: (1) 'If any one for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant, any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money or to enter into any transaction involving the borrowing of money, or to apply to any person, or at any place, with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanour, and shall be liable if convicted on indictment to' three months' imprisonment with hard labour or a fine of 100*l.* or both.

(2) 'If any such document as above in this section mentioned sent to an infant purports to issue from any address named therein, or indicates any address as the place at which application is to be made as to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in, or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to, and was wholly ignorant of the sending of such document.' If in fact the recipient is an infant, there is a presumption that the defendant knew it, unless he had 'reasonable grounds' for believing otherwise: 63-4 V. 51, 5; see *Moneylenders,* and s. 3.

In *Director of Public Prosecutions* v. *Wilkowski,* 22 Cox C. C. 425; 104 L. T. 453; 75 J. P. 171; 27 T. L. R. 211, 1911, the K. B. D. held that a moneylender who distinctly instructed his clerk not to send his circular to second lieutenants (who are generally minors) was not liable within s. 2 (2) and s. 5, above, if his clerk disobeyed him; 'in regard to the maxim,' said L. Alverstone C.J., '*respondeat superior,* much depends on the true view of the statute creating the offence. . . . In the . . . class of cases relating to nuisances and to breaches of the statutes, in regard to obstructions on railways [highways?] and such like, it has been held that the master is not responsible unless he had knowledge of or was a party to the act complained of.'

By s. 4: 'If any one, except under the authority of any court, solicits an infant to make an affidavit or statutory declaration for the purpose of or in connexion with any loan, he shall be liable . . . if convicted on indictment to' the alternatives in s. 2 (2) above, but *not* to both.

BOXING, ILLEGAL.

See *Sports, Illegal.*

BRAWLING.

See *Disturbing Public Worship.*

BREACH OF OFFICIAL TRUST.

See *Office-holders.*

BREACH OF THE PEACE.

See under *Apprehension* and in Index.

An assault is a breach of the peace: see *Assault*. No indictment for a mere breach of the peace seems to be known, but note in s. 2 of the Treason A. 1842, 'with intent to break the public peace.'

BRIBERY.

Common law] Bribery is a misdemeanour punishable at common law. 'Bribery in strict sense is taken for a great misprision of one in a judicial place, taking any valuable thing whatsoever, except meat and drink of small value, of any one who has to do before him in any way, for doing his office, or by colour of his office, but of the King only. But bribery in a large sense is sometimes taken for the receiving or offering of any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known rules of honesty and integrity. . . . Also, bribery sometimes signifies the taking or giving a reward for offices of a public nature.' 2 Hawk. P. C. 1, 67, 1-3, founded on 3 Inst. 145. See *Offices,* &c.

Attempt] An unsuccessful attempt to bribe is a misdemeanour, as where a bribe is offered to a judge, and refused by him. 3 Inst. 147. So is an attempt to bribe the first lord of the treasury or a privy counsellor, for the purpose of procuring an office. *Vaughan's case,* 4 Burr. 2494, 1769, where L. Mansfield said, 'Wherever it is a crime to take, it is a crime to give.' So an attempt to bribe an elector to a corporation is punishable. *Plympton's case,* 2 L. Raym. 1377, 1725. Bribery or promising money (not necessarily to a particular individual) at the election of an assistant overseer is an offence at common law. *Lancaster,* 16 Cox C. C. 737, 1890.

'By far the most important aspect of the law of bribery in modern times is its relation to elections': Encyc. Laws E., art. Bribery.

Elections—treating] By the Corrupt Practices Prevention A. 1883, 46-7 V. 51, 1:—

'(1) Any person who corruptly, by himself or by any other person, either before, during, or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing any meat drink entertainment or provision to or for any person, for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be guilty of treating.

(2) And every elector who corruptly accepts or takes any such meat, drink, entertainment or provision shall also be guilty of treating.'

'Treating intended to secure general popularity and so to influence votes is corrupt treating and a corrupt practice. The essence of the offence . . . is that it should be corrupt. Treating, in fact, is often innocent, and *primâ facie* it will be taken so to be': 12 Halsbury, 290; see *ib.* a valuable note *d.* Incidental refreshments (bare hospitable attention) hardly constitute treating. A promise to treat may be corrupt. In each case it is a question of fact, and the whole of the circumstances must be looked at. *Ib.* 291.

Undue influence] S. 2. 'Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall, by abduction, duress, or any fraudulent device or contrivance impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce, or prevail upon any elector either to give or to refrain from giving his vote at any election, shall be guilty of undue influence.'

By s. 64 'person' includes 'associations,' whether corporate or not, and its *members* are liable to punishment.

'A threat of withdrawing the church bread [from a baker]' or defendant's 'own custom would be an infraction of' an earlier 'Act if done with a view to induce a person to vote or to abstain from voting,' . . . just as it would be if a landlord were to say to his tenant, 'if you do not vote for so and so, I will turn you out of your house': *per* L. Campbell C.J., *Barnwell*, 5 W. R. 557, 1857.

Corrupt practice] S. 3. 'The expression 'corrupt practice,' as used in this Act, means any of the following offences, namely, treating and undue influence as defined by this Act, and bribery and personation, as defined by the enactments set forth in Part III. of the Third Schedule to this Act, and aiding, abetting, counselling, and procuring the commission of the offence of personation, and every offence which is a corrupt practice within the meaning of this Act shall be a corrupt practice within the meaning of the Parliamentary Elections Act, 1868,' *i.e.* bribery, treating or undue influence by statute or 'recognised by the common law of Parliament': s. 2.

Bribery defined] The Acts (other than Scottish) referred to as being in Part III. of the Third Schedule are 17-18 V. 102, 2, 3; 30-1 V. 102, 49; and 35-6 V. 33, 24. Of these, 17-18 V. 102, 2, runs: 'The following persons shall be deemed guilty of bribery, and shall be punishable accordingly:—1. Every person who shall, directly, or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter or to or for any other person, in order to induce any voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election; 2. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election; 3. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure or endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at any election; 4. Every person

who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise, or endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at any election; 5. Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election. . . .'

S. 3 is: 'The following persons shall also be deemed guilty of bribery and shall be punishable accordingly:—1. Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment, for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election; 2. Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or refrain from voting, at any election.'

By s. 10, no indictment for bribery or undue influence is triable at Q. S.

Payment of rates] Bribery under s. 49 of 30-1 V. 102, the Representation of the People A. 1867, is the corrupt payment of rates to enable the ratepayer to be registered as a voter; the ratepayer, if a party to the transaction, is also guilty.

Personation (*false*)] is separately treated; but see *Punishment*, below.

Agent] *Leatham*, 3 E. & E. 658; 30 L. J. Q. B. 205; 8 Cox C. C. 498; 7 Jur. N. S. 674; 3 L. T. 504, 1860, was an indictment for having in 1859 paid to A. money with the intent that it should be applied in bribery at an election. There were several other counts in which defendant was charged with actual bribery of several voters: he was found guilty generally. Objection was taken that as defendant was found guilty on the first count, he could not also be guilty of the offences charged in the other counts, as it appeared that there was but one act, namely, the payment of the money by defendant to A. the agent, who actually bribed the different voters without consulting defendant, but the court thought that this objection, if available at all, was only available at the trial by application to compel the prosecutor to elect on which of the charges, that of advancing money for bribery or that of bribing each individual, he would proceed; and the court said that it was quite possible that one act might produce several distinct offences. Another objection was, that as the evidence was that defendant had paid the money to A., and A. had employed subordinates to bribe, defendant could not be found guilty of having bribed the voters himself. But the court thought that bribing by an agent was bribing by the principal expressly within the A., and on general principles of law. At a later stage of the proceedings, 3 L. T. 777; 30 L. J. Q. B. 205, it was held that, because the defendant had, at the inquiry, by the commissioners into the corrupt practices, referred

to and stated the substance of two letters, one of which was produced, between himself and his agent, these letters were not thereby rendered inadmissible against him on an indictment for bribery, under 15-16 V. 57, 8; one judge remarked that discoveries, *e.g.* of stolen property or a body, caused by statements of confessions or prisoners, were admissible when the statements themselves were not.

Criminal liability must not be confused with the special statutory penalties incidental to *electoral* agency.

Elections—common law] Bribery at elections for parliament is also a crime at common law, and it was held that 2 G. 2, 24, rpd., which imposed a penalty on such offence, did not affect that, *per* L. Mansfield, *Pitt,* 3 Burr. 1339; 1 W. Bl. 380, 1762. *Smith* and *Hollis,* 20 St. Tr. 1225, 1776, were informations for general bribery against the two members for Hendon: both were convicted. The following cases were decided on old statutes. Where money is given it is bribery, although the person giving it take a note from the voter, which he promises to deliver up when the elector has voted, and although he votes for the other side. *Sulston* v. *Norton,* 3 Burr. 1235; 1 W. Bl. 317, 1761. 'If I lay a wager of five guineas that he does not vote for me, it is a bribe.' *Anon.,* Lofft, 552, 1774; Hawk. P. C. 1, 67, 10 *n.* A bet between two voters on the event of an election is illegal: *Allen* v. *Hearn,* 1 T. R. 56, 1785; or between a voter and non-voter: *ib. per* Buller J.

Where a voter received money *after* an election for having voted for a candidate, but no agreement was made before the election, it was held not to be within 2 G. 2, 24, 7, rpd. *L. Huntingtower* v. *Gardiner,* 1 B. & C. 297, 1823.

Whether personation is a common law offence is doubtful: 1 Russ. Cri. 642.

Indictments] An allegation that an election for members of parliament, defendant was 'guilty of corrupt practices against the form of the statute in that case made and provided,' was held by a large majority of judges to be defective because too general (though cured after the verdict that he had offered money for votes), *Stroulger.* A prosecution may be ordered for 'a corrupt practice' under 47-8 V. 70, 28, without specifying the particular corrupt practice and an indictment charging any number of the corrupt acts under the A. of 1884, in 'a corrupt practice' is good, and it need not, through sub-s. 5, aver facts to give the court of trial jurisdiction where the alleged offence to be tried was committed in another jurisdiction.

Venue] Where a commissioner ordered a trial at Derby Assizes for bribery alleged only at a Nottingham municipal election it was not necessary that the indictment should first be found by a Nottingham grand jury; 'Derbyshire to wit' in the margin was sufficient. *Riley* and *Campion,* 17 Cox C. C. 120; 59 L. J. M. C. 122, 1890: C. C. R. See also 46-7 V. 51, 50.

Time limit] By 46-7 V. 51, 51 (1): 'A proceeding against a person in respect of the offence of a corrupt or illegal practice or any other offence under the Corrupt Practices Prevention Acts or this Act shall be commenced within one year after the offence was committed, or, if it was committed in reference to an election with respect to which an

inquiry is held by election commissioners shall be commenced within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires, so that it be commenced within two years after the offence was committed, and the time so limited by this section shall, in the case of any proceeding under the Summary Jurisdiction Acts for any such offence, whether before an election court or otherwise, be substituted for any limitation of time contained in the last-mentioned Acts.

(2) For the purposes of this section the issue of a summons, warrant, writ or other process shall be deemed to be a commencement of a proceeding, where the service or execution of the same on or against the alleged offender is prevented by the absconding or concealment or act of the alleged offender, but save as aforesaid the service or execution of the same on or against the alleged offender, and not the issue thereof, shall be deemed to be the commencement of the proceeding.'

Evidence] See *Privilege of Witnesses* and *Reed* v. *Lamb*, 6 H. & N. 75, 1860: examined copies of the register, poll book, writ, return, &c., may be put in; *Vaile*, 6 Cox C. C. 470, 1853: personating a voter at an election; as the sheriff could not produce the writ, an acquittal was ordered; and *Clarke*, 1 F. & F. 654, 1859: an irregular but proved list of voters held admissible. See also 26-7 V. 29, 6, below.

Possible verdicts] S. 52. 'Any person charged with a corrupt practice may, if the circumstances warrant such finding, be found guilty of an illegal practice (which offence shall for that purpose be an indictable offence), and any person charged with an illegal practice may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt practice, and a person charged with illegal payment, employment or hiring, may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt or illegal practice.' An 'illegal practice' is not otherwise indictable: s. 10.

Not triable at Q. S.] S. 53, '(1) S. 10 of the Corrupt Practices Prevention A. 1854, and s. 6 of the Corrupt Practices Prevention A. 1863,' which now (owing to repeals) only provide that Q. S. cannot try bribery or undue influence (s. 10) and that the certificate of the returning officer shall be good evidence of the holding of the election and of any one having been a candidate (s. 6), 'shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act, and to any action for any pecuniary forfeiture for an offence under this Act, in like manner as if such offence were bribery within the meaning of those Acts, and such indictment or action were the indictment or action in those sections mentioned . . . but the director of public prosecutions or any person instituting any prosecution in his behalf, or by direction of an election court shall not be deemed to be a private prosecutor. . . .'

(2) See *Spouse Witnesses*.

(3) is unrepealed, but its provisions for the forms of indictments and for evidence are also in other ss.

S. 55.—(2) 'The enactments relating to charges before justices against persons for indictable offences shall, so far as is consistent with the tenor thereof, apply to every case where an election court orders a person to be prosecuted on indictment in like manner as if the court were a justice of the peace.'

By s. 56 the jurisdiction of the High Court may be exercised by a judge (or in certain cases and with less powers, a master).

By s. 57 (1) the duties of the Director of Public Prosecutions are defined.

By s. 58 (2) 'Where any costs or other sums are under the order of an election court or otherwise under this Act, to be paid by any person, those costs shall be a simple contract debt due from such person to the person or persons to whom they are to be paid, and if payable to the Treasury shall be a debt to her Majesty, and in either case may be recovered accordingly.'

Procedure] By a proviso to s. 43 (4) in corrupt practices the defendant has an option of being tried by a jury, and by sub-s. (5) he is then and in other cases liable to be tried on indictment.

Municipal, &c. elections] By the Municipal Elections (Corrupt and Illegal Practices) A. 1884, 47-8 V. 70, 2 (1), corrupt practices are treating, undue influence, bribery and personation, as defined by 17-18 V. 102, 2 and 3, above; 35-6 V. 33, 24; 46-7 V. 51, 1, 2; and 45-6 V. 50, 77, partly rpd.; and 'aiding, abetting, counselling and procuring the commission of the offence of personation.'

By s. 2 (2), any 'person who commits any corrupt practice in reference to a municipal election shall be guilty of the like offence, and shall, on conviction, be liable to the like punishment and subject to the like incapacities as if the corrupt practice had been committed in reference to a parliamentary election.'

In s. 28, the powers of the Director of Public Prosecutions are described, and amongst them the power (just as in s. 43 (3) of the 1883 A.) to prosecute before the election court, or *any other* competent court, any person who appears to him to have been guilty of a corrupt or illegal practice. See *Riley* and *Campion*. The accused (of corrupt practice) has the option of being tried by a jury. By s. 30, the prosecution of offences is (subject to the other provisions of the A. and some additions in this s.) to be the same in all respects as if the offence had been committed in reference to a parliamentary election. And ss. 45-6, 50-7 (above), 59, and 60 of the 1883 A. are generally to apply.

Punishment] By 46-7 V. 51, 6: '(1) A person who commits any corrupt practice other than personation, or aiding, abetting, counselling or procuring the commission of the offence of personation, shall be guilty of a misdemeanour, and on conviction on indictment, shall be liable to be imprisoned, with or without hard labour, for a term not exceeding one year, or to be fined any sum not exceeding two hundred pounds.

(2) A person who commits the offence of personation, or of aiding, abetting, counselling, or procuring the commission of that offence, shall be guilty of felony, and any person convicted thereof on indictment' [which includes information, s. 64] 'shall be punished by imprisonment for a term not exceeding two years, together with hard labour.'

(3 and 4) Persons so convicted are further subject for seven years to the incapacities of: (a) being an elector for any election to a public office in the United Kingdom; (b) holding 'any public or judicial office' within this A. and forfeiting any that he holds; (c) being a member of the House of Commons.

By s. 64, 'judicial office' includes a J.P. and a revising barrister.

Public bodies] By 52-3 V. 69, the Public Bodies Corrupt Practices A. 1889, s. 1: '(1) Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever, as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour.

(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour.'

An ex-inspector of the London County Council who offered, for money, to absent himself from the licensing committee when a licence was asked for was within (1), as any one, 'whether a servant or not of . . . [a] public body, who tried to get . . . money on the pretext that he would either abstain himself or induce someone else to abstain from giving evidence' to the public body, is liable: *Edwards,* 59 J. P. 88, 1895.

S. 2. 'Any person on conviction for offending as aforesaid shall, at the discretion of the court before which he is convicted—

(*a*) be liable to be imprisoned for any period not exceeding two years, with or without hard labour, or to pay a fine not exceeding five hundred pounds, or to both such imprisonment and such fine; and

(*b*) in addition be liable to be ordered to pay to such body, and in such manner as the court directs, the amount or value of any gift, loan, fee, or reward received by him or any part thereof; and

(*c*) be liable to be adjudged incapable of being elected or appointed to any public office for seven years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction; and

(*d*) in the event of a second conviction for a like offence he shall, in addition to the foregoing penalties, be liable to be adjudged to be for ever incapable of holding any public office, and to be incapable for seven years of being registered as an elector, or voting at an election either of members to serve in parliament or of members of any public body, and the enactments for preventing the voting and registration of persons declared by reason of corrupt practices to be incapable of voting shall apply to a person adjudged in pursuance of this section to be incapable of voting; and

(*e*) if such person is an officer or servant in the employ of any public body, upon such conviction he shall, at the discretion of the court, be liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.'

In *Edwards,* above, the disqualification and the forfeiture in (*c*) and (*e*) were part of the sentence.

(2) 'A person shall not be exempt from punishment under this Act by reason of the invalidity of the appointment or election of a person to a public office.'

S. 4. '(1) A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General.

(2) In this section the expression 'Attorney-General' includes the Solicitor-General for England or Ireland.'

By s. 6, Q. S. has jurisdiction.

S. 7. 'In this Act—

The expression 'public body' means any council of a county or or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom:

The expression 'public office' means any office or employment of a person as a member, officer, or servant of such public body:

The expression 'person' includes a body of persons, corporate or unincorporate:

The expression 'advantage' includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.'

For inland revenue officers, see 53-4 V. 21, 10.

Costs] See 46-7 V. 51, 58 (2). A successful defendant in a private prosecution cannot be deprived of his costs from the prosecutor. *Law,* 1900, 1 Q. B. 605; 19 Cox C. C. 452.

See further, *Corruption.*

BRIDGES, &c.—INJURING.

Injury] By 24-5 V. 97, 33: 'Whosoever shall unlawfully and maliciously pull or throw down, or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct, or aqueduct, any highway, railway, or canal shall pass, or do any injury with intent and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life,' 'and, if a male under the age of sixteen years, with or without whipping.' See also ss. 58-9.

Private bridges are within ss. 51 & 52. See *Rivers*.

BROKERAGE OF OFFICES.

See *Offices*, &c.

BROTHEL-KEEPING.

See under *Nuisance.*

Owner or occupier] By s. 6 of 48-9 V. 69: 'Any person who, being the owner or occupier of any premises or having or acting or assisting in the management or control thereof, induces or knowingly suffers any girl of such age as is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, (1) shall, if such girl is under the age of thirteen years, be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life or for any term not less than five years, or to be imprisoned; and (2) if such girl is of or above the age of thirteen and under the age of sixteen years shall be guilty of a misdemeanour, and being convicted thereof shall be liable' to (a maximum of) two years' imp. w. h. l. 'Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.'

Offence by householder, &c.] A parent who knowingly suffers her daughter to be on her premises for the purposes mentioned in s. 6 is liable thereunder, though the girl's home is there. *Rebecca Webster,* 16 Q. B. D. 134; 55 L. J. M. C. 63, 1885: C. C. R.

But it is otherwise where she is laying a trap to catch one who is already the seducer of her daughter (though there is a technical breach of the s.): *Justices of Merthyr Tydfil,* who had refused a summons against a mother in such a case: 10 T. L. R. 375; 10 The Reports, 189, 1894.

Detaining female]: By s. 8: 'Any person who detains any woman or girl against her will—(1) In or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man or generally; or (2) In any brothel shall be guilty of a misdemeanour'; maximum sentence: two years' imp. w. h. l.

'Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connexion, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property belonging to her, or where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied. No legal

proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel.'

By s. 13, as amended 2-3 G. 5, 20, 4 (1), (2), (3), *anyone* knowingly concerned in brothel-traffic is punishable summarily, and for a second or subsequent offence so severely that there is a right to trial by jury. Hence, when only one offence was charged, but before conviction it came out that there was a previous conviction, but the justices in sentencing to three months' imp. in the second division omitted to offer the option of trial by jury (and an appeal to Q. S. failed), the K. B. D. (Walton and Jelf JJ., Alverstone L.C.J. dissenting) quashed the conviction: *Beesby,* 1909, 1 K. B. 849; 78 L. J. K. B. 482; 73 J. P. 234; 25 T. L. R. 337; 22 Cox C. C. 47.

For other ss. of the Crim. L. Amend. A. 1885, to the general provisions of which these two are subject, see under *Rape.*

For a girl less than sixteen years old, see under *Children.*

Sentence] See *Stallwood,* 1915.

BUILDINGS, DEMOLITION OF.

See *Riot, Arson, Explosives,* and *Malicious Injury.*

BURGLARY, HOUSEBREAKING, &c.

Common law] Burglary is a felony at common law, and a burglar is defined by Coke as he 'that in the night breaketh and entreth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.' 3 Inst. 63. And this definition is adopted by Hale, 1 P. C. 549; Hawk. P. C. 1, 38, 1. For forms of indictment, see *Chitty*, 3 Crim. L. 1117.

Larceny A. 1916] By 6-7 G. 5, 50, 25: 'Every person who in the night (1) breaks and enters the dwelling-house of another with intent to commit any felony therein; or (2) breaks out of the dwelling-house of another, having (a) entered the said dwelling-house with intent to commit any felony therein, or (b) committed any felony in the said dwelling-house, shall be guilty of felony called burglary, and on conviction thereof liable to penal servitude for life.'

By s. 46 (1), 'night' 'means the interval between nine o'clock in the evening and six o'clock in the morning of the next succeeding day,' *i.e.* (by 43-4 V. 9, 1, amended 6-7 G. 5, 45) of Greenwich mean time in all the British isles.

By (2) 'dwelling-house' 'does not include a building although within the same curtilage with any dwelling-house occupied therewith, unless there is a communication between such building and dwelling-house either immediate or by means of a covered and enclosed passage leading from one to the other.'

Housebreaking and committing felony] By s. 26: 'Every person who (1) breaks and enters any dwelling-house or any building within the curtilage thereof and occupied therewith, or any school-house, shop, warehouse, counting-house, office, store, garage, pavilion, factory or workshop, or any building belonging to His Majesty or to any Government Department, or to any municipal or other public authority, and commits any felony therein; or (2) breaks out of the same, having committed any felony therein; shall be guilty of felony, and on conviction thereof be liable to penal servitude for any term not exceeding fourteen years.' Triable at Q. S.

Housebreaking with intent to commit felony] By s. 27: 'Every person who, with intent to commit any felony therein, (1) enters any dwelling-house in the night; or (2) breaks or enters any dwelling-house, place of divine worship, or any building within the curtilage, or any school-house, shop, &c.,' exactly as in s. 26, but maximum sentence is for seven years. Triable at Q. S.

Where no intent was proved or suggested (and the facts were consistent with a mere freak), c. q. *W. Pearson*, 4 Cr. A. R. 40; 74 J. P. 175, 1910.

Being found armed, &c. by night] By s. 28: 'Every person who shall be found by night (1) armed with any dangerous or offensive weapon

or instrument, with intent to break or enter into any building whatsoever, and to commit any felony therein; or (2) having in his possession without lawful excuse (the proof whereof shall lie on such person) any key, picklock, crow, jack, bit, or other implement of house-breaking; or (3) having his face blackened or disguised with intent to commit any felony; or (4) in any building with intent to commit any felony therein, shall be guilty of a misdemeanour, and on conviction thereof liable (a) if he has been previously convicted of any such misdemeanour or of any felony, to penal servitude for any term not exceeding ten years; (b) in all other cases to penal servitude for any term not exceeding five years.' Triable at Q. S.

Misdemeanours under this s. are 'crime' within 8 E. 7, 59: by s. 10 (6), *i.e.* by 34-5 V. 112, 20, which made them so when they were in rpd. 24-5 V. 96, 58.

'*Breaking*'] 'It seems agreed that such a breaking as is implied by law in every unlawful entry on the possession of another, whether it lie opened or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit,* will not satisfy the words *felonice et burglariter fregit,* except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, that if one enter into a house by a door which he finds open, or through a hole which was made there before [in a wall: *Fitzherbert's* L Office de Justices, edited by Crompton (1606), p. 33 *a.* S. 36, citing a case 8 E. 2, 1315: see '*Night,*' below], and steals goods, &c., or draw anything out of a house through a door or window which was open before, or enter into a house by the doors open in the daytime, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary.' Hawk. P. C. 1, 38, 4, 5. But 'the breaking a window, taking a pane of glass out by drawing or bending the nails or other fastening, the drawing a latch, where the door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or fastening of a window with an instrument, turning the key where the door is locked on the inside [*Chandler,* below], or unloosing any other fastening which the owner has provided; are all instances of a breaking.' East P. C. 487.

A 'correct summary of the law' till 1894 was given by Stephen J., Dig. Crim. L. 282, art. 341, thus: (a) *Break* means 'the breaking of any part, internal or external, of the building itself or the opening by any means whatever (including lifting in the case of things kept in their places by their own weight) of any door, window, shutter, cellar, flap, or other thing intended to cover openings to the house or to give passage from one part of it to another, and getting down the chimney.' *Note*—'Collins J. at the Cardiff Assizes in November, 1893, told the jury that breaking into a house meant entering it in any way except by an open door or window, and allowed a man to be convicted for burglary who entered a house through a swing door'; (b) 'obtaining an entrance into the house by any threat or artifice used for that purpose or by collusion with any person in the house.'

'*Breaking out*'] Where a lodger got up in the night and unbolted the back door, and went away with a jacket which he had stolen, he was convicted of burglary. 'It is the purpose for which he undoes the fastening that makes the act unlawful': *per* Erskine J. *Wheeldon,* 8 C. & P. 747, 1839.

Doors] Entering through an open door is not such a breaking as to constitute a burglary. Yet if the offender enters a house in the night-time, through an open door or window, and when within the house turns the key of, or unlatches a chamber, *i.e.* an inner, door with intent to steal, it is a burglary. 1 Hale P. C. 553. So where defendant entered by a back-door which had been left often, and afterwards broke open an inner door and stole goods out of the room, and then unbolted the street door on the inside and went out; this was held to be burglary. *Johnson,* East P. C. 488, 1786. So where the master lay in one part of the house, and the servants in another, and the stairfoot door of the master's chamber was latched, and the servant in the night unlatched that door and went in with intent to murder him, it was held burglary. *Edmonds,* Hutt. 20; Kel. 67, 1618; 1 Hale P. C. 554; East P. C. 488; the same with intent to commit rape, *Locost,* Kel. 30, 1664; *Gray,* 1 Str. 481, 1722; East, *ib.* A servant living in the house burst open the shop door at night to steal, this was burglary. *Wentworth,* 8 Cox C. C. 348, 1860.

Whether the pushing open the flap of a trap-door, or door in a floor, which closes by its own weight, is a sufficient breaking, was for some time a matter of doubt. Through a mill (within a curtilage) was an open entrance or gateway, capable of admitting waggons, intended for the purpose of loading them with flour through a large aperture communicating with the floor above. This aperture was closed by folding doors with hinges, which fell over it, and remained closed by their own weight, but without any interior fastenings, so that persons without, under the gateway, could push them open at pleasure. In this manner defendant entered with intent to steal; Buller J. held that this was a sufficient breaking to constitute burglary. *Brown,* 2 East P. C. 487, 1799. In another case, on nearly similar facts, the judges were equally divided. Defendant broke out of a cellar by lifting up a heavy flap, whereby the cellar was closed on the outside next the street. The flap had bolts, but was not bolted. On a conviction of burglary, six judges thought that this was a sufficient breaking; because the weight was intended as a security, this not being a common entrance; but the other six thought the conviction wrong. *Callan,* R. & Ry. 157, 1809. The only difference between this and *Brown* seems to be that in the latter there were no internal fastenings, which in *Callan* there were, but they were not used. *Ib.* The authority of *Brown* has been since followed, and that decision may now be considered to be law.

The question was, whether there had been a sufficient breaking. Where there was a cellar under the house, which communicated with the other parts of it by an inner staircase and the entrance to the cellar from the outside was by means of a flap which let down, and the flap was made of two-inch stuff, but reduced in thickness by the wood being worked up, and defendant got into the cellar by raising the flap-door, which had been from time to time fastened with nails, when the cellar was not wanted, and the jury found that it was not nailed down on the night in question, the judges upheld a conviction. *Russell,* 1 Moo. C. C. 377, 1833. Unless a distinction can be drawn between breaking into a house and breaking out of it, this case seems to overrule *Lawrence,* 4 C. & P. 231, 1830—as 2 Russ. Cri. 1068 *v* says—where the facts were much the same, but the unlocking and opening of the hall door and running away were held to be a breaking out. In both the flap was kept down by its own weight.

The breaking may be inferred from the fact that there was no other

way of getting in: *E. G. Wood,* 7 Cr. A. R. 56; 76 J. P. 103, 1911, under a s. now represented by s. 27 (2), above.

Windows—shutters.] Where the window is open, and any one enters by it, this is no breaking. 'Where a glass window was broken and the window opened with the hand, but the shutters on the inside were not broken, this was ruled burglary. . . . But they (four judges) thought this the extremity of the law, and on a subsequent conference, Holt C.J. and Powell J. doubting and inclining to another opinion, no judgment was given.' *Roberts,* 1702; East P. C. 487. Indictment for *breaking* and entering a dwelling-house and stealing therein; defendant had effected an entrance by pushing up the lower sash of a window, which was proved to have been about noon on the same day raised about a couple of inches, so as not to afford room for a person to enter the house through that opening (which the jury found *he* did not make), it was said by all the judges that there was no decision under which this could be held to be house *breaking. Smith,* 1 Moo. C. C. 178, 1827. A square of glass in the kitchen window (through which defendants entered) had been previously broken by accident, and half of it was out when they did so; the aperture formed by the half-square was sufficient to admit a hand, but not to enable a person to put in his arm, so as to undo the fastening of the casement; one of them thrust his arm through the aperture, thereby breaking out the residue of the square, and thus removed that fastening, and entered. The doubt which the judges entertained arose from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing (it not being like a chimney, an aperture necessarily left in the original construction of the house), from enlarging an aperture by lifting up further the sash of the window, as in *Smith,* above; and they doubted whether in both cases there was not a sufficient breaking. All the judges who met were of opinion that there was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window. *Robinson,* 1 Moo. C. C. 327, 1831. In *Bird,* 9 C. & P. 44, 1839, the glass, though cut through, remained in its place till defendant pushed his hand through; this was held a breaking. Cf. *Crabtree* v. *Robinson,* 15 Q. B. D. 312; 54 L. J. Q. B. 544, 1885.

Where a house was entered through a window upon hinges, which was fastened by two nails which acted as wedges, but notwithstanding these nails the window would open by pushing, and defendant pushed it open, the judges held that the forcing the window in this manner was a sufficient breaking. *Hall,* R. & Ry. 335, 1818. So pulling down the upper sash of a window which has no fastening, but which is kept in its place by the pulley weight only, is a breaking, although there is an outer shutter which is not fastened. *Haines,* R. & Ry. 451, 1821. So raising a window which is shut down close, but not fastened, though it has a hasp which might be fastened: *Hyam,* 7 C. & P. 441, 1836.

Where a cellar window, which was boarded up, had in it an aperture of considerable size to admit light into the cellar, and through this aperture one of the defendants thrust his head, and by the assistance of the others thus entered, it was ruled that this resembled the case of a man having a hole in the wall of his house large enough for a man to enter, and that it was not burglary. *Lewis,* 2 C. & P. 628, 1827; cf. *Spriggs,* below. A shutter-box partly projecting from a house, and adjoining the side of the shop window, which side was protected by wooden panelling lined with iron, was held not to be part of the dwelling-house. *Paine,* 7 C. & P. 135, 1834: 'it is not stated

whether the box had any communication with the inside of the house or whether the breaking was such as to make an opening into the inside of the house': *Greaves,* 2 Russ. Cri. 1069 *a.*

Chimneys] Hale doubted whether getting into the chimney of a house in the night-time, with intent to commit a felony, was a sufficient breaking. 1 Hale, P. C. 552. But it is settled that this is a breaking, for though actually open, it is as much inclosed as the nature of the place will allow. *Ib.;* Hawk. P. C. 1, 38, 6; East P. C. 485. And it was so held by ten judges against two, who were of opinion that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that defendant, by lowering himself in the chimney (though he got no farther), made an entry into the dwelling-house. *Brice,* R. & Ry. 450, 1821.

But an entry through a hole in the roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and requires protection, whereas, if a man chooses to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *Spriggs,* 1 Moo. & R. 357, 1834. Cf. *Lewis,* above.

Fixtures, cupboards, &c.] The breaking open of a movable chest or box in a dwelling-house, in the night-time, is not a sufficient breaking, for it is no part of the house. Foster, C. C. 108-9; East P. C. 488. Whether breaking open the door of a cupboard let into the wall of a house be burglary or not, does not appear ever to have been decided. In 1690, the judges were equally divided on the point. *Ib.* Hale says that such a breaking will not make a burglary *at common law.* 1 P. C. 527; but cf. 555—though, on the authority of *Simpson,* Kel. 31, 1664, he considers it a sufficient breaking within rpd. 5-6 E. 6, 9, and 39 Eliz. 15. In the opinion of Foster J. however, *Simpson* does not warrant the position that breaking open a movable chest was within 39 Eliz. *Foster,* East, *ib.* And 2 Hale P. C. 358 *n.* supports this view. Foster J. concludes that such fixtures as merely supply the place of chests and other ordinary utensils of household, should for this purpose (whatever they may be for others) be considered in no other light than as mere movables. *Foster,* East, *ib.*

Walls] Whether breaking a *wall,* part of the curtilage, is a sufficient breaking to constitute burglary, has not been decided. Hale, at 106, after citing 22 Lib. Assis. 95, which defines burglary to be 'to break houses, churches, *walls, courts,* or *gates,* in times of peace,'—says—'by that book it should seem that if a man hath a wall about his house for its safeguard, and a thief in the night break the wall or the gate thereof, and finding the doors of the house open he enters into the house, this is burglary; but otherwise it had been, if he had come over the wall of the court and found the door of the house open, then it had been no burglary.' 1 P. C. 559. On this passage an annotator observes, 'This was antiently understood only of the walls or gates *of the city: vide* Spelman, *in verbo Burglaria.* If so, it will not support our author's following conclusion, wherein he applies it to the wall of a private house.' East likewise observes, that the distinction between breaking and coming over the wall or gate, 'is very refined; for if it be part of the mansion, and be inclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or overleapt, and more properly to fall under the same consideration as the case of

a chimney. And if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial; in neither case will it amount to burglary.' P. C. 488.

Gates] Where a gate forms part of the outer fence of the curtilage, and does not open into the house, or into some building parcel of the house, the breaking of it will not constitute burglary. Thus, where large gates opened into a yard in which was situated the dwelling-house and warehouse, the warehouse extending over the gateway, so that when the gates were shut the premises were completely inclosed, the judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. *Bennett,* R. & Ry. 289, 1815. So, where defendant opened the area gate of a house with a skeleton key, and entered the house by a door in the area, which did not appear to have been shut, the judges were all of opinion that breaking the area gate was not a breaking of the dwelling-house, as there was no free passage 'in time of sleep' from the area into the dwelling-house. *Davis,* R. & Ry. 322, 1817.

Constructive burglary—fraud] It is not essential that force should be employed. There may be a *constructive* breaking by fraud, conspiracy or threats, and if, by such means, an entrance is effected into a dwelling-house in the night-time, with a felonious intent, it is burglary. As if thieves come with a hue and cry, pretending that they be robbed, and require the constable to go with them to search for felons, enter the house, bind the constable and the occupier, and rob the latter. 3 Inst. 64. So, where thieves entered a house, pretending that the owner harboured traitors; in both these cases, though the owner himself opened the door at the command of the constable, it was held burglary. 1 Hale P. C. 552, 553. Defendant, knowing the family to be in the country, and meeting the boy who kept the key of the house, desired him to go with her to the house, promising him a pot of ale. The boy accordingly let her in, when she sent him for the ale, robbed the house, and went off. This, being in the night-time, was held by Holt C.J., Tracy J., and Bury B., to be burglary. *Hawkins,* East P. C. 485, 1704. 'By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector [*i.e.* formerly, a fictitious party to a suit], obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein.' *Ib.; Farre,* Kel. 43, 1665. So, where persons designing to rob a house, took lodgings in it, and then fell on the landlord and robbed him: *Cassey,* Kel. 62-3, 1666; Hawk. P. C. 1, 38, 9.

Conspiracy] 'If A., the servant of B., conspire with C. to let him *in* to rob B., and accordingly A. in the night-time opens the door or window and lets him *in*, this is burglary in C. but larciny in A., the servant: Dalt. [c. 151, edn. 1742]: it seems it is burglary in both, for if it be burglary in C., it must needs be so in A., because he is present and aiding C. to commit this burglary.' 1 Hale P. C. 553. On indictment with another for burglary, C. was a servant in the house, and in the night-time opened the street-door and let in the other, who robbed the house, after which C. opened the door and let the other out, but did not go out with him. It was doubted on the trial whether this was a burglary in the servant, he not going out with the other; but afterwards, at a meeting of all the judges, they

were all of opinion that it was a burglary in both, 'and not to be distinguished from the case that had been often ruled and allowed in the same page in Hale [555, below, or Summary, 81] that if one watches at the street end while the others go in, it is burglary in all.' *Cornwall,* 2 Str. 881, 1731; 4 Bl. Com. 227; East P. C. 486. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of apprehending him, this is not burglary (in the latter) but larceny, for the door is lawfully open. *Johnson, &c.,* Carr. & M. 218, 1841 (accessory before the fact). In similar circumstances, where a key had been borrowed and a duplicate made, the C. C. A. held that there had been a breaking by the key; 'appellant was only allowed the key in order that he might be detected': *A. Chandler,* 1913, 1 K. B. 125; 82 L. J. K. B. 106; 77 J. P. 80; 23 Cox C. C. 330; 8 Cr. A. R. 82; the true test is 'lawful authority to enter': *per* L. Alverstone C.J.

Menaces] 'There may also be a breaking in law, where, in consequence of violence commenced or threatened in order to obtain entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it, opens the door, through which the robbers enter. East P. C. 486. [*Swallow,* 1813; 2 Russ. Cri. 1070 *o*: of threats.] But if the owner only throw his money out of the house to the thieves who assaulted it, this will not be burglary;' *Ib.;* Hawk. P. C. 1, 38, 3, 7; 'though if the money were taken up in the owner's presence, it would be robbery. In all other cases, where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part or other of the house, though it need not be accompanied with any violence as to the manner of executing it.' East, *ib.;* Hale, Summary, 80. See further under *Dwelling-house.*

Breaking by one of several] See on *Cornwall,* above, and 1 Hale P. C. 439, 534; 3 Inst. 64. So where a room-door was latched, and defendant lifted the latch and entered the room, and concealed himself for the purpose of committing a robbery there, which he did, and two other defendants were present with him at the time he lifted the latch to assist him to enter, and screened him by opening an umbrella, it was held by three judges that the two were, in law, parties to the breaking and entering, having been present at the beginning of the transaction, though perhaps they were not near the spot at the time the robbery was perpetrated. *Jordan,* 7 C. & P. 432, 1836.

Where the breaking is one night, and the entering the night after, a person present at the breaking, though not present at the entering, is, in law, guilty of the whole offence. *Ib.*

Entering] 'There must be an *entry* as well as a breaking . . . otherwise it is no burglary.' 1 Hale P. C. 555. '*Enter* means the entrance into the house of any part of the offender's body or of any instrument held in his hand for the purpose of intimidating any person in the house or of removing any goods, but does not include the entrance of part of an instrument used to break the house open': *Stephen,* Dig. Cr. L. 283, art. 341. If any part of the body be within the house, hand or foot, this at common law is sufficient. Foster C. C. 108; East P. C. 490. Thus where a man cut a hole through the window-shutters of a shop, put his hand through the hole, and took out watches, &c., but no other entry was proved, this was held to be

burglary. *Gibbons,* Foster 108, 1752. So where defendant broke a pane of glass in the upper sash of a window (which was fastened in the usual way by a latch), and introduced his hand within, for the purpose of unfastening the latch, but while he was cutting a hole in the shutter with a centre-bit, and before he could unfasten the latch, he was seized, the judges held this to be a sufficient entry for burglary. *Bailey,* R. & Ry. 341, 1818. The prosecutor observed defendant push his finger against a shop window-pane. The glass fell inside by the force of his finger; the prosecutor saw the fore-part of it on the shop-side of the glass. The judges ruled this a sufficient entry. *Davis,* R. & Ry. 499, 1823.

Breaking without entering] Where the facts only amount to a breaking and not to an entry, defendant may be found guilty of the attempt to commit burglary. *Spanner,* 12 Cox C. C. 155, 1872.

Use of fire-arms or other instruments] Where not the least part of the body enters the house, but defendant introduces an instrument, whether that is sufficient *entry* depends, it seems, on the object with which the instrument is employed. Thus if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of committing the contemplated felony, it will amount to an entry as where a man 'puts in a hook or other engine to reach out goods' or a pistol with intent to kill, through a window, though his hand be not within, this is burglary. 1 Hale P. C. 555; East P. C. 490. Cf. Hawk. P. C. 1, 38, 11, and *Stephen,* Dig. Cr. L., above.

But where the instrument is used, not for the purpose of committing the contemplated felony, but only for the purpose of effecting the entry, the introduction of the instrument will not be sufficient entry. Thus where thieves had bored a hole *through* the door with a *centre-bit,* and part of the chips were found inside the house, by which it was apparent that the end of the *centre-bit* had penetrated into the house; yet, as the instrument had not been introduced for the purpose of taking the property, or committing any other felony, and they had not got in themselves, the entry was ruled to be incomplete. *Hughes,* East P. C. 491; 1 Lea. 406, 1785; Hawk. P. C. 1, 38, 12. A glass sash-window was left closed down, but was thrown up by defendants; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the latter were about an inch thick; after the sash had been thrown up, a crowbar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found there. The judges were of opinion that this was not burglary, there being no proof that any part of either defendant's hand was within the window. *Rust,* 1 Moo. C. C. 183, 1828.

'*Offensive weapon*'] See *Game* and *Smuggling.*

Firing a gun into the house] The passage from Hale last cited continues: 'But if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary; *quære.*' Hawkins, however, perhaps means that the discharging a loaded gun into a house is sufficient; above, s. 11; and this opinion has been followed by East, who says, 'It seems difficult to make a distinction between this kind of implied entry, and that by means of an instrument introduced within the window or threshold for the purpose of committing a felony,

unless it be that the one instrument by which the entry is effected is holden in the hand, and the other is discharged from it. No such distinction, however, is anywhere laid down in terms, nothing further appearing than that the entry must be for the purpose of committing a felony.' P. C. 490; apparently adopted 2 Russ. Cri. 1073. It was ruled by L. Ellenborough, that a man who from the outside of a field discharged a gun into it, so that the shot must have struck the soil, was guilty of breaking and entering it. *Pickering* v. *Rudd,* 4 Camp. 220; 1 Stark. 58, 1815.

Entering by one of several] There may be a constructive *entry* as well as a constructive *breaking*. 'A., B., and C. come in the night by consent to break and enter the house of D. to commit a felony; A. only actually breaks and enters the house; B. stands near the door, but actually enters not; C. stands at the lane's end, or orchard gate, or field-gate, or the like, to watch that no help come to aid the owner or dweller, or to give notice to the others if help comes; this is burglary in them all, tho A. only actually brake and entered the house, and they all in law are principals.' 1 Hale P. C. 555. So where a man puts a child of tender years in at the window of the house, and the child takes goods and delivers them to A., who carries them away, this is burglary in A., though the child that made the entry be not guilty on account of its infancy. *Ib.* And so if the wife, in the presence of her husband, by his threats or coercion, breaks and enters a house in the night, this is burglary in the husband, 'tho the wife, that is the immediate actor, is excused by the coercion of her husband.' *Ib.* 556.

Dwelling-house] It must be proved that the premises broken and entered were either a dwelling-house or parcel of a dwelling-house. 'Every house for the dwelling and habitation of man is taken to be a dwelling-house wherein burglary may be committed.' East P. C. 491; see 3 Inst. 64, 65.

A tent or booth erected in a market or fair is not a dwelling-house for the purpose of burglary. 1 Hale P. C. 557; 'though the owner may lodge therein,' 4 Bl. Com. 226. But where the building was a *permanent* one of mud and brick on a down, erected only as a booth for the purposes of a fair for a few days in the year, having wooden doors and windows bolted inside, it was held that as the prosecutor and his wife slept there every night of the fair (during one of which it was broken and entered) this was a dwelling-house: *Smith,* 1 Moo. & Rob. 256, 1833.

Buildings adjoining the dwelling-house] At common law it was frequently a matter of dispute whether they formed a part of the dwelling-house. The point was settled by (24-5 V. 96, 53, now) 6-7 G. 5, 50, 46 (2).

A shop adjoining to and let with living-rooms in a house, though not communicating, is part of it, but would not be if let by itself and no one lived in it. *Gibson,* 1 Lea. 357, 1785. In *Clayburn,* R. & R. 360, 1818, a goose-house was held part of the dwelling-house in the yard of which it was.

The following cases have been decided on 7-8 G. 4, 29, 13, rpd., which is practically the same as s. 46 (2), above. It only applies to buildings not physically part of the dwelling-house. A house consisted of two long rooms, another room used as a cellar and washhouse

on the ground floor, and three bedrooms upstairs. There was no internal communication between the washhouse and any of the other rooms of the house, the door of the washhouse opening into the back yard. All the buildings were under the same roof. Defendant broke into the washhouse. Seven of the judges thought that the washhouse was part of the dwelling-house, and five not. *Burrowes*, 1 Moo. C. C. 274, 1830.

Behind a dwelling-house there was a pantry; to get to the pantry from the house it was necessary to pass through the kitchen into a passage; at the end of the passage there was a door, on the outside of which, to the left, was the door of the pantry. When the passage door was shut, the pantry door was excluded, and open to the yard; but the roof or covering of the passage projected beyond the door of the passage, and reached as far as the pantry door. There was no door communicating directly between the pantry and the house, and the two were not under the same roof. The roof of the pantry was a 'tea-fall,' and leaned against the wall of an inner pantry, in which there was a latchet window common to both, and which opened between them; but there was no door of communication. The inside pantry was under the same roof as the dwelling-house. Defendant entered the outer pantry by a window which looked towards the yard, having first cut away the hair-cloth nailed to the frame. It was held that the outer pantry was not part of the dwelling-house within the above s., and consequently that no burglary had been committed. *Somerville,* 2 Lew. C. C. 113, 1834; see also *Turner*, 6 C. & P. 407, 1834; bedroom over a stable in a yard, detached from house.

In *Higgs,* 2 C. & K. 322, 1846, it appeared that adjoining to a dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house, and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roof of the dwelling-house, kiln, and dairy were of different heights. It was held that the dairy was not a part of the dwelling-house; *Burrowes* was distinguished where the washhouse was under the same roof as the dwelling-house and part of it.

Occupation of dwelling-house] It must appear that the dwelling-house was occupied. Therefore, where a house was under repair, and the tenant had not entered into possession, but had (according to one report: the reverse is stated by East) deposited some of his goods there, but no one slept in it, it was held not to be a dwelling-house, and the breaking and entering not burglary. *Lyons,* 1 Lea. 185, 1778; East P. C. 497. Nor will the circumstance of the prosecutor having procured one of his workmen to sleep in a new house (his own family not being in possession) for its protection make any difference. *Fuller,* 1 Lea. 186 n., 1782; following *Lyons*, where it was expressly held, at any rate, by some judges, that even if goods were in the place, that, without domestic habitation, will not make it a dwelling-house. And the habitation must be domestic, for where only two caretakers, who were not servants of the tenant, had slept in the house for six nights, it was held, that as the latter had only in fact taken possession of the house so far as to deposit certain articles of his trade therein, it could not in contemplation of law be called his *dwelling-house. Harris,* 2 Lea. 701; East P. C. 498, 1795. So *Hallard*, 1792, 2 Lea. 701 n.; *Thompson, ib.* 771, 1796. A public-house with furniture left by one tenant who had no intention of residing there, and let to another not

yet in possession, was only inhabited by a caretaker at night; a conviction for burglary therein was held wrong. *Davies,* 2 Lea. 876, 1800; East P. C. 499. A servant and another person put a bed in a barn and slept there for four nights watching for thieves till defendant broke and entered the barn; it was agreed by all the judges that this sleeping in the barn did not make it a dwelling-house. *Brown,* East, *ib.* 497, 501, 1787. So a porter lying in a warehouse *to watch goods,* which is only for a particular purpose, does not make it a dwelling-house. *Smith,* East, *ib.* 497, 1717.

Premises consisted of a shop and parlour, with a staircase to a room over. The prosecutor took them, intending to live there, but did not. Every morning he went to the shop, transacted his business, dined and entertained his friends, and stayed the whole day there, considering it as his only home. All the judges held, that this was not a dwelling-house, apparently because no one slept there. *Martin,* R. & Ry. 108, 1806. Any part of the owner's family, his domestic servants, apparently, sleeping in the house will do.

Executor's occupation] A. died in his house. B., his executor, put servants into it, who lodged in it at board wages, but B. never lodged there himself. On an indictment for burglary, the question was, whether this was 'the mansion-house' of B. The court *inclined* to think that it might be, *because the servants lived there. Jones,* East P. C. 499, 1689.

Temporary absence] A house is no less a dwelling-house, because at certain times the occupier quits it. 'If A.,' says Hale, 'having a dwelling-house, and upon occasion he and all his family are absent a night or more, and in their absence in the night, a thief breaks and enters the house to commit felony, this is burglary.' 1 Hale P. C. 556; 3 Inst. 64. 'So if A. have two mansion-houses, and is sometimes with his family at one, and sometimes at the other, the breach of one of them, in the absence of his family, from thence is burglary.' *Ib.;* 4 Rep. 40 *a.* Again, 'if A. have a chamber in a college or inn of court, where he usually lodgeth in term-time, and in his absence in the vacation his chamber or study be broken open, &c., this is burglary.' *Evans,* Cro. Car. 473, 1638; Hale, *ib.;* East P. C. 505. After prosecutor had been absent from his house for a month on a journey, no person being in the house, it was broken open, and robbed. He returned a month after with his family and inhabited there. This was adjudged burglary. *Murry,* 2 East P. C. 496, 1698; Foster C. C. 77; 'but there must be an intention of returning.'

The prosecutor had a house at Hackney, which he made use of in the summer. One summer he removed to his town house, bringing away a considerable part of his goods. The following November the house at Hackney was broken open, on which he removed thence almost everything else. He said in evidence that he had not come to any settled resolution whether to return or not, but was rather inclined totally to quit the house and let it. When the house was again broken into it was held that it could not be deemed his dwelling-house. *Nutbrown,* Foster, 77; East P. C. 496, 1750.

The prosecutor left a dwelling-house, keeping it only as a warehouse and workshop, without any intention of returning to it. Two women, employed by him in his business (not as domestic servants), slept there to take care of the house, but did not take their meals there or use the house for any other purpose whatever. On an indictment for

stealing goods in the dwelling-house, &c., the judges held that this could not be considered his dwelling-house. *Flannagan*, R. & R. 187, 1810. Here, perhaps, there was no dwelling-house at all. Still, though the object of the owner of the house in putting in his servants, be to protect his property only, yet if *they live there* their occupation will be deemed his occupation, and the house may be described as his dwelling-house. The shop broken open was part of a dwelling-house which the prosecutor had inhabited. He had left and never meant to live in it again, but retained the shop and let the other rooms to lodgers; after some time he put a servant and his family into two of the rooms, lest the place should be robbed. The judges thought that putting in a servant and his family *to live*, was very different from putting them in merely to sleep, and that this was still to be deemed the prosecutor's house. *Gibbons*, R. & R. 442, 1821; 2 Russ. Cri. 1082.

Who is the occupier?] Prosecutions for burglary frequently used to fail because the occupation was wrongly laid, but the point was for long of small importance, and is now of none, for Rule 6 (1) of the Indictments A. 1915, only requires 'the property referred to' to be identified. See also R. 9 and Form 10. But it is convenient that some occupation should be averred, and it must be proved: s. 8 (1) of that A.

Lodgers] The old cases drew a sharp distinction between the actual occupier and his lodgers. Possibly—but not certainly—it survives in the case mentioned in the following passage, which concludes a discussion of these cases: 'Hence it follows, that if a man lets out part of the house to inmates, and continue to inhabit the rest himself; if he break open the apartments of such inmates, and steal their goods, it is felony only, and not a burglary; for it cannot be burglary to break open his own house.' East P. C. 506, 780; Kel. 84. See 2 Russ. Cri. 1088.

Dalton says that if the host of an inn break the chamber of his guest in the night to rob, this is burglary; ch. 151 (p. 342, ed. 1742). 'But this may be justly questioned; for that there seems no distinction between this case' and the case put above. East P. C. 502. 'If A. be a lodger in an inn . . . and in the night he riseth, openeth his chamber-door, steals goods in the house, and goes away, it may be a question whether this be burglary; it seems not, because he had a kind of special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house, for A. hath a special property in his chamber; but if he had opened the chamber of B., a lodger in the inn, to steal his goods, this had been burglary.' 1 Hale P. C. 554.

'Night'] It must be proved that both the breaking and entering took place in the night-time, but it is not necessary that both should take place on the same night. It is said by Hale, that if thieves break a hole in the house one night, to the intent to enter another night and commit felony and do so through that hole, this seems to be burglary; 'for the breaking and entring were both *noctanter*, tho not the same night; and it shall be supposed that they brake and entred the night they entred, for the breaking makes not the burglary till the entry.' 1 P. C. 551. This point was decided in the following case: During the night of Friday, the side-door of a house, which opened into a public passage, had all the glass taken out by defendant with intent to

enter, and on the Sunday night he entered through the hole thus made. The judges were of opinion, that the offence amounted to a burglary, the breaking and entry being both by night, and the breaking being originally with intent to enter. *Smith,* R. & Ry. 417, 1820.

'If the breaking of the house were in the day-time, and the entring in the night, or the breaking in the night and entring in the day, this will not be burglary, for both make the offense, and both must be *noctanter; vide*' 1 Hale P. C. 551, where the authority he gives is clearly misprinted and misplaced; there is no reference to '8 E. 4' in *Crompton,* 33 *a;* there is one there to '8 E. 2,' but not on this point; it is on the point of *Breaking,* above, where it is correctly set out; *Crompton* does not mention *this* point. Obviously Hale's 'reasoning [in the first passage above], if applied to a breaking in the day-time, and entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entry a burglary,' which contradicts the second passage (551) above. 2 Russ. Cri. 1091; and see East P. C. 509. It may well be doubted whether, in such a case, the offence would be held to amount to burglary.

Intent to commit felony] This must be proved. Evidence that a felony was actually committed therein is evidence that the house was broken and entered with intent to commit that offence. 1 Hale P. C. 560; East P. C. 514. But 'tho he attains not that intent, but takes or steals nothing, this is burglary': Hale, 562; *i.e.* at common law, if the intent is charged, as in *Vandercomb,* below; but cf. *Anon.,* 1 Lew., below, no doubt under a statute. It was at one time asserted that it was essential that the felony should be at common law, and then doubted. 1 Hale P. C. 562; Crompt. Fitzh. 32; Dalt. c. 151. But it is settled that it makes no difference whether it be at common law or by statute; 'because wherever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law.' Hawk. P. C. 1, 38, 38; *Gray,* 1722; 4 Bl. Com. 228; East P. C. 511; see *Indictment,* below. Intent to commit trespass or misdemeanour is not enough: *Powell,* 2 Den. C. C. 403; 21 L. J. M. C. 78; 5 Cox C. C. 396, 1852. Where defendant enters with intent to beat some person in the house, even though killing or murder may be the consequence of beating, yet if the primary intent was not to kill, it is still not burglary. 1 Hale P. C. 561; East P. C. 509. In *Rodley*—burglariously breaking, &c., with intent to rape—it was argued that the conviction was bad as, at any rate, that intent was formed after the entry, and *Tucker,* 1 Cox C. C. 73, 1844, to that effect was cited, but the case was decided on another ground. Where a shopman got money for his master's goods, he put none of it 'in the till or otherwise under the master's immediate control,' but ten guineas of it in his trunk in his room in the house, and quitted his master's service, but afterwards broke and entered the house in the night, and took away that sum: held no burglary, for he did not enter to commit a felony, but a trespass only. 'Although it was the master's money *in right,* it was the servant's *in possession,* and the first act no felony.' *Bingley,* Hawk. P. C. 1, 38, 37, cited Lea. 840-1, as *Dingley,* 1 Show. 53, 1687; East P. C. 510, as *Anon.* Where tea had been seized as contraband by an excise officer, and his house was entered in the night, and the goods taken away, on an indictment for entering his house, with intent to steal his goods, the jury found that defendant broke and entered the house with intent to take the goods on behalf of the person who had smuggled them; all the judges were of opinion

that the indictment was not supported, there being no intent to *steal*, however outrageous their conduct was. *Knight and Roffey*, East P. C. 510, 1781. If the indictment had been for breaking and entering the house, with intent feloniously to rescue goods seized—a felony by 19 G. 2, 34, rpd.—it would have been burglary: *ib.* On indictment for breaking, &c., with intent to kill and destroy a gelding 'there being,' it appeared that defendant, in order to prevent the horse from running a race, cut the sinews of his forelegs, from which he died. Pratt C.J. directed an acquittal, the intent being not to commit felony by killing and destroying the horse [as it would be now], but a trespass only to prevent his running, and therefore it was no burglary. But he was afterwards indicted for killing the horse, and capitally convicted. *Dobbs*, 2 East P. C. 513, 1770. Two poachers went to the house of a gamekeeper, who had taken a dog from them, and believing him to be out of the way, broke the door and entered. Being indicted for this as a burglary, as their intent was to rescue the dog, and not to commit a felony, Vaughan B. directed an acquittal. *Anon.*, Matth. Dig. C. L. 48, 1831; see *Holloway*, 5 C. & P. 524, 1833.

Evidence] Possession of stolen property three months after the breaking is very weak evidence of that offence: *T. Bailey*, 13 Cr. A. R. 27, 1917: c. q.

Intent is gathered from all the circumstances of the case. Three persons attacked a house. They broke a window in front and at the back. They put a crow-bar and whittle through a window, but the owner resisting them, they went away. They had ample opportunity to enter and plunder, if they wished. Being indicted for burglary with intent to commit a larceny, it was contended that there was no evidence of the intent; but Parke J. said that it was for the jury to say, from all the circumstances, whether defendant went with the intent alleged or not. *Anon.*, 1 Lew. C. C. 37, 1830. Where the intent was clearly not to steal, but to get a conviction and so discharge from the army, the C. C. A. materially reduced the sentence: *G. Williams*, 12 Cr. A. R. 11, 1916. The jury may find the intent from mere presence if they do not accept the explanation given or there is none: *E. G. Wood*, 1911.

Indictment—intent] Where there was an indictment for burglary and stealing goods, and it appeared that there were no goods stolen, but only an intent to steal, it was held by Holt C.J. that this ought to have been so laid, and he directed an acquittal. East P. C. 514, 1700. The intent must be proved as laid. If it is laid that the intent was to commit one sort of felony, and it is proved that the intent was to commit another, it is a fatal variance: *ib.* But now by s. 5 (1) of the Indictments A. any amendment which can be made 'without injustice' will be made. And that statute permits these charges to be made in the same indictment.

Property—bailee] The property in the goods which it is alleged were intended to be stolen, must, if stated, be correctly laid, subject now to Indictment R. 6 and to amendment, above. 2 Russ. Cri. 1094. But even before it was enough to *prove* the intent to steal goods *generally*. *Clarke*, 1 C. & K. 421, 1844. See further under *Dwelling-house*. A. was charged with breaking into the house of K., and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M. carried on the trade of a silversmith

for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but that he should tell K. of it; and that he sometimes bought goods for the shop, and sometimes K. did it; it was held that M. was a bailee, and that the goods in his shop might properly be laid as his property. *Bird,* 1839; see this point under *Larceny.*

It seems in all cases sufficient where a felony has been actually committed, to allege the commission without any intent: 1 Hale P. C. 560; East P. C. 514, above. 'It is, besides, a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself upon the ground that he did not intend . . . that particular offence. Yet this, it seems, must be confined to cases where the offence intended is in itself a felony': citing *Dobbs,* above. See 4 Bl. Comm. 221; *Attempts* and *Intent,* above.

Larceny] If the indictment charges a larceny as well, there may be a conviction thereof. *Withal.* In a similar case the verdict was, 'not guilty of the burglary, but guilty of stealing above the value of 40*s.* in the dwelling-house.' *Hungerford,* East P. C. 518, 1790.

Joint indictment] It was formerly thought, that if several were jointly indicted for burglary and larceny, one could not be convicted of larceny only and another of burglary. *Turner,* 1 Sid. 171, 1675; East P. C. 519. But in a later case, where one pleaded guilty to burglary, and two others were found guilty of the larceny but acquitted of burglary, the judges came by a majority to the opposite conclusion. *Butterworth,* R. & Ry. 520, 1823; 2 Russ. Cri. 1100.

Although defendant may be convicted of the larceny only (if the charge of burglary is abandoned), yet if the larceny was committed on a day *before that* laid in the indictment, he cannot be convicted thereof. In *Vandercomb,* defendants had previously broken in and made preparations for stealing, but on the day they were caught on the premises had not actually taken anything; it was held that evidence of theft of some of the articles charged before three o'clock, the alleged time of entering, could not be given, and that they must be acquitted of larceny on that day. The court said: 'The charge now proposed to be introduced goes to connect the prisoners with an antecedent felony committed before *three* o'clock, at which time, it is clear, they had not entered the house. . . . It is said that they stole the goods on a former day, and that their being found in the house is evidence of it. But this is surely a distinct transaction; and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present.'

Autrefois acquit] The defendants having been acquitted both of burglary and of larceny, were indicted again for burglary *with intent,* &c., and for stealing other goods (than those in the earlier indictment): to both indictments they pleaded *autrefois acquit.* On demurrer in the Ex. Ch. all the judges, *per* Buller J. said: '[The] cases establish the principle that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now to apply the principle of these cases to the present case: The first indictment was for burglariously breaking and entering the house of, &c., and *stealing the goods* mentioned; but it

appeared that the prisoners broke and entered the house *with intent to steal,* for in fact no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking, &c. *with intent to steal,* which is the charge in the present indictment, and therefore they have never been in jeopardy for this offence. For this reason the judges are all of opinion that the plea is bad: ' defendants were then tried and convicted. *Turner,* Kel. 30, 1664, and *Jones and Beaver, ib.* 52, 1665, were thus overruled, East P. C. 579.

Found by night armed, &c.] Under s. 28, above, the particular building must be specified in the indictment; and, probably, it should also charge an intent to commit a definite felony. *Jarrald,* L. & C. 301; 9 Cox C. C. 307; 32 L. J. M. C. 258; 1863. This decision was severely criticised by Mr. Greaves: 2 Russ. Cri. 1103 *f*; and see below.

Possessing 'implement of housebreaking'] This offence consists in mere possession without lawful excuse. It is not necessary to allege or to prove an intent to commit a felony. *Bailey,* 1 D. & P. C. C. 244; 6 Cox C. C. 241; 23 L. J. M. C. 13, 1853, under 14-15 V. 19, 1, rpd., substantially the same as s. 28, above, where the jury found no evidence of intent to commit a felony; conviction affirmed. Where only one is in possession of the implements, that is possession by all. *Thompson,* 11 Cox C. C. 362, 1869.

If a man is armed with any other weapon than one for housebreaking, there must be some other proof of an intent to break house (and, perhaps, into some particular house): *Jarrald,* above, where the weapon was a loaded gun; Crompton J. seems in some preceding words to differ from *Bailey,* above, to which, however, he was a party.

Instances] Keys are implements of housebreaking; for though commonly used for lawful purposes, they are capable of being employed in housebreaking, and it is for the jury whether the defendant had them 'without lawful excuse,' and to use as such implements. *Oldham,* 2 Den. C. C. R. 472; 21 L. J. M. C. 134; 5 Cox C. C. 551, 1852. But when defendant was a bricklayer and the implements were a bricklayer's chisel and a screwdriver, the C. C. A. held that he had a 'lawful excuse' for the possession; otherwise, if he had been a farmer; the direction, therefore, that the *onus* was on him to prove innocent intention was wrong: c. q.: *E. Ward,* 1915, 3 K. B. 696; 25 Cox C. C. 255; 60 S. J. 27; 11 Cr. A. R. 245. A piece of linen smeared with treacle, found near a stone, may be such implement (the combination being commonly used by housebreakers, though not *eiusdem generis* with 'keys,' &c.): *Percival,* 69 J. P. 320, 1905.

Accessories] See *Aiders, &c.*

BURIAL, OBSTRUCTING.

Riotous or indecent behaviour at burials] including delivering an address without authority and 'under colour of any religious service or otherwise . . . endeavouring to bring into contempt or obloquy the Christian religion or the belief or worship of any Church or denomination of Christians or the members or any minister of any such Church or denomination' is made a misdemeanour by 43-4 V. 41, 7.

See also *Dead Human Bodies.*

CANALS, OFFENCES RELATING TO.

See Index.

CANDIDATES, OFFENCES (I.) AGAINST.

See *Elections.*

False statements] By 58-9 V. 40, 1: 'Any person who or the directors of any body or association corporate which, before or during any parliamentary election, shall for the purposes of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate shall be guilty of an illegal practice within' 46-7 V. 51, which is amended to include this offence as if therein mentioned. Hence by s. 51 it may become indictable. By s. 2, it is a defence to believe on reasonable grounds that the statement is true. By s. 3, the candidate is *wholly* exonerated for this offence, 'committed by his agent other than his election agent,' unless he or the election agent 'has authorised or consented to . . . or paid for' such statement *or* an 'election court' reports that this 'election . . . was procured or materially assisted' by such statement.

(II.) BY.

See *Bribery* and *Elections.*

CARDS, OFFENCES IN CONNECTION WITH.

See under *Cheating* and *Gaming.*

CARNAL KNOWLEDGE, ILLICIT,

is most conveniently treated under *Defectives, Rape.*

CASTING AWAY SHIPS.

See *Ships* and 24-5 V. 97, 42, under *Arson.*

CATTLE, OFFENCES WITH REGARD TO.

Larceny] By 6-7 G. 5, 50, 3: 'Every person who steals any horse, cattle or sheep shall be guilty of felony, and on conviction thereof liable to penal servitude for any term not exceeding fourteen years.' See under *Animals*.

Killing with intent to steal] By s. 4: 'Every person who wilfully kills any animal with intent to steal the carcase, skin, or any part of the animal killed, shall be guilty of felony, and on conviction thereof liable to the same punishment as if he had stolen such animal, provided the offence of stealing the animal so killed would have amounted to felony.' See above.

Killing or maiming] By 24-5 V. 97, 40: 'Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years.' By s. 41 the same offences on 'any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law or being ordinarily kept in a state of confinement or for any domestic purpose' are punished; see under *Dog*. See *Miles* v. *Hutchings*, 20 Cox C. C. 555, 1903.

Parry, 35 L. J. newspaper, 456, 1900, was convicted under this s. of injuring his own horse: '*sed quære*': 2 Russ. Cri. 1826 *p*: the charge should certainly have been for *cruelty*.

Ss. 58-9 also apply.

'*Cattle*'] The word *cattle* in s. 40 would, doubtless, receive the same interpretation as it bore in the rpd. 9 G. 1, 22, 'under which it was held that an indictment for killing a 'mare' (or a *horse* or *colt*) was good, on the ground that this Act was an extension of 22-3 C. 2, 7, rpd., which speaks (ss. 2, 5) of 'horses, sheep, or other cattle.'' *Paty*, 1 Lea. 72; 2 W. Bl. 721; East P. C. 1074, 1770; followed in the case of 'a gelding' in *Mott*, 1 Lea. 73 n., 1783; cf. *Tivey*, 1 C. & K. 704, 1844; *Welch*, below. Pigs were held to be within 9 G. 1, 22: *Chapple*, R. & Ry. 77, 1804; and asses: *Whitney*, 1 Moo. C. C. 3, 1824. Thus 'the term appears to include not only horned cattle and sheep': 2 Russ. Cri. 1826. There are many statutory definitions, the latest being in 6 E. 7, 32, the Dogs A. 1906—for that A.—s. 7, viz.: 'horses, mules, asses, sheep, goats and swine.'

Indictment] It was not sufficient in the indictment to allege maiming, &c. 'certain cattle' generally, without naming the species: *Chalkley*, R. & R. 258, 1813. Indictment Rules 6 and 9 apply.

The injury—'maiming,' 'wounding'] On an indictment for maliciously *maiming* or *wounding*, it need not appear either that the animal was killed, or that the wound inflicted a permanent injury. Defendant had maliciously driven a nail into a horse's foot. The horse

was thereby rendered useless to the owner, and continued so for some months; but at the trial it was stated that it was likely to be perfectly sound again in a short time. The judges held a conviction right, as the word 'wounding' does not imply a permanent injury. *Haywood,* R. & Ry. 16; East P. C. 1076, 1801. But *maiming,* it seems, does. East, *ib.* 1077; *Jeans,* 1 C. & K. 539, 1844, under 7-8 G. 4, 30, 16, rpd. Where defendant was indicted under rpd. 4 G. 4, 54, 2, for wounding a sheep—he had set on a dog which inflicted several severe bites—Park J. said, 'This is not an offence at common law, and is only made so by a statute; and I am of opinion that injuring a sheep, by setting a dog to worry it, is not a maiming or wounding within the meaning of that statute.' *Hughes,* 2 C. & P. 420, 1826; but this decision is doubted as the dog was 'an instrument': 2 Russ. Cri. 1827. The word 'wound' in s. 40, above, is to be construed according to its ordinary meaning; and injuries to a horse's tongue, apparently caused by a pull of the hand, were held to be a 'wounding.' *Bullock,* 37 L. J. M. C. 47; L. R. 1 C. C. R. 115; 11 Cox C. C. 125, 1868. Defendant poured nitrous acid into the ear of a mare, some of which getting into the eye produced blindness; a conviction for 'maiming' was held to be right. *Owens,* 1 Moo. C. C. 205, 1828, under 7-8 G. 4, above. Where defendant set fire to a cowhouse, and a cow in it was burned to death, Taunton J. ruled that this was a killing of the cow within the same s. *Haughton,* 5 C. & P. 559, 1833.

Malice and intent] See 24-5 V. 97, 58, p. 387. As always, some evil intent in defendant must appear. Thus, in *Mogg,* Park J. left it to the jury to say whether defendant had administered the sulphuric acid with the intent of improving the appearance of the horses (there being evidence of a practice of that kind by grooms) or that charged; in the former case they ought to acquit him. And where defendant caused the death of a mare by inserting the handle of a fork into her vagina, and pushing it into her body, it was held there was sufficient malice to support an indictment under s. 40, above, though there was no evidence that he was actuated by ill-will towards the owner, or spite towards the mare, or by any motive except the gratification of his own depraved mind. The jury found that he did not, in fact, intend to maim, wound, or kill the mare, but that knowing what he was doing would or might have that effect, he nevertheless did what he did recklessly and not caring whether the mare was injured or not. *Welch,* 1 Q. B. D. 23; 45 L. J. M. C. 17; 13 Cox C. C. 121, 1875: C. C. R.; cf. *Presumption of Malice.*

Cruelty] Offences under the Cruelty to Animals A., 39-40 V. 77, passed in order to regulate vivisection, may, by s. 15, where the penalty which can be imposed exceeds five pounds, be prosecuted on indictment at the request of the accused. A custom of the district is no defence to cruelty: *Waters* v. *Braithwaite,* 78 J. P. 124; 110 L. T. 266; 30 T. L. R. 107; 24 Cox C. C. 34, 1913: K. B. D.—not milking cow.

Slaughter-houses] By s. 8 of 26 G. 3, 71, the Knackers A. 1776, unlicensed slaughtering of cattle, except 'for butchers' meat,' or flaying of dead horses, &c., is a felony punishable by fine or imprisonment and 'corporal punishment' or transportation for seven years (maximum). By s. 9, destroying hides of such animals is a misdemeanour. The A. is repealed *for London* by 54-5 V. 76, 142.

CHALLENGING TO FIGHT.

See under *Assault.* 'It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send such a challenge, or to fight; as by dispersing letters to that purpose, full of reflections and insinuating a desire to fight, &c.' 2 Hawk. P. C. 1, 63, 3; see *Knock,* 1877. Thus, a letter saying, 'You have behaved like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make,' was held indictable. *Philipps,* 1808; *Rice,* 3 East, 581, 1803. No provocation, however great, is a justification, although it may affect the punishment. *Ib.* Provoking to challenge is a form of *Incitement,* which see: Steph. Dig. Cr. L. 54 *n.*

Evidence] Prosecutor must prove *inter alia,* where it does not appear from the writing or words used themselves, the intent to challenge, or to provoke to a challenge. Thus, in cases where the words are ambiguous, he must show the circumstances in which they were uttered. Thus, words of provocation, as 'liar,' or 'knave,' though a *mediate* provocation to a breach of the peace, do not tend to it *immediately,* like a challenge to fight, or a threatening to beat another. *King,* 4 Inst. 181, 1586. Yet these, or any other words, would, perhaps, be indictable if proved to have been spoken with an intent to provoke the sending of a challenge. 1 Russ. Cri. 440, citing the rule, 3 Inst. 158: *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*

Venue] Where a challenging letter is posted in one county, and delivered in another, the venue may be laid in the former. If the letter is never delivered, the defendant's offence is the same. 'On trials for high treason, intercepted letters are received in evidence as overt acts of treason in the county where they were written': *per* L. Ellenborough. *Williams,* 2 Camp. 506, 1810.

Criminal informations for this misdemeanour have often been granted in the High Court: *Russ. ib.;* but it is triable at Q. S.

CHAMPERTY.

See under *Maintenance.*

CHANCE MEDLEY, HOMICIDE BY.

See *Homicide.*

CHAPELS, OFFENCES IN.

See *Disturbing Public Worship* and under *Bigamy.*

CHARACTER, FALSE, GIVING OR USING.

Common law] See *Toshack; Sharman,* 1854; *Moah,* D. & B. 550; 27 L. J. M. C. 230; 4 Jur. N. S. 464; 7 Cox C. C. 503, 1858: letter of recommendation; cf. *Hodgson,* 1856.

Statutes] See 32 G. 3, 56, 4; 6 E. 7, 5, 1, 2. By 57-8 V. 60, 104, forgery, fraudulent alteration, use, &c. of a 'certificate of competency' (s. 93) is a misdemeanour; for punishment, see *Seamen.*

CHASTISEMENT, EXCESSIVE.

See under *Assault, Child, Manslaughter, Murder.*

CHEATING.

At Common Law.

The question whether or not a fraudulent transaction—for the meaning of which see *Agents*—is indictable, has long been of less importance than it formerly was, because several cheats have been made indictable by a line of statutes, the latest being 6-7 G. 5, 50, which include that class of offences known as obtaining money and goods by *false pretences*.

Cheats at common law 'may, in general, be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice or by causing an illiterate person to execute a deed to his prejudice by reading it over to him in words different from those in which it was written,' &c. Hawkins P. C. I. 71, 1. On this East, P. C. 817, observes: 'It may be doubted whether [this] description . . . be sufficiently accurate or distinct to be taken as a definition of the offence at common law. I should rather say that it consists in the fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public.' He himself, *ib.* 860, points out 'that to constitute a cheat properly so called there must be a prejudice received, both at common law and under . . . 33 H. 8, 1, and 30 G. 2, 24,' rpd., citing *Ward*, 1727, which see under *Forgery* and *Attempts*, below.

East's definition is accepted 9 Halsbury, 689, with the addition engrafted by many later cases: 'the contrivance used must be of such a character that common prudence and caution are not sufficient security against a person being defrauded thereby.'

What is evidently intended is such conduct as shows a design of systematic cheating, 'according to the doctrine in *Wheatly* . . . and . . . *Young*,' *i.e.* in the passages cited from L. Mansfield and Buller J., below—'of the kind which in its nature is calculated to defraud numbers'—and in some of the following cases. The distinction sometimes attempted, *e.g.* in *Brailsford*, below, between 'acts which are merely improper and immoral and those which tend to produce a public mischief' is unscientific because all immoral wrong tends to produce public mischief, and even if an injury is exclusively confined to an individual, the public, of which he is a member, suffers *pro tanto*. What is probably meant is that there are infinite degrees of public mischief between 'public' and 'private' frauds and the criminal law can only take notice of the more serious, *i.e.* those affecting numbers at once. Whether a given fraud affects or *may* affect sufficient 'numbers' or not, and is, therefore, *public* or *private*, naturally depends on the view of individual judges, and hence there is considerable variation in the cases. The courts have always been anxious to maintain the distinction between the civil and the criminal, but the

differentiation is not yet complete, and in Cheats and Frauds it is especially difficult to draw the line between them. In them a link is naturally found between civil and criminal wrongs, and hence it is not always easy to determine whether a given act is indictable or actionable (if it is not both). Cf. '*False Pretence.*' In *Jones,* 1 Salk. 379; 2 L. Raym. 1013; 6 Mod. R. 105, as '*Anon.*,' 1704, where an indictment for pretending to A. to be sent by B. to get twenty pounds, and in fact getting it, was quashed, Holt C.J. said, 'It is not indictable unless he came with false tokens; playing with false dice is, for that is such a cheat as a person of an ordinary capacity cannot discover. We are not to indict one man for making a fool of another; let him bring his action.' But may not this be said of any fraud? This decision—assuming that all the relevant facts are reported—is the more remarkable because Hale, 2 P. C. 506, says: 'If A. comes to B. and by a false message or token receives money of him and carries it away, it is no felony but a cheat punishable by indictment at common law or' on 33 H. 8, 1, rpd. Hawkins, however, I. 71, 2, thinks Holt's 'the better opinion . . . because it [the fraud] is accompanied with no manner of artful contrivance but wholly depends *on a bare naked lie;* and it is said to be needless to provide severe laws for such mischiefs against which common prudence and caution may be a sufficient security.' *Jones* was followed in *Nunos,* 2 Sess. Cas. 377, case 201, or *Munoz,* 2 Str. 1127, 1740. It seems that a very wide meaning was given to 'false tokens,' which see, below. *Jones* was followed in *Bryan,* 2 Str. 866; 2 Sess. Cas. 23, 1730. East is clearly mistaken in saying that the goods were obtained. Holt seems to have pressed his opinion rather far: see in his own reports, 354, *Glanvill,* 1710, where there are several other instances. Powell J. said that a woman who threatened several men, unless they paid her, to 'lay her bastard' to them, could be indicted; Holt said: 'but not if she goes to one particular person.'

However, legislation has expressly declared many forms of fraud indictable crimes. Opinion, in fact, general and legal has gradually changed in favour of greater definiteness in the law so that *Dr. Groenvelt's case* could hardly occur to-day: he was fined 20*l.* and committed to gaol 'for his ill-practice upon the body of J. S. in 1692, by which J. S. died, by the censors of the College of Physicians . . . until he should be delivered by the College or otherwise by due course of law': 1 L. Raymond, 213, 1697. In discharging him the K. B. said: '*Mala praxis* is a great misdemeanour and offence at common law (whether it be for curiosity and experiment or by neglect) because it breaks the trust which the party has placed in the physician tending directly to his destruction.'

The crown and the public] 'Those frauds which affect the crown and the public at large are also clearly the subject of indictment though they may arise in the course of some particular transaction or contract with private individuals': 2 Russ. Cri. 150, citing *Brailsford;* fraudulently obtaining a passport from the Foreign Office for use by *another;* on a doubtful point in which see under *Libel;* also below.

Public justice] All cheats which are levelled against the public justice of the kingdom are indictable at common law. East P. C. 821. Some such cheats will be found under the head of *False Personation, Forgery,* &c. East cites from *Tremaine's* Pleas of the Crown, 101, where there are many precedents of indictments for cheats; *Black-*

bourne, 1685, a married woman indicted for pretending to be a widow, and as such, executing a bail-bond; and a precedent in the Crown Circuit Companion, 78, 1738, of an indictment for forging a request for a *nolle prosequi.*

By a contract for the purchase of wheat it was provided that any dispute should be referred to arbitrators. Sealed bags of the samples having been prepared for the arbitrators, defendant removed their contents and placed in them wheat of better character, to deceive the arbitrators and to injure the buyer, and to pass them off as genuine samples. It was held that this was an indictable misdemeanour, though the fraud was not, in fact, practised. *Vreones,* 1891, 1 Q. B. 360; 60 L. J. M. C. 62; 17 Cox C. C. 267: C. C. R. The court expressly recognised the arbitrators 'as a tribunal administering public justice . . . one specially sanctioned by courts of law; its decisions are enforced . . . by courts of law.' But where an overseer was charged with a statutory offence by wilfully falsifying lists of voters with intent to mislead the revising barrister, it was held by Charles J. on a consideration of 6-7 V. 18, 51, and other enactments (which provide another remedy), that this was not indictable, and that as such lists are published, and every facility for correction given, and are not laid by the overseer before the revising barrister at all (but before the town clerk), *Vreones* did not apply. *Hall,* 1891, 1 Q. B. 747; 60 L. J. M. C. 124; 17 Cox C. C. 278.

Attempts] L. Coleridge C.J. and Pollock B. were emphatic, in *Vreones,* that an attempt to prevent the course of justice is a misdemeanour, the latter saying: 'I am quite clear that the condition precedent that there must be injury to the individual [see East, 860, above] does not apply in the present case. It applies in cases of cheating or defrauding private individuals, because otherwise a mere naked lie might constitute an offence. . . The real offence *here* is the doing of some act which has a *tendency* and *is intended* to prevent the administration of public justice': Q. B. 369.

Selling unwholesome provisions] The selling unwholesome provisions, 4 Bl. Com. 162, or 'the giving of any person unwholesome victuals not fit for man to eat, *lucri causâ,* or from malice or deceit, is undoubtedly in itself an indictable offence.' East P. C. 822. Where a Government contractor was indicted for deceitfully, &c. providing French prisoners with unwholesome bread, to the injury of their health, it was objected in arrest of judgment, that the indictment could not be sustained, for it 'did not appear that what was done was in breach of any contract *with the public,* or of any moral or civil (*sic*) duty'; but the judges held the conviction right. *Treeve,* 1796, *ib.;* in *Brailsford,* L. Alverstone C.J. stated that the original record of *Treeve* shows that the decision was not on the ground East gives; but he did not say on what ground it was. The principle meant is, apparently (though 'it cannot be maintained that every fraud and cheat constitutes an offence against the criminal law, but) the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognised.' On a very similar indictment at common law, where many of the loaves were strongly impregnated with alum, then prohibited by rpd. 37 G. 3, 98, 21, the defence was that it had been carefully employed, that a small quantity is not injurious, and that if too much had been put in, it was not with defendant's knowledge. But L. Ellenborough said, 'Who-

ever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm.' *Dixon,* 1814.

False accounting, &c., by public officers] See *Office-holders.* Fraudulent malversations or cheats by public officers are also indictable at common law; thus, overseers of the poor are indictable for refusing to account within the proper time: *Commings,* 5 Mod. 179, 1696; 1 Bott's Poor Laws, pl. 370, p. 357, 6th ed.; or for rendering false accounts, *e.g.* by not bringing sums into account. *Martin,* 2 Camp. 269, 1809; 3 Chitty, C. L. 701. An information was granted against overseers for procuring a pauper to marry 'a single woman with child of a bastard' to get the latter settled in the husband's parish: *Tarrant,* 4 Burr. 2106, 1697. On an application to the K. B., against the minister and churchwardens of a parish, for misapplying monies collected for charity, and returning a smaller sum only as collected, the court, refusing an information, referred the prosecutors to an indictment. *Ministers, &c., of St. Botolph,* 1 W. Bl. 443, 1763.

On indictment for enabling persons to pass their accounts with the pay-office, in such a way as to defraud the government, it was objected that it was only a private matter of account, and not indictable; the court decided otherwise, as it related to the public revenue. *Bembridge,* 22 St. Tr. 1; 6 East at 136, 1783.

False weights, &c.—public tokens] There seems to be no definition of 'false token,' but *Jacob,* Law Dict., includes under the phrase 'forged letters or other counterfeit means.' In rpd. 33 H. 8, 1, they are called 'privy tokens and counterfeit letters in other men's names' ('unto divers persons, their special friends and acquaintances'). In *Terrey,* Cro. Ch. 564, 1640, under this statute, the false token was 'a false note.' 'A false 'privy token' within the statute,' says East P. C. 826, 'has generally been taken to denote some real visible mark or thing, as a key, a ring, &c. A mere false affirmation or promise is certainly not such': *Munoz.*

In *Macarty, &c.,* 6 Mod. 301, case 389, 1705, Holt C.J. said, 'here is a *false token,* the one [defendant] pretending to be a broker, and the other a merchant, or a combination to treat.' 'Yet,' as East, 825, says, 'what was that but a false affirmation, simply?' So in *Munoz,* above, the false token was set out to be by falsely affirming that there was a person in the next room that would pay the money due upon it, and by that means getting the note': held not to be sufficient.

Cheating by false weights and measures—the capital instance—'by which the public in general may be imposed upon without any imputation of folly or negligence,' or by 'any false token having the semblance of public authenticity,' is indictable. East P. C. 820.

'If a person sell by false weights, though only to one person, it is an indictable offence; but if without false weights he sells to many persons a less quantity than he pretends to do, it is not indictable': *per* Buller J., *Young,* 1789, at 104. Thus, if a person has measured corn in a bushel, and put something in the bushel to fill it up, or has measured it in a bushel short of the statute measure, it may be indictable; but not where he sold a sack falsely affirming it to contain a 'Winchester bushel,' for this is 'no more than telling a lie.' *Pinkney,* or *Pickley,* 2 Barnard. 244, 1733; East P. C. 818, 820; 1 Sess. Ca. 198. The K. B. declined to accept the view that the sack

was a false token. 'Judge Page likened' the case to that 'of a tradesman's telling his chap there are so many ells in such a piece of cloth; the buyer may easily measure the cloth and see whether there are so many; and, if he will not, it is his own folly.' See *Wheatley*, below.

Knowingly exposing to sale and selling wrought gold under the sterling alloy as and for gold of the true standard weight (indictable in *goldsmiths* by statutes then in force), is a private imposition only in a common person (a pawnbroker): *Bower*, 1 Cowp. 323, 1775: judgment arrested. Selling coals under measure is not indictable, but selling them by false measure is: citing *Lewis*, below. East, *ib.*, who asks, '*Qu.* if false stamps or marks be used such as are required by statute on plate of a certain alloy?' 'I conceive,' he says, 1 P. C. 194, 'that offenders of this description fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable . . . at common law . . . for a cheat.'

By 52-3 V. 21, 33 (3), the Weights and Measures A. 1889, any court dealing with an offence under that A. which is also an offence at common law or under another A. may order proceedings at common law or under such other A.

Other false tokens—relation to forgery] The question was much considered in *Closs*, D. & B. C. C. 460; 27 L. J. M. C. 541; 7 Cox C. C. 494, 1858. That was an indictment for (obtaining money by false pretences—of which defendant was acquitted—and) keeping, and exposing for sale, and selling a picture, on which was unlawfully painted the forged signature of J. Linnell, intending thereby to denote that the picture was an original picture by that artist—of which he was convicted. This was held to be a fraud at common law. Cockburn C.J. said, 'We have carefully examined the authorities, and the result is, that we think if a person, in the course of his trade openly and publicly carried on, were to put a false mark or token upon an article so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article was sold, and money obtained by means of that false mark or token, that would be a cheat at common law.' The count for a common law cheat by means of a forgery was held to fail, and as the other count was held bad for not alleging with sufficient clearness that it was *by means* of the false token, that the defendant passed off the picture as genuine: c. q. East's conclusion on the whole matter (827) is 'the false token must be such as is calculated to gain the party some additional credit and confidence beyond his own assertion or what is resolvable into such'; and it is even more true than in his day that 'this enquiry is become less important' owing to statutes. For forgery at common law, see *Hamilton*, 1901, where the definition of Hawk. 1, 71, 1, above, of a common law cheat was said, by Mathew J., to be 'far too wide' (so 65 J. P. 266, correctly).

Cards, dice, &c.] Cheating was considered an indictable offence at common law. *Tremaine*, P. C. 91, sets out an indictment against *Arnope*, in 1685, for cheating with picture cards at whist—'*quendam lusum illicitum vocatum* whist and passage': also false dice. See under *Gaming*.

Not indictable] The following cheats have been held not to be indictable at common law; though many of them are now so by statute. Most of these decisions rest on the ground that they relate to cheats not of a *public* nature.

'A bare lie' has been dealt with: *Pinkney,* above. Thus, where an indictment charged a selling eight cwt. gum at seven pounds per cwt., with the false affirmation that the gum was gum *seneca,* and that it was worth seven pounds, whereas it was not gum *seneca,* and was not worth more than three, &c., it was quashed, because no false token was used. *Lewis,* Sayer, 205, 1755. See also *Lara,* East P. C. 819, 827; 6 T. R. 565; 2 Lea. 647, 1794. But such an offence is punishable as a *false pretence.* Cf. *Ridgway,* 1862, and *H. Williams,* 1836.

So where a brewer was indicted for sending to a publican so many vessels of ale, marked as containing a certain measure, and writing a letter, assuring him that they did contain so much, when in fact they did not, but less, &c., the indictment was quashed on motion, as 'the prosecutor could not have been imposed on without his own carelessness.' *Wilders,* 1720, cited *Wheatly,* below; East P. C. 819; doubted by Foster J., who thought the marking was a token. On the same principle, where a miller detained corn [perhaps as toll] sent to him to be ground, the indictment was quashed, it being merely a private matter for which an action would lie. *Channell,* 2 Str. 793; 1 Sess. Ca. 366; East, *ib.* 818, 1727. Receiving good barley, and delivering meal in return different from the produce thereof, and musty, &c., was held not to be indictable. L. Ellenborough said, that if the case had been that the miller had been owner of a soke mill [*i.e.* a monopoly], to which the inhabitants of the vicinage were bound to resort to get their corn ground, and he, abusing the confidence of his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it then stood, it seemed to be no more than the case of a common tradesman, who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in *Wheatly,* below, and the other cases, as not being indictable. *Haynes,* 4 M. & S. 214, 1815; hence *Wood,* 1 Sess. Ca. 277, no. 217, 1743, is doubted: 2 Russ. Cri. 1513 *y.* So selling sixteen gallons of ale as eighteen; L. Mansfield, as reported by East, said, 'It amounts only to an unfair dealing, and an imposition on this particular man, by which he could not have suffered but for his own carelessness in not measuring it; whereas fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights and measures, false tokens, or where there is a conspiracy.' *Wheatly,* 2 Burr. 1125; 1 W. Bl. 273; East P. C. 818, 1761. A baker had contracted with the guardians of a parish to deliver loaves of a certain weight. The relieving officer gave the recipient tickets to take to the baker; they were his weekly vouchers, when he made a statement to the relieving officer of the number of loaves supplied, and the latter would give him credit for the amount, and he would be paid by the guardians later; by a clause in the contract, the guardians had the power, in case of any breach, to deduct damages caused thereby from the amount payable. Loaves short of the weight were supplied. It was held by fifteen judges, after several arguments, that this was a mere private fraud, and not indictable at common law. *Eagleton,* 24 L. J. M. C. 158; D. & P. C. C. 515; 6 Cox C. C. 559, 1854-5; see the other references and *Glanvill,* 1710.

Evidence of similar acts] See under *Conspiracy.*

Triable at Q. S.

CHILDREN.

I. OFFENCES AGAINST; II. OFFENCES BY.

I.

Common law] See under *Servants.*

The Dangerous Performances Acts] The effect of 42-3 V. 34, 3, 4, and 60-1 V. 52, 1, 2, is that 'where in the course of a public exhibition or performance which in its nature is dangerous to the life or limb of' any male under sixteen or any female under eighteen 'taking part therein, any accident causing actual bodily harm occurs to' such person, 'the employer of such' person 'shall be liable to be indicted as having committed an assault' and the court of conviction may award compensation up to twenty pounds for such person: 'provided that no person shall be punished twice for the same offence.' If the defendant disputes the age accepted by the court, the *onus* of disproof is on him. Unless an accident has actually occurred the consent of the local 'chief officer of police' must be obtained for a prosecution.

Cruelty] The governing A. is 8 E. 7, 67. By s. 131 in this A. 'child' = a person under the age of fourteen; 'young person' = a person between fourteen and sixteen; 'guardian' includes 'any person who in the opinion of the court . . . has for the time being the charge of or control over the child, young person or youthful offender.'

Age] By s. 123 (1), when 'it appears to the court' that a person brought before it (not to give evidence), 'whether charged . . . or not,' is under sixteen, it 'shall make due inquiry' and 'shall take such evidence as may be forthcoming at the hearing, but no 'subsequent proof that the age . . . has not been correctly stated to the court' shall invalidate its order or judgment and 'for *the purposes of this Act*' 'the age presumed or declared by the court . . . shall . . . be deemed to be the true age.'

(2) 'Where in a charge or indictment for an offence under this Act or any of the offences mentioned in the First Schedule [below] to this Act, except an offence under the Criminal Law Amendment Act, 1885, it is alleged that the person by or in respect of whom the offence was committed was a child or young person or was under or above any specified age, and he appears to the court to have been at the date of the commission of the alleged offence a child or young person or to have been under or above the specified age, as the case may be, he shall for the purposes of this Act be presumed at that date to have been a child or young person or to have been under or above that age, as the case may be, unless the contrary is proved.'

By (3), an allegation that a 'child' is a 'young person' or *vice versâ* 'shall not be a defence' if the offence may be charged in both cases; but (4) 'where a person is charged with an offence under this Act in respect of a person apparently under a specified age, it shall be

a defence to prove that the person was actually of or over that age.' See on ss. 31-2, below.

By s. 12 (1): 'If any person over the age of sixteen years who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child or young person unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour; and shall be liable—

(*a*) on conviction on indictment, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years;

and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid or lodging for the child or young person or if, being unable otherwise to provide such food, clothing, medical aid or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor.'

The last paragraph enacts the judgment in *Connor,* 1908, 2 K. B. 26; 21 Cox C. C. 628: C. C. R. For 'the peculiar people,' see *Senior.*

(2) 'A person may be convicted of an offence under this section . . . notwithstanding that actual suffering or injury to health or the likelihood of such suffering or injury to health was obviated by the action of another person.'

(3) 'A person may be convicted of an offence under this section . . . notwithstanding the death of the child or young person in respect of whom the offence is committed.'

(4) 'Upon the trial of any person over the age of sixteen indicted for the manslaughter of a child or young person, of whom he had the custody, charge, or care, it shall be lawful for the jury, if they are satisfied that the accused is guilty of an offence under this section in respect of such child or young person, to find the accused guilty of such offence.'

The C. C. A. declined to substitute such a verdict in the case of a baby-farmer, when the child died in hospital six weeks after it was taken from her: *Chalker,* 4 Cr. A. R. 2, 1910. In *Byers, ib.* 5, the interval was four (or five) months and the child improved in the infirmary before it died, but the conviction was affirmed. There cannot be a verdict 'under this s.' if the jury is satisfied of the manslaughter: *Tonks,* which see.

(5) 'If it is proved that a person indicted under this section was directly or indirectly interested in any sum of money accruable or payable in the event of the death of the child or young person, and had knowledge that such sum of money was accruing or becoming payable, then—

(*a*) in the case of a conviction on indictment, the court may, in its discretion, either increase the amount of the fine under this section so that the fine does not exceed two hundred pounds; or in lieu of awarding any other penalty under this section, sentence the person to penal servitude for any term not exceeding five years; and

(*b*) a person shall be deemed to be directly or indirectly interested in a sum of money under this section if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable.'

By (8), 'An offence under this section' is in ss. 12-38 called 'cruelty.'

Abandonment—exposure] By 24-5 V. 100, 27: 'Whosoever shall unlawfully abandon or expose any child being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude.'

Where the mother left the child at the door of its father's house to his knowledge, and he left it there for some hours so that it became cold and stiff, this was held an 'abandonment' and an 'exposure' by the father. If the child had died, it might have been murder, *per* Blackburn J. See under *Murder*. *White,* L. R. 1 C. C. R. 311; 40 L. J. M. C. 135; 12 Cox C. C. 83, 1871.

Where the child was carefully packed up in a hamper, labelled 'with care,' and sent by rail to the father, and the parcel was delivered in less than an hour, a conviction was affirmed by a majority of fifteen judges. *Falkingham,* L. R. 1 C. C. R. 222; 39 L. J. M. C. 47; 11 Cox C. C. 475, 1870. See also *Ridley,* 1811; *March,* 1844.

There can be exposure without abandonment, as when a father took his children out of a workhouse and made them walk thirty miles on a wet night: *J. O. Williams,* 4 Cr. A. R. 89; 29 T. L. R. 290, 1910.

A single woman was indicted for neglecting to furnish her infant with sufficient food, she having the means to do so. There was no evidence of her actual possession of means, but it was proved that she could have applied to the relieving officer who was bound to give her proper relief: c. q. The court said that to show that she might by possibility have obtained the necessary means was not sufficient; that 'must be matter of uncertainty.' *Chandler,* D. & P. C. C. 453; 24 L. J. M. C. 709; 6 Cox C. C. 519, 1855; *Rugg,* 12 Cox C. C. 16, 1871: C. C. R.

'*Custody, charge, care*'] Who has either is, in each case, a question of fact; a man living with a woman convicted for cruelty to their illegitimate children (though not affiliated to him) may also be convicted: 'a person is not to be excused because he does not happen to be the legal guardian of the child': *Liverpool Society, &c.* v. *Jones,* 24 Cox C. C. 434, 1914: K. B. D.; see further on s. 38 (2), below. *Butler* v. *Gregory,* 18 T. L. R. 370, 1902: K. B. D., on a rpd. s. of the 1904 A. is therefore overruled. When parents were by agreement living apart, the husband paying sufficient for the maintenance of the wife and the children with her, but she neglected them (and was convicted), he was also liable to conviction, as he was well aware of such neglect; he was not exempt from his obligations under the A. because he supplied enough money: *Poole* v. *Stokes,* 24 Cox C. C. 169, 1914: K. B. D.

Physical defect] When a father refused to permit an operation for adenoids, chiefly on the ground that it involved the use of an anæsthetic which 'naturally involved a certain amount of danger to . . . life,' and the justices refused to convict under this s., the K. B. D. remitted the case to them: each case must be decided on its facts—the nature

of the operation, the reasonableness of the refusal and the competence of the adviser of the operation: *Oakey* v. *Jackson,* 23 Cox C. C. 734, 1913.

Suffocation—overlaying] S. 13: 'Where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air-passages of the infant) whilst the infant was in bed with some other person over sixteen years of age, and that that other person was at the time of going to bed under the influence of drink, that other person shall be deemed to have neglected the infant in a manner likely to cause injury to its health within the meaning of this Part [II.] of this Act,' *i.e.* ss. 12-38.

Exposing to risk of burning] S. 15 provides that the penalty which it inflicts on any one over sixteen who allows a child under seven, in his care, &c., to be in a room with 'an open fire grate' not sufficiently protected, &c., shall not be a bar to indictment for any other offence.

Brothels] S. 16 (1): 'If any person having the custody, charge or care of a child or young person between the ages of four and sixteen allows that child or young person to reside in or to frequent a brothel, he shall be guilty of a misdemeanour . . .': maximum sentence—fine of 25*l.* and six months' imprisonment with hard labour.

Verdict] (2) This s. does not affect liability under 48-9 V. 69, 6, 'but upon the trial of a person under that section it shall be lawful for the jury, if they are satisfied that the accused is guilty of any offence under this section, to find the accused guilty of such an offence.'

Encouraging unchastity] S. 17 (1), amended by 10 E. 7 & 1 G. 5, 25: 'If any person having the custody, charge or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution or unlawful carnal knowledge of that girl, he shall be guilty of a misdemeanour . . .': maximum sentence—two years' imprisonment with hard labour.

(2) If in fact such a girl has submitted to any of these things, any one is within the s. who 'has knowingly allowed the girl to consort with or to enter or continue in the employment of any prostitute or person of known immoral character.' 'Seduction' is here used in its 'popular' sense; it cannot mean carnal connection on any occasion; hence convictions of parents were quashed where after seduction in May a man was allowed to sleep in a barn with their daughter (and the whole family) in September: *Moon,* 1910, 1 K. B. 818; 79 L. J. K. B. 505; 74 J. P. 231; 4 Cr. A. R. 171. When a father allowed a man engaged to an elder daughter to sleep in the same bed with her and her sister aged eleven, a conviction under (2) was affirmed (but sentence was reduced from two years' to nine months' imprisonment with hard labour): *Ralphs,* 9 Cr. A. R. 86, 1913. 'There is a very important difference between 'allowing' . . . and 'knowingly allowing' . . . within . . . the section': *per* Isaacs L. C. J., in *Chainey,* where both parents were convicted, but in the father's case c. q. because mere 'negligence' is not an offence within (2).

Sexual offences] See under *Rape.*

Loss of guardianship] S. 21 (1). If a parent, custodian, guardian, &c., has been—

'(*a*) convicted of committing in respect of such child or young person an offence under this Part [II.] of this Act, or any of the offences mentioned in the First Schedule to this Act; or

(*b*) committed for trial for any such offence; or

(*c*) bound over to keep the peace towards such child or young person,

by any court, that court' may dispose of the custody of the child until 'at most' he is sixteen to 'a relative . . . or some other fit person' (below).

By s. 127, if the person removed 'is entitled under any trust' to receive money to maintain the child, &c., the court may vary the trust for the child's benefit.

By s. 21 (2): 'If the child or young person has a parent or legal guardian, no order shall be made under this section unless the parent or legal guardian has been convicted of or committed for trial for the offence or is under committal for trial for having been or has been proved to the satisfaction of the court making the order to have been party or privy to the offence, or has been bound over to keep the peace towards the child or young person, or cannot be found.' By (4), where the guardian, &c., has been committed for trial but the charge fails, the order is void. By (7), when the court may send a child to an industrial school (below), it need not make the above order.

Evidence] S. 27 puts offences under Part II., *i.e.* ss. 12-38 and Sched. I. (below) in the Schedule of the Criminal Evidence A. By s. 29, on indictment for cruelty or an offence in Sched. I., if 'the court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the court of any child or young person in respect of whom the offence is alleged to have been committed would involve serious danger to the life or health' of him or her, 'any deposition of the child or young person taken under the Indictable Offences Act, 1848, or this Part of this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

(*a*) if it purports to be signed by the justice by or before whom it purports to be taken; and

(*b*) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use it as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition.'

S. 30, as amended by 4-5 G. 5, 58, 28 (2) & Sched. 4: 'Where, in any proceeding against any person for an offence, any child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of that child may be received, though not given upon oath, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: and the evidence of the child, though not given on oath but otherwise taken and reduced into writing, in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848, or of this Part of this

Act, shall be deemed to be a deposition within the meaning of that section and that Part respectively:

Corroboration] Provided that—

(*a*) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(*b*) Any child whose evidence is received as aforesaid and who wilfully gives false evidence under such circumstances that, if the evidence had been given on oath he would have been guilty of perjury, shall, subject to the provisions of this Act, be liable on summary conviction to be adjudged such punishment as might have been awarded had he been charged with perjury and the case dealt with summarily by section ten of the Summary Jurisdiction Act, 1879.'

How the court should satisfy itself, see *Infant Witness.*

The jury ought to be specifically directed on the law of corroboration, but, if, in fact, there is corroboration, a conviction under this s. will not be quashed: *E. Murray,* 9 Cr. A. R. 248; 30 T. L. R. 196, 1913. Otherwise, if there is no corroboration: *W. Davies,* 85 L. J. K. B. 208; 25 Cox C. C. 225; 114 L. T. 80; 11 Cr. A. R. 272, 1915. The C. C. A. does not accept the view that it is 'safer to accept the uncorroborated evidence of a young child than that of an adult': *Dossi.*

Evidence that the child *identified* defendant immediately after the offence is not corroboration of the child within this s.: *per* H. L. in *Christie;* see L. Atkinson's judgment.

S. 31: 'Where in any proceedings with relation to an offence under this Part of this Act or any of the offences mentioned in the First Schedule to this Act, the court is satisfied that the attendance before the court of any child or young person in respect of whom the offence is alleged to have been committed is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child or young person.' This does not mean that in every other case the child must be present in court. 'The section was, no doubt, inserted in the interest of the prisoner. If the child's evidence is essential, the child must be called; if the child's evidence is not essential, then it need not be present in court': *per* L. Alverstone C.J., *Hale,* 1905, 1 K. B. 126; 20 Cox C. C. 739: C. C. R., under a similar s.

Where the child is not produced to the court the fact that it is under sixteen may be proved by 'any lawful evidence,' and it is not necessary to produce a birth certificate which with proof of identity is legal evidence. Thus the evidence of persons who had seen the children and stated that in their belief they were under sixteen, and of the mistress of a 'board' school that the eldest children attended it, was admitted in *Cox,* 1898, 1 Q. B. 179; 77 L. T. 534; 18 Cox C. C. 672: C. C. R.

Age of the parents] They 'were in the dock and the jury were able to judge from their appearance': *ib.*

Wages] By s. 124: 'In any proceedings under this Act a copy of an entry in the wages book of any employer of labour, or, if no wages

book be kept, a written statement signed by the employer or by any responsible person in his employ, shall be *primâ facie* evidence that the wages therein entered, or stated as having been paid to any person, have in fact been so paid.'

By s. 88, certain documents relating to certified schools are made evidence; so s. 90 (2) of reformatory and industrial schools.

Similar Acts] See *Miller,* 1901.

In camera] By s. 114, when the court thinks a witness is under sixteen, who is called on a charge for offences against 'decency or morality,' it may exclude 'all or any persons not being . . . directly concerned in the case,' but not '*bonâ fide* representatives of a newspaper or news agency.'

Not a spectator] By s. 115, no child (other than an infant in arms or one employed about the court) shall be 'present in court during the trial of any person charged with an offence.'

Indictment] By s. 32 (4), the indictment need not specify the date of acts constituting a continuous offence, when the offence is in Part II. or Sched. I. This sub-s. is expressly unaffected by the Indictment Rules, 1915, R. 12, which seems to be an exception to s. 3 (1) of the Ind. A. Nevertheless it is better to allege the dates *between* which the offence continued, as is done in Form 6, appended to the Ind. Rules. This has always been the practice where an exact date was incapable of ascertainment (*e.g.* in conspiracy) and it is certainly not forbidden by the A. If the dates are mentioned, 'it would be a little hard . . . to allow evidence' of antecedent [or subsequent] acts 'to be given. It had better not be given': *per* Phillimore J., *Miller,* 65 J. P. 313, 1901, where, however, defendants were cross-examined on the excluded matters. This ruling must be taken subject to the general rule in *Similar Acts.*

The ability to provide need not be alleged; it is sufficient if the word 'neglect' is used: *Ryland,* L. R. 1 C. C. R. 99; 37 L. J. M. C. 10; 10 Cox C. C. 569, 1867.

The child's age need not always be averred: *Stephenson,* 1912; but it is better to do so: see s. 123 (4), above.

By s. 35, the Vexatious Ind. A. 1859, and amending Acts apply.

Lawful chastisement] By s. 37: 'Nothing in this Part of this Act shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to such child or young person.'

Interpretation] By s. 38 (1), 'fit person' includes any relevant philanthropic 'society or body corporate.'

(2) 'For the purposes of this Part of this Act—

Any person who is the parent or legal guardian of a child or young person or who is legally liable to maintain a child or young person shall be presumed to have the custody of the child or young person; and as between father and mother the father shall not be deemed to have ceased to have the custody of the child or young person by reason only that he has deserted or

otherwise does not reside with the mother and child or young person; and

Any person to whose charge a child or young person is committed by any person who has the custody of the child or young person shall be presumed to have charge of the child or young person; and

Any other person having actual possession or control of a child or young person shall be presumed to have the care of the child or young person.'

Even before sub-s. (2) desertion was not a defence: *Connor*, 1908, above. Sub-s. (2) is not an exhaustive definition of the persons liable to be proceeded against under s. 12 (1); an illegitimate child living with its mother may be in the 'actual possession, &c.' of another, and 'actual possession is not to be confined in its meaning to legal possession.' 'The real effect of this sub-s. is that the persons' there enumerated 'may be convicted in certain circumstances under s. 12 even though they have not in fact such custody, &c.': *Liverpool Society* v. *Jones*, and other cases.

The First Schedule is: 'Any offence under ss. 27, 55 or 56 of the Offences against the Person Act, 1861, and any offence against a child or young person under ss. 5, 42, 43, 52 or 62 of that Act, or under the Criminal Law Amendment Act [amended 2-3 G. 5, 20]; any offence under the Dangerous Performances Acts, 1879 and 1897; any other offence involving bodily injury to a child or young person.'

'It is difficult to say precisely what this phrase would cover. Vaughan Williams J. held (*Salisbury*, unreported) that the mere rupture of the hymen of a girl of sixteen was not such 'bodily injury.' *Quære*, however, whether to render a child pregnant would not be, or to have carnal knowledge of a very young child, or to infect a child with venereal disease': *Hall & Pretty*, Law of Children, 144. See *Roberts*, 18 Cox C. C. 530, 1896.

The 'other' offences here contemplated 'are offences of which it is an *essential* part that the person injured is under sixteen'; and so not murder: *per* Cave J. This case was dissented from in a Scottish case on a point of evidence now settled: (see last edn.). For these ss. see Table of Statutes.

Parents, &c. habitual drunkards] By s. 26 of 8 E. 7, 67: On a conviction for 'cruelty' [s. 12 (8), above] or of any offence in Sched. I. of this A. [above], if defendant 'is a parent of the child or young person in respect of whom the offence was committed or is living with the parent . . . and is a habitual drunkard within the Inebriates Acts, 1879 to 1900,' the sentence in lieu of imprisonment may be 'an order for his detention in a retreat under the said Acts, the licensee of which is willing to receive him, for . . . two years' at the most; in which case the order has the same effect as if made by a justice under those Acts: provided that (a) notice has been given defendant of the allegation of habitual drunkenness and he consents to the order; (b) the court must hear defendant's spouse who comes forward and objects to such order; (c) it must be reasonably satisfied that defendant's expenses in the retreat will be paid; (d) nothing in this s. affects the court's power to order detention in a certified inebriate reformatory.

II. Offences by Children.

Criminal responsibility] An infant is, in certain cases, and under a certain age, privileged from punishment, by reason of a presumed want of criminal design.

Misdemeanours] In certain misdemeanours an infant is privileged under the age of twenty-one, as in cases of 'mere *nonfeasance* (unless it be of such a thing as he is bound to by reason of tenure and the like as to repair a bridge, &c.) . . . because *laches* in such a case shall not be imputed to him.' 1 Hale P. C. 20; though even if indicted for non-repair, it was admitted, in argument, that he would not be liable to imprisonment, and it would be difficult to fine him. *Manners Sutton,* 3 A. & E. 597, 1835. [The difficulty, apparently, was in procedure, 604, 607.] But he is liable to fine and imprisonment for misdemeanours accompanied with force or violence as a riot or battery. Hale, *ib.* So for perjury. 1 Sid. 258, 1666. See p. 487. So he may be convicted of a forcible entry, and fined, if not imprisoned: 3 Bac. Ab., Forcible Entry (D.); or of cheating with false dice, &c.: *ib.* Infancy (H.). See 4 Bl. Com. 22-4.

Felony] An infant under the age of seven years 'cannot be guilty of felony, whatever circumstances proving discretion may appear.' 1 Hale P. C. 27; for, as the civilians say, he is not *doli capax: ib.* 18, 19. But on attaining the age of fourteen he is *doli capax,* and so subject to capital (and, of course, to any minor) punishment, *ib.* 25.

With regard to infants, between the ages of seven and fourteen, it is now quite clear, that where the circumstances of the case show that the offender was capable of distinguishing between right and wrong, and that he acted with malice and an evil intention, he may be convicted even of a capital offence; and accordingly there are many cases, in which infants, under the age of fourteen, have been executed. Thus in 1629, an infant between eight and nine years of age was convicted of burning two barns, and it appearing that 'he had malice, revenge, craft, and cunning,' he was executed. *Dean,* Hale, *ib.* 25 *n.*, 26, who mentions other instances, one of a girl of thirteen, executed for killing her mistress, another of a boy of ten for the murder of his companion, and another of a boy of sixteen for an atrocious arson and murder, citing *Fitzherbert's Abridgement, Corone et plees del Corone* (1514), fol. 213, par. 118 (the second). In 1748 a boy of ten years of age was convicted of murder, and the judges, on a reference to them, were unanimous that the conviction was right, and, after several reprieves, he was left for execution, but respited by the Secretary of State, and in 1757 he was pardoned 'upon condition of his entering immediately into the sea service'; see *York.* In 1835 a boy not quite fourteen who drowned two infants was sentenced to death by Gaselee J., but was transported for life: *Wild,* 1 Moo. C. C. 452. For convictions for manslaughter and for larceny as a bailee, see *Langstaffe* and *Macdonald,* 1885.

Though in other felonies than rape, *malitia supplet ætatem,* 'yet it seems, as to this fact, the law presumes him impotent, as well as wanting discretion.' 1 Hale P. C. 630. See under *Rape,* and *Waite,* 1892, and *Williams,* 1893, and *Infamous Crime.*

'It is necessary that very strong and pregnant evidence ought to be [*sic*] to convict one of that age, and to make it appear he understood what he did.' Hale, *ib.* 27; cf. Bl. Com., above.

Sentence—detention order] By s. 57 (1): 'Where a youthful offender who in the opinion of the court . . . is twelve years of age or upwards, but less than sixteen . . . is convicted of an offence punishable in the case of an adult with penal servitude or imprisonment, the court may, in addition to or in lieu of sentencing him according to law to any other punishment, order that he be sent to a certified reformatory school: Provided that where the offender is ordered to be sent to a certified reformatory school he shall not in addition be sentenced to imprisonment.'

(2) 'Where such an order has been made in respect of a youthful offender of the age of fourteen years or upwards and no certified reformatory school can be found' to take him, 'the Secretary of State may order' him 'to be brought before the court which made the order or any court having the like jurisdiction, and that court may, in lieu of the detention order, make such order or pass such sentence as the court may determine, so, however, that the order or sentence shall be such as might have been originally made or passed in respect of the offence.'

In ss. 57-8, 'penal servitude or,' &c., means that the court could inflict imprisonment whether *or not* it could impose penal servitude instead: *Tydeman* v. *Thrower,* 24 Cox C. C. 163, 1914: K. B. D.

Under twelve] By s. 58 (2): 'Where a child apparently under the age of twelve . . . is charged . . . with an offence punishable in the case of an adult by penal servitude or a less punishment, the court, if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to a certified industrial school.' By (7) the court is alternatively empowered to commit to the care of a relative or other fit person as in s. 21, above, with the same provisions 'so far as applicable.' And further, by s. 60, the child *or young person* (s. 59) so committed, *under ss.* 44-94, may be placed under a probation officer, according to the Probation of Offenders A. 1907: 'Provided that the recognisance into which the child, if not charged with an offence, or the young person is required to enter shall bind him to appear and submit to the further order of the court.' By s. 61, there is power to defer the order, regard being had to age or health. By s. 62 (1), the school need not be situate within the jurisdiction of the court; it should be, if possible, specified in the order, and (3) if 'by reason of mental or physical defect' the child, &c. is 'incapable of receiving proper benefit from industrial training in an ordinary certified school, but is not incapable' of so doing in a school where 'special provision' is made for such children, the order shall specify such a school.

Remand] By s. 63, if the order is not to take effect at once (s. 61), the court may commit 'him either to custody in any place to which he might be committed on remand under Part V. [s. 97], or to the custody of a relative, &c.,' as in s. 21, and he shall be so kept until he is sent to the school. By s. 65, the order must specify the length of the detention, which for a youthful offender sent to a reformatory school shall be not less than three and not more than five years, but not in any case extending beyond the time when he will be nineteen, and for a child sent to an industrial school 'such time as to the court may seem

proper for the teaching and training of the child, but not in any case extending beyond' his attaining sixteen. By s. 66 (1), the court 'shall endeavour to ascertain the religious persuasion' of the child, &c., and 'where practicable' send him to a corresponding school.

Expenses] By s. 74 (4), if the order is made by an assize court or Q. S., 'the court shall remit to a court of summary jurisdiction for the place where' the child, &c. 'was committed for trial the determination of his place of residence,' the local authority for which has to bear the expense, but by s. 75 (1), 'the parent or other person liable to maintain' the child, &c. 'shall, if able to do so, contribute to his maintenance' in the school, and by s. 125 a step-parent, putative father, &c., *may* be made to contribute; and by s. 75 (2) (*a*), the court, when it makes the order, shall, 'unless it considers that it is not in possession of the necessary information,' specify a weekly sum, but it 'may, if it thinks fit, remit the case' to the committing court, as in s. 74 (4); by (5), the person to pay should be summoned to attend and be heard against the proposed order; and by (11), if the contributing person has a pension or income 'capable of being attached,' the court may attach 'such part as' it 'may see fit' 'after giving the person by whom the pension or income is payable an opportunity of being heard.' By s. 78 (1), 'any child authorised by this Part [IV.] of this Act [ss. 44-94]' to be sent to a certified industrial school may be sent to such a day school; and by s. 83, the provisions in the latter case are as far as possible the same as in the former.

Informality] By s. 87 (4), no summons, notice or order under this Part (IV.) 'shall be invalidated for want of form only.'

Child not to appear alone] By s. 98 (1), 'Where a child or young person is charged with any offence . . . his parent or guardian may in any case and shall, if he can be found and resides within a reasonable distance, and the person so charged . . . is a child, be required to attend at the court . . . during all the stages of the proceedings, unless the court is satisfied that it would be unreasonable to require his attendance'; by (4), the person to attend is the one who has 'the actual possession and control' of the child, and if that is not the father, he, too, may be summoned, unless (5) the parent or guardian has been deprived of the custody by law.

Order on parent, &c. to pay fine, &c.] By s. 99 (1), 'Where a child or young person is charged before any court with any offence for the commission of which a fine, damages or costs may be imposed, and the court is of opinion that the case would be best met by' such an imposition, 'whether with or without any other punishment, the court may in any case and shall, if the offender is a child, order that the fine, damages or costs awarded be paid by the parent or guardian . . . instead of by the child or young person, unless the court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child,' &c.; (2) the parent, &c. may be ordered to give security for the good behaviour of the child, &c.; but (4) no order can be made against him unless he has had an opportunity of being heard, or when he has been summoned and has not attended.

Appeal] By 6 (*b*), the parent, &c. may appeal against an order by

a court of assize or Q. S. *under this s.* [99] 'to the Court of Criminal Appeal . . . as if the parent,' &c. 'against whom the order was made had been convicted on indictment and the order were a sentence passed on his conviction.'

No disqualification] By s. 100, 'The conviction of a child or young person shall not be regarded as a conviction for felony for the purposes of any disqualification attaching to felony.'

Restrictions on punishment] By s. 102 (1), 'A child shall not be sentenced to imprisonment or penal servitude for any offence or committed to prison in default of payment of a fine, damages or costs.' But this sub-s. does not abolish whipping, *e.g.* under 6-7 G. 5, 50, 2: *Lydford,* 1914, 2 K. B. 378; 83 L. J. K. B. 589; 24 Cox C. C. 142; 78 J. P. 213; 10 Cr. A. R. 62. The duty of carrying out such a sentence is on the sheriff: *ib.*

(2) 'A young person shall not be sentenced to penal servitude for any offence.'

(3) 'A young person shall not be sentenced to imprisonment for an offence or committed to prison in default of payment of a fine, damages or costs, unless the court certifies that the young person is of so unruly a character that he cannot be detained in a place of detention provided under this Part of this Act or that he is of so depraved a character that he is not a fit person to be so detained.' A sentence of imprisonment unauthorised by this sub-s. was set aside: *Bradford,* 7 Cr. A. R. 42, 1911. Where no 'place of detention' for tuberculous boys had been provided by the county and a boy was sent to prison for six months, the court certifying that he was 'depraved' (apparently without evidence), the C. C. A. quashed the imprisonment and bound him over in his own recognisance (5*l.*) and sent him to a home: *F. A. E. Foster,* 12 Cr. A. R. 164, 1916.

Death sentence abolished] By s. 103, it is not to be 'pronounced on or recorded against a child or young person, but in lieu thereof the court shall sentence him to be detained during His Majesty's pleasure. . . .' When a boy under sixteen committed murder but was not convicted till he was over sixteen, the Irish C. C. R. held that sentence of death must be pronounced: *Fitt,* 1919, 2 Ir. R. 35: C. C. R.

Detention] By s. 104: 'Where a child or young person is convicted on indictment of an attempt to murder or of manslaughter or of wounding with intent to do grievous bodily harm and the court is of opinion that no punishment which under the provisions of this Act it is authorised to inflict is sufficient, the court may sentence the offender to be detained for such period as may be specified . . .'; other details are left to the Secretary of State.

'*Custody*'] By s. 106: 'Where a child or young person is convicted of an offence punishable, in the case of an adult, with penal servitude or imprisonment or would, if he were an adult, be liable to be imprisoned in default of payment of any fine, damages or costs, and the court considers that none of the other methods in which the case may legally be dealt with is suitable, the court may, in lieu of sentencing him to imprisonment or committing him to prison, order that he be committed to custody in a place of detention provided under this Part (V.) of this Act and named in the order for such term as may be specified in the order, not exceeding the term for which he might,

but for this Part of this Act, be sentenced to imprisonment or committed to prison, nor in any case exceeding one month.'

Summary] By s. 107: 'Where any child or young person charged with any offence is tried by any court and the court is satisfied of his guilt, the court shall take into consideration the manner in which, under the provisions of this or any other Act enabling the court to deal with the case, the case should be dealt with, namely, whether—

(*a*) by dismissing the charge; or
(*b*) by discharging the offender on his entering into a recognisance; or
(*c*) by so discharging the offender and placing him under the supervision of a probation officer; or
(*d*) by committing the offender to the care of a relative or other fit person; or
(*e*) by sending the offender to an industrial school; or
(*f*) by sending the offender to a reformatory school; or
(*g*) by ordering the offender to be whipped; or
(*h*) by ordering the offender to pay a fine, damages or costs; or
(*i*) by ordering the parent or guardian of the offender to pay a fine, damages or costs; or
(*j*) by ordering the parent or guardian of the offender to give security for his good behaviour; or
(*k*) by committing the offender to custody in a place of detention provided under this Part of this Act; or
(*l*) where the offender is a young person, by sentencing him to imprisonment; or
(*m*) by dealing with the case in any other manner in which it may be legally dealt with:

Provided that nothing in this section shall be construed as authorising the court to deal with any case in any manner in which it could not deal with the case apart from this section.'

Age] See s. 123, above, and note that (2) deals also with the age of the *offender*.

Forcible entry] at common law: see under that title.

CHOSES IN ACTION, LARCENY OF.

See under *Larceny* and *Written Instruments*.

CHRISTIAN RELIGION, OFFENCES AGAINST.

See *Religion*.

CHURCH, OFFENCES CONNECTED WITH THE.

See Index.

CLERGYMEN.

I. Offences by (other than those only Ecclesiastical).

Solemnising matrimony] By 4 G. 4, 76, Marriage A. 1836, 21, as amended by 49-50 V. 14: 'If any person shall . . . solemnise matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight in the forenoon and three in the afternoon, unless by special licence from the Archbishop of Canterbury, or shall solemnise matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same; or if any person falsely pretending to be in holy orders shall solemnise matrimony according to the rites of the Church of England; every person knowingly and willingly so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported for the space of fourteen years . . . Provided that all prosecutions for such felony shall be commenced within the space of three years after the offence committed.' See *Disqualification*. The amending A. only applies to England and Wales.

For a prosecution of this sort see *per* L. Mansfield in *Northfield*, 2 Doug. 661, 1781. It is doubtful whether a clergyman who refuses to marry persons lawfully marriageable *inter se* can be indicted. *James*, 3 C. & K. 167; 4 Cox C. C. 217, 1850: C. C. R.: c. q. For this, and other offences cognisable by an ecclesiastical court, see *Millis*, at 859-60. For *Burials*, see under *Dead Bodies*.

Marriages between British subjects and foreigners] Any clergyman who is a party, after notice, to the solemnisation of such a marriage without the certificate required under 6 E. 7, 40—for which see *Marriage, &c.*—is liable to the punishment there mentioned.

Disqualification] See that title. By s. 1 (1) of 55-6 V. 32, the Clergy Discipline A. 1892: 'If a clergyman [*i.e.* practically of the Church of England, s. 12] is convicted of treason or felony or is convicted on indictment of a misdemeanour and on any such conviction is sentenced to imprisonment with hard labour or any greater punishment . . . the preferment (if any) held by him shall within twenty-one days without further trial be declared by the bishop to be vacant . . . and he shall be incapable, save as in this Act mentioned [*i.e.* if he is pardoned by the crown: sub-s. (2) and s. 6 (2)], of holding preferment.' By s. 5 (4), the convicting court must certify the conviction to the bishop.

By 61-2 V. 58, the Marriage A. 1898, 12, if any authorised person does not comply with this A. 'or the enactments or regulations for the time being in force with respect to the solemnisation and registration of marriages,' he is liable on conviction on indictment to imprisonment

for two years or to a fine of 50*l.* 'and shall . . . cease to be an authorised person.'

Ecclesiastical privilege] See that title.

Ireland] 'It would seem that the celebration of marriages between two Protestants by a Roman Catholic priest is still illegal and punishable': 1 Russ. Cri. 1002, citing *Taggart*, 2 Cox C. C. 50, 1846: Q. B. Ir.

II. Against.

Disturbing officiating clergyman, &c.] See 24-5 V. 100, 36, and *Disturbing Public Worship*.

CLUBS, BETTING, &c. IN.

'A *boná fide* club is not subject to the provisions of the Betting Houses Act, 1853, even though the members thereof habitually bet with one another on the club premises and there is a special room . . . set apart for betting, provided that the betting is confined to members and that they bet with one another indiscriminately. . . . But if persons who are not members are admitted to the premises for the purpose of betting with members or if the club is not a *boná fide* club but 'a mere blind' for betting purposes, the provisions of the Act apply. . . . Gaming at clubs may be unlawful either because the club premises are a common gaming-house in which all gaming even at games which are not unlawful in themselves is unlawful or because the particular game is itself an unlawful game': 4 Halsbury, 435.

'Unlawful games are ace of hearts, pharaoh (or faro), basset and hazard passage and every other game played with dice (except backgammon), roulette, baccarat and every game of cards which is not a game of mere skill, and probably every other game of mere chance: 12 G. 2, 28; 13 G. 2, 19; 18 G. 2, 34: *Jenks* v. *Turpin*, 13 Q. B. D. 505, 1884.' *Ib.* 9, 546. See further *Gaming*.

'The occupier of the house and in the case of a club the members of the committee, if any, are liable to the penalties' of 'the Gaming Houses Act, 1854, as having the care or management or assisting in conducting the business of the house. . . . The players may be indicted for unlawful gaming: see stat. 33 H. 8, c. 9, s. 14, and *Jenks* v. *Turpin*, at 526.' *Ib.*

'If a club is a common gaming-house, the keeper is indictable at common law'; 'a club may be a common gaming-house although the gaming is restricted to members and the club exists for other purposes than that of gaming': *Jenks* v. *Turpin*, at 505, 513. *Ib.* 4, 436.

COAL MINES, OFFENCES RELATING TO.

See *Mines*.

COIN—OFFENCES RELATING TO.

Interpretation] By 24-5 V. 99, 1: 'In the interpretation of and for the purposes of this Act, the expression 'the queen's current gold or silver coin,' shall include any gold or silver coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise in any part of her Majesty's dominions, whether within the United Kingdom or otherwise; and the expression 'the queen's copper coin,' shall include any copper coin and any coin of bronze or mixed metal coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise, in any part of her Majesty's said dominions; and the expression 'false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin,' shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble, or pass for any of the queen's current coin of a higher denomination; and the expression 'the queen's current coin,' shall include any coin coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation or otherwise in any part of her Majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of any other person.'

'Whether the coin is the King's current coin or not is a mere question of fact which may be found upon evidence of common usage or notoriety': 1 Russ. Cri. 344, from 1 East P. C. 149; Hale, 1 P. C. 213, adds: 'though no proclamation of it extant.' Cf. s. 29.

'The standard of the money of England that hath for many ages obtained is that which is commonly called *sterling* . . . tho the denomination of *sterling* was at first applied to the coin of silver . . . yet use hath made it applicable not only to all kind of English coin of silver, but also to coin of gold.' 1 Hale P. C. 188.

Counterfeiting coin] By s. 2: 'Whosoever shall falsely make or counterfeit any coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin shall, in England and Ireland, be guilty of felony . . . and being convicted thereof shall be liable . . . to be kept in penal servitude for life.' (This crime was reduced from treason by 2 W. 4, 34, 1.)

Colouring coin, counterfeit, metal, &c.] By s. 3: 'Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever wash, case over, or colour any coin whatsoever resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin; or shall gild or silver, or shall with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever wash, case over, or colour any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, or by any means whatsoever, wash, case over, or colour any of the queen's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the queen's current gold coin; or shall gild or silver, or shall with any wash or materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever wash, case over, or colour any of the queen's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the queen's current gold or silver coin, shall, in England or Ireland, be guilty of felony,' &c., as in s. 2.

Gilding sixpences with gold is within 'materials capable,' &c.: *Turner*, 2 Moo. C. C. 42, 1838, though two judges dissented.

Impairing coin, &c.] By s. 4: 'Whosoever shall impair, diminish, or lighten any of the queen's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened, may pass for the queen's current gold or silver coin, shall, in England or Ireland, be guilty of felony . . . and, being convicted thereof shall be liable' to penal servitude for fourteen years.

Possession of filings, &c. of coin] By s. 5: 'Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing or lightening any of the queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall,' &c., as in s. 4; maximum term of penal servitude is seven years.

Buying or selling, &c., counterfeit coin] By s. 6: 'Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, at or for a lower rate or value than the same imports, or was apparently intended to import, shall,' &c., exactly as in s. 2.

Indictment] 'and in any indictment for any such offence as in this section aforesaid, it shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off the false or counterfeit coin at or for a lower rate or value than the same imports, or was apparently intended to import, without alleging at or for what rate, price, or value the same was

'bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off.'

Importing counterfeit coin] By s. 7: 'Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall import or receive into the United Kingdom from beyond the seas, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall,' &c., exactly as in s. 2.

Exporting counterfeit coin] By s. 8: 'Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall export, or put on board any ship, vessel, or boat, for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current coin, knowing the same to be false or counterfeit, shall, in England or Ireland, be guilty of a misdemeanour . . . and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . .'

Uttering counterfeit coin] By s. 9: 'Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall,' &c., as in s. 8; maximum term is one year. See *Punishment,* below.

Uttering and possessing counterfeit coin, &c.] By s. 10: 'Whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin.

Uttering twice within ten days] or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall,' &c., exactly as in s. 8. See *Punishment.*

'The uttering should be charged in the same count': 1 Russ. Cri. 357 *v.*

Possessing three or more counterfeit coins, &c.] By s. 11: 'Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England or Ireland, be guilty of a misdemeanour . . . and being convicted thereof, shall be liable . . . to be kept in penal servitude.' See *Punishment.*

The possession of one of a number acting in concert is the possession of each of them: *W. Johnson,* 3 Cr. A. R. 168, 1909. See further, below, *Skerrit, &c.*

Uttering, &c., after a previous conviction] By s. 12: 'Whosoever, having been convicted, either before or after the passing of this Act, of any such misdemeanour or crime and offence, as in any of the last three preceding sections mentioned, or of any felony or high crime and offences against this or any former Act relating to the coin, shall afterwards commit any of the misdemeanours in any of the said sections mentioned, shall be guilty of felony,' &c., exactly as in s. 2.

For the meaning of 'convicted' here, see *Blaby.* See s. 37.

Uttering foreign coin, &c.] By s. 13: 'Whosoever shall with intent to defraud, tender, utter, or put off as or for any of the queen's current gold or silver coin any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure, and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals so tendered, uttered, or put off, being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall,' &c., exactly as in s. 9. The 'intent to defraud' occurs only here in this A.; but cf. ss. 4, 15.

On an indictment under s. 13 for uttering a medal resembling a half-sovereign in size, figure, and colour, it was shown that the medal was of the same diameter, and similar in colour; that the knurling [= milling: *guerling* is a mistake] was round and not square; that the stamp of the head of the queen was similar to that on a half-sovereign; but that the legend was different. No evidence was given about the reverse of the medal, the medal being dropped and lost by a witness during his examination; it was held that there was evidence that the medal resembled a half-sovereign in 'size, figure, and colour.' *Robinson,* L. & C. 604; 34 L. J. M. C. 176; 10 Cox C. C. 107, 1865: conviction upheld. It was to meet such cases that 46-7 V. 45 was passed.

Counterfeiting, &c. copper coin] By s. 14: 'Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin; and whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the queen's current copper coin; or shall buy, sell, receive, pay or put off, or offer to buy, sell, receive, pay or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, at or for a lower rate or value than the same imports, or was apparently intended to import, shall,' &c., exactly as in s. 5.

By s. 1, 'copper coin' includes bronze or mixed metal.

Uttering base copper coin] By s. 15: 'Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin

resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall,' &c., exactly as in s. 9.

Defacing coin] By s. 16: 'Whosoever shall deface any of the queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall,' &c., exactly as in s. 9.

Counterfeiting foreign coin] By s. 18: 'Whosoever shall make or counterfeit any kind of coin not being the queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall,' &c., exactly as in s. 5.

Importing foreign counterfeit coin] By s. 19: 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall bring or receive into the United Kingdom any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall be guilty of felony,' &c., exactly as in s. 5.

Uttering foreign counterfeit coin] By s. 20: 'Whosoever shall tender, utter, or put off any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall be guilty,' &c., as in s. 8; maximum term is six months.

Second uttering foreign coin] By s. 21: 'Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England or Ireland, be guilty of a misdemeanour . . . and being convicted thereof, shall be liable to be imprisoned with or without solitary confinement.'

Third offence] 'and whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall,' &c., exactly as in s. 2.

Counterfeiting other foreign coin] By s. 22: 'Whosoever shall falsely make or counterfeit any kind of coin not being the queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin, of any foreign prince, state, or country, shall, in England or Ireland, be guilty of a misdemeanour . . . and being convicted thereof, shall be liable . . . for the first offence to be imprisoned for any term not exceeding one year, and for the second offence to be kept in penal servitude for any term not exceeding seven years . . .'

Making, possessing, &c. coining tools] By s. 24: 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession any puncheon, counter puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the queen's current gold or silver coin, or of any coin of any foreign prince, state, or country, or any part or parts of both or either of such sides; or shall make or mend or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging, or other tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges, with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin, as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin as in this section aforesaid, shall,' &c., exactly as in s. 2. The only 'lawful authority' seems to be that of the mint officials: *per* Tindal C.J., *Bannen,* below. A galvanic battery is a 'machine' as it is used in counterfeiting: *Gover,* 9 Cox C. C. 282, 1863.

On an indictment in respect of a mould for sovereigns, evidence of *uttering* a counterfeit sovereign was admittedly good (exactly as in *Weeks,* below, which see), but the C. C. A. refused to decide whether the uttering of a gilded shilling (which the mould was incapable of turning out) as a sovereign was properly admitted: *W. Baker,* 7 Cr. A. R. 252, 1912.

Conveying coining tools, coin, &c. out of the Mint] By s. 25: 'Whosoever, without lawful authority or excuse (the proof whereof shall lie upon the party accused), shall knowingly convey out of any of her Majesty's mints any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging, or other tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal or mixture of metals, shall,' &c., exactly as in s. 2.

Suspected coin] By s. 26: Anyone who thinks coin tendered to him 'diminished otherwise than by reasonable wearing' may cut, bend, or deface, &c. it; if it is counterfeit, the tenderer bears the loss; if not, the defacer, &c. 'is hereby required to receive the same at the rate it was coined for'; any dispute is to be settled by summary jurisdiction.

Coining plant and counterfeit coin] By s. 27, when coin is proved counterfeit, the plant and everything connected with the fabrication, whether, apparently, seized with it or not, and whether or not there has been a conviction, is forfeited to the crown.

Venue] By s. 28: 'Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this Act, every such offender may be dealt with, indicted, tried and punished, and the offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction.'

For Admiralty jurisdiction, see under *Venue*.

Proof of badness] By s. 29: 'Where, upon the trial of any person charged with any offence against this Act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of her Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.' See on s. 1.

Completion of offence] By s. 30: 'Every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off any false or counterfeit coin against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.'

Principals in the second degree, &c.] By s. 35: 'In the case of every felony punishable under the Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour.'

Evidence of occasionally visiting coiners, that money was then heard to rattle, of counting what seemed money when leaving, of endeavouring to escape on arrest and then having bad money in possession is not enough to convict of being accessory to coining: *Isaacs*, 1 Russ. Cri. 348 *z*, 1813.

Allegation of a previous conviction under a Coinage A.] S. 37 is made up of (i) in respect of the *certificate*, (almost) the identical words of 28-9 V. 18, 6, except that s. 37 has 'for every such certificate a fee of six shillings and eightpence and no more shall be demanded or taken'; (ii) in respect of procedure the identical words of 24-5 V. 96, 116; and (iii) 'and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided that if upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto, to give evidence of the

conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.'

Where defendant had been jointly convicted of a misdemeanour under s. 10, and was then arraigned on another indictment and before another jury for the felony under s. 12, the *subsequent* offence alleged being one of the same three utterings, for which he was already convicted, and the whole of the indictment was read and he pleaded 'not guilty,' and evidence was called of a previous offence *before* the jury found on the subsequent, despite the grave irregularity, the C. C. A. applied the proviso to s. 4 (1) of the C. A. Act: *J. Russell,* 6 Cr. A. R. 78, 1910.

The above s. applies to indictments under s. 12, though it is the previous conviction which makes the offence *felony: Martin,* 1869. 'The offence is still a compound one, and the previous conviction is a part of the offence and a necessary ingredient in it': *per* L. Coleridge C.J., *Thomas,* L. R. 2 C. C. R. 141; 44 L. J. M. C. 42; 13 Cox C. C. 52, 1875, which, since the Indictments A., is no longer an authority that if there be an acquittal on the previous conviction, there must be one on the *subsequent* (if a misdemeanour).

Coins excluded from the United Kingdom] By 39-40 V. 36, 42: 'Coin, viz. false money or counterfeit sterling. Coin, silver, of the realm, or any money purporting to be such, not being of the established standard in weight or fineness.' The penalty is forfeiture with costs, by summary jurisdiction.

Counterfeit medals] By 46-7 V. 45, the Counterfeit Medal A., s. 2: 'If any person, without due authority or excuse (the proof whereof shall lie on the person accused), makes or has in his possession for sale, or offers for sale, or sells, any medal, cast, coin, or other like thing made wholly or partially of metal or any metallic combination and resembling in size, figure and colour any of the queen's current gold or silver coin, or having thereon a device resembling any device on any of the queen's current gold or silver coin, or being so formed that it can by gilding, silvering, colouring, washing, or other like process be so dealt with as to resemble any of the queen's current gold and silver coin, he shall,' &c., as in s. 9, above.

Imitation coin] may not be imported into the United Kingdom by 52-3 V. 42, 2, as there defined and therein excepted. Penalty as in s. 42, above.

Completion of counterfeiting] It is apprehended that, notwithstanding s. 30, above, there must still be a substantial making or counterfeiting proved, and that it will not be sufficient merely to show that steps have been taken towards a counterfeiting. The s. appears to have been intended to provide against such cases as that of *Harris,* 1 Lea. 135, 1776, where, the metal requiring a process of beating, filing, and immersing in *aqua fortis,* to render the coin passable, the judges held, that the prisoner could not be convicted of counterfeiting under 25 E. 3, St. 5, c. 2, rpd. See also *Varley,* 1 Lea. 76; W. Black. 682; East P. C. 164, 1771. *Roberts,* 1855, is a leading case.

Resemblance] The question whether the given coin does, in fact, resemble or is apparently intended to resemble current gold or silver coin, is one of fact for the jury. Thus, as genuine coin is often worn smooth, an unstamped counterfeit bearing no impression is indictable; for it may deceive the more readily for bearing no impression, 'and in the deception the offence consists.' *Welsh,* East P. C. 87, 164; 1 Lea. 364, 1785; *Wilson,* 1 Lea. 285, 1783. Nor will a variation, not sufficient to prevent the deception, render the coin less a counterfeit. Thus, it is said by Hale, that counterfeiting the lawful coin of the kingdom, 'yet with some small variation in the inscription, effigies, or arms, to the intent thereby to evade the statute,' is criminal. 1 P. C. 215.

The words 'figure, stamp, resemblance, or similitude,' in 8-9 W. 3, 26, rpd., do not mean an exact figure; 'but if the instrument impress a resemblance in fact such as will impose upon the world, it is sufficient whether the letters are apparent on the puncheon or not.' *Ridgelay,* East P. C. 171; 1 Lea. 189, 1778. See *Richmond,* below, how the indictment should be framed, where a mould is made and impressed to resemble the obverse of a coin which is partly defaced by wear.

One side of a base metal coin might have been taken for a half-sovereign, but the obverse had the Prince of Wales's arms and an inscription calling it 'a model half-sovereign.' The judge laid down that the true test was whether the maker (and user?) intended to pass it as good or only as a card-maker, and practically directed an acquittal (of the user): *Byrne,* 6 Cox C. C. 475, 1852: two judges: Ir.

In *Hermann,* 4 Q. B. D. 284; 48 L. J. M. C. 106; 14 Cox C. C. 279, 1879: C. C. R., the court were divided whether a genuine sovereign which had been fraudulently filed at the edges to such an extent as to reduce its weight by one twenty-fourth part, a new milling having been added to restore the appearance of the coin, was false and counterfeit within s. 9, it was held by three to two that it was.

Evidence] On trials for uttering, &c. counterfeit coin, it is the practice, as in cases of forgery, to receive proof of more than one uttering, committed by defendant about the same time, though only one uttering be charged: 1 Russ. Cri. 361. In *Whiley* it was stated by defendant's counsel, that on an indictment for uttering bad money, the proof is always exclusively confined to the particular uttering charged. On this, Thompson B. observed, 'I by no means agree . . . that the prosecutor cannot give evidence of another uttering *on the same day,* to prove the guilty knowledge. Such other uttering cannot be punished, until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a *common utterer;* but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad.' Also proof of defendant's conduct in such other utterings (as, for example, that he passed by different names) is for the same reason clearly admissible: see *Tattershall; Phillips,* 1 Lew. C. C. 105, 1829—but not of conduct or words *collateral* to such other utterings.

The admissibility of evidence of *subsequent* utterings of counterfeit coin was definitely decided by the C. for C. C. R., *Forster,* 24 L. J. M. C. 134; D. & P. C. C. 456; 6 Cox C. C. 521, 1855. 'The uttering of a piece of bad silver,' said the court, 'although of a

different denomination from that alleged in the indictment, is so connected with the offence charged [uttering another coin] that the evidence of it was receivable,' though the *difference* does 'go to the weight' of such evidence. Cf. on the difference of denomination, *Harris, &c.*, above. *Connection* between *subsequent* acts and those charged is the test. *Smith,* 20 Cox C. C. 804, 1905: C. C. R. See on ss. 13, 24, above. 'Other substantive felonies which have a tendency to establish the *scienter* may undoubtedly be proved': *per* Pollock C.B., *Weeks,* L. & C. 18, 1861. On an indictment for making counterfeit coin, evidence of *uttering* such is admissible if it tends to prove *scienter: Rowlands,* 224, 1909.

Uttering] Cf. under *Forgery.* On an indictment for uttering [= 'to pass or attempt to pass off as genuine,' *Sweet,* Law Dict.; 'to offer, whether it be taken or not,' *per* Jervis C.J., *Welch,* 20 L. J. M. C. 101; 4 Cox C. C. 430, 1851: C. C. R.; a form of the word *out*], it must be proved that the money was counterfeit, and that defendant knew it to be such. The trick of 'ringing the changes' was held to be an 'uttering' under rpd. 15 G. 2, 28: *Franks,* 2 Lea. 644, 1794; and it is so likewise under ss. 9 and 15, above: 1 Russ. Cri. 357. The coin must be proved to be counterfeit.

The law of uttering in concert has been stated in *Soares, Davis, &c.*, under *Aiders,* &c.; see on s. 11, above, and the analogous law in *Forgery,* and *Completion of Crimes* in Index.

Joint indictment] If two utterers of counterfeit coin, though with a general community of purpose, go different ways and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both so as to let in the separate utterings on a joint indictment. *Manners* and *Mills,* 7 C. & P. 801, 1837. But the reverse was held by Erskine J. in a very similar case: *Hurse* and *Dunn,* 2 Moo. & R. 360, 1841. See *Greenwood,* 1852, and *Skerrit,* below.

Gift] Giving a counterfeit coin in charity was held not an uttering within 2-3 W. 4, 34, 7, rpd., although the giver might know it to be counterfeit, for there must be some intent to defraud. *Page,* 8 C. & P. 122, 1837. See 1 Russ. Cri. 362 *s*, and 2 *ib.* 1716 *n.*, where the correctness of this decision is doubted, as it had been by two judges who held that if a person gave a counterfeit coin to a woman as payment for immorality, it was an uttering within that s. *Anon.,* 1 Cox C. C. 250, 1845.

Knowledge of badness—possession—intent] Having 13 half-crowns and 14 shillings of counterfeit coin in possession, all of each sort being of the same date and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is evidence that the possessor knew that the coin was counterfeit and intended to utter it. *Jarvis,* Dears. C. C. 552; 7 Cox C. C. 53; 1 Jur. N. S. 1114; 25 L. J. M. C. 30, 1855: C. C. R. Two persons were convicted of the joint uttering of a bad shilling, having others in their possession, although the latter coins were found only on one of them. One of them went into a shop and purchased a loaf, for which she tendered a shilling. She was secured, but no more counterfeit money was found upon her. The other who had come with her, and was waiting at the shop-door, then ran away.

but was immediately secured, and fourteen bad shillings were found on her, wrapped in gauze paper. It was objected, that the complete offence stated in the indictment, under rpd. 15 G. 2, 28, was not proved against either of them, but Garrow B. was of opinion, that as they came together to the shop, the one staying outside, they must both be taken to be jointly guilty of uttering, and that it was for the jury to say whether the possession of the remaining bad pieces was not joint; it was not necessary to identify the particular coin uttered. Cf. on s. 11, above. *Skerrit,* 2 C. & P. 427, 1826. *Rogers,* 2 Moo. C. C. 85; 2 Lew. C. C. 119, 297, 1838; *Gerrish and Brown,* 2 Moo. & R. 219, 1839; *Williams,* Carr. & M. 259, 1842—all under 2 W. 4, 34, 7 or 8, rpd.—dealt with the same point and made the possession of one accomplice the possession of the other. See now s. 1, above.

Twice uttering] An indictment for *twice uttering,* under s. 10, is not the same as two indictments or counts for two utterings; for on the corresponding 2 W. 4, 34, 7 (above), where defendant was convicted of two single utterings contained in two counts of the same indictment, the judges held that one judgment (for two years' imprisonment) was bad, and that 'there should have been consecutive judgments of one year's imprisonment each': c. q. *Robinson,* 1 Moo. C. C. 413, 1834.

Coining plant] Defendant employed a die-sinker to make, for whist counters, as he pretended, dies, calculated to make shillings; the die-sinker suspecting fraud, informed the commissioners of the Mint, and under their directions made dies for the purpose of detection. It was argued that no felony had been committed and that, at most, he was guilty of the misdemeanour of inciting to commit a felony, but it was held that the die-sinker was an innocent agent (see in Index), and that defendant was rightly convicted as a principal, under 2 W. 4, 34, 10 (rpd.: practically the same as s. 24, above). *Bannen,* 2 Moo. C. C. R. 309; 1 C. & K. 295, 1844; cf. *Harvey,* L. R. 1 C. C. R. 284; 40 L. J. M. C. 63; 11 Cox C. C. 662, 1871.

The particular tool specified must be proved. With regard to all the tools mentioned in s. 10, they were there for the first time described to be such as will impress 'any *part* or *parts* of both or either of the sides' of current gold or silver coin. There is also there a distinction between instruments, &c., (1) on which there shall be 'made or impressed,' and (2) those 'which will make and impress' the figure, &c. Both these points are reproduced in s. 24, above. Defendant was indicted under 8-9 W. 3, 26 (rpd., but on this point the same as s. 24), for having in his possession a mould on which there was made and impressed, &c., the figure of the 'head' side of a shilling. The mould bore the resemblance of a shilling inverted, viz. the *convex* parts were *concave* in the mould and *vice versâ;* and it was objected that it should have been described as an instrument which *would make or impress,* &c., and not as one on which *was made and impressed,* &c.; but a great majority of the judges were of opinion that the evidence maintained the indictment, 'because the stamp of the current coin was certainly impressed on the mould in order to form the cavities thereof.' They agreed, however, that it would have been more accurate had the instrument been described as one 'which would make or impress.' *Lennard,* 1 Lea. 90, 1772; East P. C. 170.

To convict under 2 W. 4, 34, 10, above, of having in his possession a 'mould upon which was impressed the figure and apparent resem-

blance' of the obverse side of a shilling, Patteson J. held that the jury must be satisfied that, at the time he had it in his possession, the *whole* of either the obverse or the reverse of a shilling was impressed on the mould, and not only a part. *Foster,* C. & P. 494, 1836. But on a second indictment, for making a mould 'intended to make and impress the figure and apparent resemblance' of the obverse side of a shilling, the same judge ruled that it was sufficient to prove that defendant made the mould, and a part of the impression, though he had not entirely completed them. *Ib.* 495. An indictment under that s. alleging that defendant had in his possession a mould, on which 'was made and impressed the figure,' &c., of a sixpence, was held bad on demurrer; as not sufficiently showing that the impression was on the mould *at the time* it was in his possession. A fresh indictment, with the words 'then and there' was held good. *Richmond,* 1 C. & K. 240; 1 Cox C. C. 9, 1843.

Onus] An indictment under s. 24, above, must negative the 'authority or excuse,' although the burden of proof is cast upon the accused, but the word 'excuse' includes 'authority.' *Harvey,* above.

Defendant's intention about the use of dies of current coin need not be inquired into; 'there is nothing in the Act to make the intent any part of the offence . . . under 'feloniously,' a guilty knowledge must be shown; that is to say, that the accused must have knowingly done that which is made an offence by the Act': *per* Bovill C.J. *ib.* 'Intent to defraud' only occurs in s. 13; but to convict 'there must be some indication of a dishonest purpose or *mens rea*': 1 Russ. Cri. 362.

Punishment] Uttering false or counterfeit coin or possessing counterfeit gold or silver coin in England or Ireland is a 'crime' within s. 20 of 34-5 V. 112 and 8 E. 7, 59.

Common law] is now seldom invoked; according to 1 Russ. Cri. 356, 'Possession of counterfeit coin of the realm with intent to utter it is not an offence at common law. But the unlawful procuring of counterfeit coin with *intent to circulate* it, though no act of uttering be proved, is a misdemeanour at common law [*Fuller,* R. & R. 308, 1816], and the possession of counterfeit coin under suspicious circumstances and without any circumstances to induce a belief that the defendant was the maker, was held to be evidence of unlawful procuring with intent to utter [*ib.*].' The first proposition here is due to the fact that there is no *act:* by all the judges: *Heath,* R. & R. 184, 1810.

Coinage offences are triable at Q. S., except when the penalty may be penal servitude for life.

Effect of scientific progress] It was held that a collar marking the edge, by having the coin forced through it by machinery, is an instrument within 8-9 W. 3, 26, above, though this device is of modern invention. *Moore,* 1 Moo. C. C. 122, 1826. So when it was 'obvious that the legislature could not in providing for the protection of works of art, describe a piracy by means of a process not then within the knowledge of mankind [viz. 'the modern art called photography'] . . . it by no means follows that when words large enough to embrace it are used the prohibition should not . . . be extended to a subsequently discovered mode': *per* Kelly C.B., *Graves* v. *Ashford,* L. R. 2 C. P. 420, 1867.

COMMISSION, TAKING, &c. SECRET.

See *Corruption*.

COMPANIES, LIMITED.

I. Offences by.

See *Corporations* in Index.

II. Offences by Officials of.

Embezzlement] and analogous offences are now punished under the Larceny A. 1916. Where a director, by arrangement with his officials, but without the knowledge or consent of the board (in defiance of an express article of association) opened a 'trust' account at a branch, and from time to time overdrew, and when the bank stopped payment about seven years after there had been any operation at all on the account, owed the bank a large sum on the overdrafts, he being solvent at the time the overdrafts were made, a conviction in the Isle of Man under a s. in a local statute which incorporated *verbatim* the *offence(s)* stated in a rpd. English s. now represented by s. 20 (1) (ii) of that A., was quashed by the Judicial Committee of the Privy Council on the ground that there was serious misdirection on fraudulent appropriation within the s. *Nelson* v. *R.*, 1902, A. C. 250; 20 Cox C. C. 150; 71 L. J. P. C. 55; 86 L. T. 164.

Falsifying accounts] By s. 82 of 24-5 V. 96: 'Whosoever, being a director, public officer, or manager of any body corporate or public company, shall, as such, receive or possess himself of any of the property of such body corporate or public company, otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanour. . . .' Maximum punishment: seven years' p. s.

Falsifying books, &c.] By s. 83: 'Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanour.' Punishment as under s. 82.

Publishing fraudulent statements] By s. 84: 'Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanour.' Punishment as under s. 82.

'*Deceive or defraud*'] See *per* Buckley J. under *False Pretences*, 1, and title *Agents, &c.*

A manager, who has acted throughout as such, though not so appointed within the Companies Acts, is within this s. *Lawson*, 1905, 1 K. B. 541; 20 Cox C. C. 812; 74 L. J. K. B. 296; 69 J. P. 122; 21 T. L. R. 231: C. C. R.

If defendant knows the statement, &c. to be false with the intent that it shall be acted on by any one it reaches, he is guilty within ss. 83, 84: *Birt*, 63 J. P. 328, 1899: a general intent to defraud is enough.

These offences are not triable at quarter sessions: by s. 87.

By s. 86: 'Nothing in any of the last eleven preceding sections [now rpd. except 82-5] . . . nor any proceeding, conviction or judgment to be had or taken thereon against any person under any of the said sections shall prevent, lessen or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity; and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee having for its object the restoration or repayment of any trust property misappropriated.'

Compulsory admission of offences] See under *Agents*.

Railway directors, &c.] See *Railways*.

Companies (Consolidation) A. 1908—8 *E.* 7, 69, *s.* 216] 'If any director, officer or contributory of any company being wound up destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or document belonging to the company, with intent to defraud or deceive any person, he shall be guilty of a misdemeanour': maximum punishment, two years' imp. w. h. l. Cf. s. 281. Triable at Q. S.

'COMPOUND' CRIME.

See Index.

COMPOUNDING OFFENCES AND INFORMATIONS.

Felonies] Though 'the bare taking of one's own goods again which have been stolen' (without favour shown to the thief) is no offence, Hawk. P. C. 1, 59, 7, yet where a man 'not only knows of a felony, but takes his goods again or other amends not to prosecute, this is misprision of felony [below] . . . punishable only with ransom and imprisonment, unless it were accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact.' *Ib.* ss. 5, 6. '*Theft bote*' is 'reducible' to it: *ib.* And so in any other felony an agreement for reward not to prosecute an indictment is punishable as a misdemeanour; though nearly all the precedents of indictments for this species of offence seem to be confined to that compounding of felony which has reference to the recovery of property. Cf. *Coke*, 3 Inst. 134 and 139. 'Agreements not to prosecute or to stifle a prosecution are in certain cases criminal. This offence is distinct from that of misprision of felony': 1 Russ. Cri. 579.

Non-owner] But, on the other hand, it has been pointed out that none of the old writers expressly say that the offence cannot be committed by a person who is not the owner. See *Burgess*, 16 Q. B. D. 141; 55 L. J. M. C. 97; 15 Cox C. C. 779, 1885: C. C. R., where it was held that the offence of compounding a larceny may be committed by a person other than the owner of the goods stolen, or a material witness for the prosecution. Where, in an indictment for compounding a felony, it was averred that the defendant did desist, and from that time hitherto had desisted from all further prosecution, and it appeared that after the alleged compounding he prosecuted the offender to conviction, Bosanquet J. directed an acquittal. *Stone*, 4 C. & P. 379, 1838; but since *Burgess* this case has no authority. It is not necessary, however, to allege in the indictment that the defendant desisted from prosecuting the felon; the offence consists in the corrupt agreement not to prosecute. *Burgess*, above.

Misdemeanours] Whether, at common law, the compounding of misdemeanour is 'apart from conspiracy' (1 Russ. Cri. 580) in any case a misdemeanour, is perhaps doubtful. Such agreements, when not made with the permission of a court of justice, are clearly, in many cases, illegal. *Collins* v. *Blantern*, 2 Wils. 341, 1767; 4 Bl. Comm. 363; *Beeley* v. *Wingfield*, 11 East, 46, 1809; *Hardey*, 14 Q. B. 529, 1850. And in some cases even when made with the permission of the court: *Keir* v. *Leeman*, 9 Q. B. 371, 1846, where plaintiff indicted persons 'for assault coupled with riot and the obstruction of a public officer' (a bailiff executing a *fi. fa.*), and with the consent of L. Denman and Maule J. offered no evidence, and they were acquitted, promising to pay what was due and costs, the Ex. Ch., affirming the Q. B., held that he could not recover this sum. 'No case has said that it is lawful to compromise such an offence.' 'We have no doubt,'

said Tindal C.J., 'that in all offences which involve damages to an injured party for which he may maintain an action it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so; but we are not disposed to extend this any further.' An indictment for not repairing cannot legally be referred to an arbitrator, nor its subject-matter, as it is of public concern: *Blakemore,* 14 Q. B. 544; 4 Cox C. C. 352, 1850, where the judges did not consent. *Keir* v. *Leeman* was followed in *Windhill Local Board, &c.* v. *Vint,* 45 Ch. D. 351; 59 L. J. Ch. 608, 1890: C. A., where the point was the same as in *Blakemore,* but the sanction of the judge had been obtained.

Informations on penal statutes] By 18 Eliz. 5, 4 (otherwise 3: amended 42-3 V. 59), no informer or plaintiff under any penal statute shall compound with defendant until after answer nor without leave of the court; and by s. 5 (otherwise 4), if any informer, 'by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward,' without the order or consent of the court, he shall stand two hours in the pillory, be for ever disabled to sue on any 'popular' [*i.e.* a statute permitting an informer to sue] or penal statute, and shall forfeit ten pounds. This statute does not extend to proceedings only cognisable by justices. *Crisp,* 1 B. & Ald. 282, 1818. But it is not necessary, to bring the case within the statute, that there should be an action or other proceeding pending. *Gotley,* R. & R. 84, 1805. A mere threat to set a public officer in motion to prosecute for the recovery of penalties (and not therefore being such a threat as a firm and prudent man might not be expected to resist [see under *Threats*] amounting to an indictable offence at common law) is yet, it seems, within this statute. *Southerton,* 6 East, 126, 1805. A person may be convicted, under this statute, of taking money, though no offence liable to a penalty has been committed by the person from whom the money is taken. *Best,* 2 Moo. C. C. 124; 9 C. & P. 868, 1840.

Misprision of felony] 'The word *misprision* means a mere mistake': per L. Denman C.J., *Conyers.* 8 Q. B. 991, 1846; 'misprision of felony is taken for a concealment of felony or a procuring of the concealment thereof, whether it be felony by the common law or by statute.' Hawk. P. C. 1, 59, 2. 'Silently' to observe the commission of a felony, without using any endeavours to apprehend the offender, is a misprision. *Ib.* (editor's note); cf. 1 Hale P. C. 439. When one 'is slaine,' whether feloniously or not, it seems, omission to apprehend the slayer is a misprision: 3 Inst. 139, '8 E. 2 (Fitzh.). Cor. 395.' If to the knowledge of the felony there be added assent to it, the assenter is either principal or an accessory. 4 Bl. Comm. 121. But mere standing by when a crime is committed does not constitute that crime [if it does any]: *J. H. Gray,* 12 Cr. A. R. 244, 1917, who was convicted of manslaughter with another man convicted of murder: the C. C. A. was satisfied that the motive of the latter was not robbery, as was supposed at the trial: former's c. q.

Rewards for recovery of stolen, &c. goods] Similar to the offence of compounding a felony is that of taking a reward for the return of

stolen property, and advertising a reward for the same purpose. By 6-7 G. 5, 50, 34, 'Every person who corruptly takes any money or reward, directly or indirectly, under pretence, or upon account of helping any person to recover any property which has under circumstances which amount to felony or misdemeanour been stolen or obtained in any way whatsoever, or received, shall (unless he has used all due diligence to cause the offender to be brought to trial for the same) be guilty of felony, and on conviction thereof shall be liable to penal servitude for any term not exceeding seven years, and, if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable.' On an indictment under 7-8 G. 4, 29, 58, rpd., it was not necessary to show that defendant was in any way a party to the felony; it was sufficient if he had some corrupt and improper design when he received the money, and did not *bonâ fide* intend to use such means as he could for the detection, &c. of the offender. *King*, 1 Cox C. C. 36, 1844. Where A. was charged with corruptly and feloniously receiving money from B. under pretence of helping B. to recover goods stolen from B., and with not causing the thieves to be apprehended, three questions were left for the jury: 1. Did A. mean to screen the guilty parties, or to share the money with them? Ans.: No. 2. Did A. know the thieves, and intend to assist them in getting rid of the property by procuring B. to buy it? Ans.: No. 3. Did A. know the thieves, and assist B., as her agent, and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice? Ans.: Yes. It was held that the receipt of the money was 'corrupt' within s. 58 and that the verdict of guilty was right. *Pascoe*, 1 Den. C. C. R. 456; 18 L. J. M. C. 186; 3 Cox C. C. 469, 1849.

It is not necessary to prove that the reward was paid before the property was restored if it was paid because there was a previous agreement to pay: *O'Donnell*, 7 Cox C. C. 337, 1857: C. C. R. Ir.

By 24-5 V. 96, 102, anyone advertising a reward for the return of property stolen or lost, and using any words purporting that no questions will be asked, or that a reward will be given for property stolen or lost 'without seizing or making any inquiry after the person producing such property,' or promising to return to any pawnbroker or other person who may have bought or advanced money upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or any person printing or publishing such advertisement, shall forfeit fifty pounds to any person suing. This s. is governed by 33-4 V. 65, the Larceny (Advertisements) A. 1870.

Dogs] See that title.

Triable at Q. S.

COMPROMISING CRIMINAL PROCEEDINGS.

See *Compounding*.

CONCEALING BIRTH OF CHILD.

By 24-5 V. 100, 60: 'If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided, that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence, as if such person had been convicted upon an indictment for the concealment of the birth.'

A dead body must be found and identified. *Williams,* 11 Cox C. C. 684, 1871; cf. *Hopkins,* 1838. Unless there be a confession: *Kersey,* 21 Cox C. C. 690, 1908, where there was also a confession of murder; the judge directed the grand jury not to find a bill for murder, and when they did, directed an acquittal therefor. The C. C. A. upheld the conviction for concealment, thinking the confession good. 1 Cr. A. R. 260.

'*A child*'] There must be sufficient maturity at the birth to give a chance of life, to which 'no specific limit can be assigned, but it may perhaps be safely assumed that under seven months the great probability is' against life: *per* Erle J., *Berriman,* 6 Cox C. C. 388, 1854. Perhaps a fœtus not bigger than a man's finger, but having the shape of a child, is 'a child' within the statute. *Colmer,* 9 Cox C. C. 506, 1864; *sed quære,* 1 Russ. Cri. 778 *s;* but in *Hewitt,* 4 F. & F. 1101, 1866, Smith J. left a similar point to the jury.

'*Any secret disposition*'] In view of these words, where a woman deposited a child while *alive* in a field, and there left it to die, it was held that she could not be convicted under s. 60. *May,* 10 Cox C. C. 448; 16 L. T. 362, 1867: C. C. R.

It is a question of law whether the *place* of disposal is such as the offence may have been committed in (*e.g.* a dustbin): *Clarke,* 4 F. & F. 1040, 1866. Defendant denied her pregnancy, and also, after the birth at first denied that, but afterwards confessed to a surgeon. The body was, on the same day, found among the soil in the privy. Patteson J. held it to be essential to the commission of the offence, that she should have done some act of disposal of the body after the child was dead; therefore if she had gone to the privy for another purpose and the child came from her unawares, and fell into the soil, and was suffocated, she must be acquitted, notwithstanding her denial of the birth. *Turner,* 8 C. & P. 755, 1839: acquitted. So *Coxhead,* 1 C. & K. 623, 1845.

What was a sufficient disposal of the body was a matter of doubt under 9 G. 4, 31, 14, rpd.—'secret burying or otherwise disposing of.' Where the evidence was, that defendant had been delivered of a child, and had placed it in a drawer, where it was found locked up, the drawer being opened by a key taken from her pocket, Maule J. directed an acquittal, being of opinion that the statute contemplated a *final* disposing of the body, by the *eiusdem generis* rule. *Ash,* 2 Moo. & R. 294, 1840; *Bell, ib. note,* 1841. These cases were overruled by a majority of the judges in *Goldthorpe,* 2 Moo. C. C. R. 244, 1841. There defendant confessed that the child was between the bed and the mattrass, where it was discovered. The point was again reserved in *Perry,* D. & P. C. C. R. 471; 24 L. J. M. C. 137; 6 Cox C. C. 531, 1855, when *Goldthorpe* was upheld, except by Pollock C.B. with whom Martin B. agreed in *Opie,* 8 Cox C. C. 332, 1860. There defendant placed the body under the bolster, with the intention of endeavouring, as far as she could, to conceal it from the surgeon, but with the intention of removing it elsewhere when an opportunity offered.

S. 60] It seems clear under s. 60 that it is immaterial 'whether the secret disposition was temporary or permanent,' since the words are '*any* secret disposition.' 1 Russ. Cri. 773 *s.* Where defendant denied to her mistress that she was pregnant, but told the doctor that she had been confined and the child was in a box in her bedroom, and it was so found, the lid being open, Byles J. left it to the jury to say if they thought this was a secret disposition of the body: 'secrecy was the essence of the offence,' *i.e.* the place must be one where the body is not likely to be found. *Sleep,* 9 Cox C. C. 559, 1864: not guilty. Where defendant put the dead body of her child over a wall into a field which was quite unfrequented, this was held to be a secret disposition. *Brown,* L. R. 1 C. C. R. 244; 39 L. J. M. C. 94; 11 Cox C. C. 517, 1870; 'secret disposition must depend upon the circumstances of each particular case.' There must be some concealment.

Notification of pregnancy to others] Frances D. and Robert H. had been living together for some time, and about four in the morning she was delivered of a child, in the presence of H., its father. He very soon afterwards put the child (which had not been separated from the after-birth) into a pan, carried it downstairs into the cellar, and threw the whole into the privy, the female remaining in bed upstairs. She was proved to have said she knew it was to be done. The fact of her being with child was, some time before her delivery, known by her mother, who lived at some distance, and was apparent to other women. No female was present at the delivery, though one had been sent for about twelve at night. No provision had been made, but defendants were in a state of the most abject poverty: verdict, guilty of endeavouring to conceal, &c. The judges were of opinion that the communication made to other persons was only evidence, but no bar, under the statute, to the conviction which was good; but they recommended a pardon. *Douglas,* 1 Moo. C. C. 480, 1836.

Born dead] So in *Mary Skelton* and *Henry Batting,* 3 C. & K. 119, 1850, the judge directed the jury, that if a woman be delivered of a dead child, and a man take the body and secretly bury it, she was indictable for the concealment by secret burying under rpd. s. 14, above, and he as an accessory, for aiding, &c. (under s. 31 of the

same A.), if there was a common purpose in thus endeavouring to conceal the birth; but that the jury must be satisfied, not only that she wished to conceal the birth, but was a party to the secret burial by the man, in pursuance of a common design; if the woman was acquitted, the man must be: both were found guilty. This followed *Bird,* 2 C. & K. 817, 1849.

Not complete] Where defendant was stopped going across a yard, in the direction of a privy, with a bundle, which on examination was found to be a cloth sewed up, containing the body, it was held that she could not be convicted, the offence not having been completed. *Snell,* 2 Moo. & R. 44, 1837.

Indictment] Under s. 14, rpd., it needed not to be stated whether the child died 'before, at, or after' the birth, for that s. expressly provided that the moment of death need not 'be proved.' *Coxhead,* above. So under s. 60, though there are no such express words. See *Saunders* on Indictments, no. 57.

On indictment for the murder of a child, *any* person may now be convicted under s. 60 of endeavouring to conceal the birth. Formerly, under s. 14, above, no person but the mother could be so convicted. *Wright,* 9 C. & P. 754, 1841; 1 Russ. Cri. 773. Where defendant was tried for murder on the coroner's inquisition *only,* it was held that she might be found guilty of the concealment, 43 G. 3, 58, 4, rpd., speaking of 'any person *charged* with such murder,' the judges holding that the coroner's inquisition was a *charge. Maynard,* R. & R. 240, 1812; *Cole,* 2 Lea. 1095; 3 Camp. 371, 1813. There seems no doubt that a defendant might in the same way be convicted under s. 60, for he or she is 'tried for the murder of' the child, as much on the inquisition as the indictment.

CONCEALMENT BY BANKRUPT.

See *Bankrupts.*

CONCEALMENT OF DEEDS, WILLS, INCUMBRANCES, OR EVIDENCE.

By 22-3 V. 35, 24: 'Any seller or mortgagor of land or of any chattels, real or personal, or choses in action conveyed or assigned to a purchaser [or mortgagee—23-4 V. 38, 8], or the solicitor or agent of any such seller or mortgagor who shall, after the passing of this Act, conceal any settlement, deed, will, or other instrument material to the title, or any incumbrance, from the purchaser [or mortgagee—23-4 V. 38, 8], or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases, to defraud, shall be guilty of a misdemeanour, and, being found guilty, shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any term not exceeding two years, with or without hard labour, or by both, as the court shall award.'

By 38-9 V. 87, the Land Transfer A. 1875, s. 99: 'If in any course of any proceedings before the registrar or the court in pursuance of this Act any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person, or to substantiate a false claim, suppresses, attempts to suppress, or is privy to the suppression of any document or of any fact, the person so suppressing, attempting to suppress, or privy to suppression, shall be guilty of a misdemeanour, and upon conviction on indictment shall be liable to be imprisoned for a term not exceeding two years, with or without hard labour, or to be fined such sum, not exceeding five hundred pounds, as the court before which he is tried may award.' So by s. 100, of fraudulent entries or erasures in the (land) register: such entries, &c. to be void between the parties.

See generally, *Written Instruments.*

Triable at Q. S.

CONCEALMENT OF TREASON, FELONY.

See *Misprision.*

CONSPIRACY.

[This chapter is *substantially* as it was left by Sir J. F. (afterwards Mr. Justice) Stephen in the seventh (1868)—which, however, was founded on the sixth (1862)—and eighth (1874) editions; see his Digest of Criminal Law (1877), p. 384, where he states that he is also 'responsible' for the next title. The latter he added in 1868 for the first time, but the course of legislation has very much altered the law.]

The principles of the law are the same in every form, but as in some aspects it has been chiefly developed in the *political* varieties, they will be most conveniently treated under *Treason*.

The *name* of this crime seems to occur first in the second part of the *Statutum de Conspiratoribus*, printed 1 Statutes of the Realm, 216; the mention of *Gilbert Thornton* there shows that it must be earlier than 1295 (when he died), and as the reference is almost certainly to him as chief justice, it may date from 1289-90; cf. 20 E. 1 (stat. 2 or), Statute of Waste, 1291-2, *ib.* 109. The sense of the word there is much wider than that of to-day. The next mention seems to be in 28 E. 1, c. 10, 1300, *Articuli super cartas*, *ib.* 139.

Definition] There is a formal definition, now only of historical value in the statute *Ordinacio de Conspiratoribus*, 33 E. 1, 1305.

In modern books numerous definitions of conspiracy occur: see *Jones*, 4 B. & Ad. 345, 1832; *Seward*, 1 A. & E. 706; 3 Nev. & M. 557, 1834; *Vincent, &c.*, 9 C. & P. 91, 1839; *Peck*, 9 A. & E. 686, 1839, 'virtually overruled' *Heymann; Parnell*, 14 Cox C. C. 508, 1881; Russ. Cri. 146; they all, in effect, amount to this, that a conspiracy is an agreement between two or more persons to do that which is unlawful. It 'consists not merely in the *intention* of two or more, but in the *agreement* of two or more to do an unlawful act, or to do a lawful act by unlawful means,' *per* Willes J. delivering the opinion of the judges, *Mulcahy* v. *R.*, at 317, 1868: this is 'the best established definition . . . accepted by' H. L. in that and other cases: 1 Russ. Cri. 146. 'Thus if two lovers agree to commit suicide together, but promptly think better of it, they nevertheless are liable to an indictment for conspiracy.' *Kenny*, Outlines Cr. L. 18. It makes no difference whether (a) the final object be unlawful, or (b) the means be unlawful; in either case the conspiracy is equally indictable.

Notwithstanding the high authority on which the definition just cited is founded it is unsatisfactory, inasmuch as the word 'unlawful,' on which it turns, is ambiguous, and appears to be used in a sense which is unique: *Kenny, ib.* It does not mean 'criminal,' for there are many cases in which a combination to do a thing is a crime, although the act itself, if done by an individual, would not be a crime; for instance, it is a crime to conspire to seduce a woman, though seduction itself is not a crime. On the other hand, 'unlawful' does not mean

'tortious,' for there are torts which it is not a crime to conspire to commit. Nor, again, does any case go so far as to decide that a combination to commit a breach of contract is a criminal conspiracy. Hence, the word 'unlawful,' in the definition of conspiracy, has no precise meaning. It is tempting to rest in the rule laid down by *Hawkins,* 'there can be no doubt but that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law.' P. C. 1, 72, 2. But the same difficulty recurs in 'wrongfully.' There are not wanting dicta which adopt this proposition, interpreting 'wrongfully' as *immorally,* in a wide sense, and Sir J. F. Stephen points out that 'especially in the case of agreements between more persons than one to carry on purposes which the judges regarded as injurious to the public,' where the court thought that the acts in question had 'an analogy' to 'other acts which had been held to be misdemeanours, although such first-mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them,' such acts have been held to be conspiracy. Dig. Crim. L. ch. 16, art. 178, 5th ed. If, then, the test of conspiracy is *ultimately* immorality of a sufficiently heinous sort, it is not surprising that the decisions have varied with individual judges, and while a number of immoral acts have founded conspiracies, 'on the other hand it is doubtful whether an agreement to make loud noises for the purpose of disturbing an invalid neighbour would be indictable as a conspiracy': *Levy,* 2 Stark. N. P. 458, 1819; *Kenny, ib.* At any rate, Chitty is justified in remarking, 'There are, perhaps, few things left so doubtful in the criminal law as the point at which a combination of several persons in a common object becomes illegal': 3 Crim. Law, 1139.

Conspiracy to defraud] 'An agreement made with a fraudulent mind to do that which, if done, would give to the prosecutor a right of action founded on fraud, is a criminal conspiracy': 9 Halsbury, 709. It is 'crime' within 34-5 V. 112 and 8 E. 7, 59.

Summary] On comparing the cases referred to, below, the following propositions may be deduced:—

1. A combination to commit any 'substantive' crime is an indictable conspiracy. Kenny adds, 'even though there be in the gang other persons in whom it would be no offence to commit' that crime [see *Duguid*] and though the crime be non-indictable. See *Turner,* 1811. 'Or,' adds 1 Russ. Cri. 151, an act 'visited by a specific criminal penalty, and' it 'also extends to include combination to commit a breach of the peace,' citing *Holberry, &c., Sheffield Chartists,* 4 St. Tr. N. S. 1347, 1840; but the charges were much graver.

Torts] 2. A combination to commit a civil injury is an indictable conspiracy in many, though it is impossible to say precisely in what, cases. Kenny says, 'any tort that is malicious . . . thus excluding for instance a trespass committed *bonâ fide* by persons eager to assert their supposed right of way.'

3. Combinations to do acts which the courts regard as outrages on morality and decency, or as dangerous to the public peace, or injurious to the public interest, called generically 'acts involving public mischief' by Sir J. F. Stephen (cited above), have in many cases been held to be conspiracies.

[3a. Kenny, *ib.* adds: 'Agreements to commit a breach of contract

in circumstances that are peculiarly injurious to the public': *Vertue* v. *L. Clive,* 4 Burr. 2473, 1769.]

The vagueness of the second and third of these propositions obviously leaves a broad discretion to the judges; practically, it has been exercised, as has already been suggested, by distinguishing between immorality of a heinous and that of a more trivial sort; theoretically, of course, anything *contra bonos mores* is a public evil, if only because of bad example. (The same question about the distribution of power between judge and jury in these cases has arisen as in those of criminal libel, under which see on this point, *Brailsford.*) The law of conspiracy as it affects *workmen* has had a peculiar history; see below.

Class 2.

With regard to civil injuries, it may be observed that wherever a combination to commit such an injury has been held to be criminal, the injury has been malicious, that is to say, the parties have not been under a *bonâ fide* mistake about a matter of fact, which, if true, would have justified their conduct. Thus, a combination to walk over a field, or to pull down fences, would not be a conspiracy, if the object was to try a question of a right of way, though it certainly would be a combination to commit an act unlawful in the sense of being a tort. On the other hand—as is said above—a conspiracy to commit a fraud may be indictable though the fraud is not in itself indictable. In *Warburton,* L. R. 1 C. C. R. 274; 11 Cox C. C. 584; 40 L. J. M. C. 22; 23 L. T. 473, 1870, defendant and another conspired to defraud defendant's partner of partnership property at a time when it was not criminal for one partner to steal or fraudulently obtain partnership property. Cockburn C.J. pointed out that there was a remedy in *equity,* and in delivering judgment said, 'It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *i.e.* amount to a civil wrong.' The generality of these expressions must probably be limited by reference to the particular class of wrongs under consideration, namely, 'civil wrongs by fraud and false pretences.' And where a woman was indicted with *Whitchurch, &c.,* for conspiring to procure her miscarriage by unlawful means, and there was no evidence of her pregnancy, it was held that, although the acts if done by herself alone would not have been criminal, yet she could be rightly convicted of conspiring to commit a felony. *Whitchurch and others,* 24 Q. B. D. 420; 59 L. J. M. C. 77; 16 Cox C. C. 743; 54 J. P. 472, 1890: C. C. R., where Hawkins J. pointed out that the woman was not charged for conspiring to do an innocent act, but one with others which they could not do without felony.

Numbers] There must be two at least, and if two only be tried together the jury cannot be satisfied of the guilt of either if they are not satisfied of the guilt of both: *Manning and another,* 12 Q. B. D. 241; 53 L. J. M. C. 85; 48 J. P. 536; 51 L. T. 121, 1883, below; cf. *Plummer,* 1902; and husband and wife cannot be guilty of the offence of conspiracy, because they are one person at law. Hawk. 1, 72, 8. Four being indicted, *J. S. Cooke,* 5 B. & C. 538; 7 D. & R.

673, 1826, and another, *R. J.*, pleaded not guilty, one never appeared, and *R. S. Cooke* pleaded in abatement. Before that plea was tried *J. S. Cooke* was found guilty of conspiring with *R. S. Cooke;* the co-defendant *J.* was acquitted; after *R. S. C.* was ordered to plead, but before his trial, a rule was obtained to stay judgment against *J. S. C.* because *R. S. C.* might be acquitted; but the Q. B. held that judgment could be pronounced, on authority and because it could not presume that the verdict was wrong; if *R. S. C.* were acquitted, said Littledale J., 'perhaps this judgment may be reversed.' 'But it is not settled whether in cases of separate trials of the conspirers the acquittal of those tried later would avoid the conviction of one earlier tried and convicted for the same conspiracy': 1 Russ. Cri. 148. In *Duguid,* defendant and another were jointly tried; the latter was acquitted on all counts, but on certain counts for conspiracy between them and a third person who (probably) could not in law be guilty and not on trial the former was convicted. C. C. R.

Evidence] The evidence in conspiracy is wider than, perhaps, in any other case; greater latitude in proving this offence is admitted. Taken by themselves the acts of conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances (see above). Thus, on the trial of several persons for a conspiracy in unlawfully assembling to excite discontent, &c., as the material points for the jury are *the general character and intention* of the assembly, and the particular case of the defendant as connected therewith, it is relevant to prove that bodies of men came from different parts to attend the meeting, organised in the same manner and acting in concert. It is relevant also to show, that early on the day of the meeting on a spot at some distance therefrom, whence bodies of men came thither afterwards, a great number of persons, so organised, had assembled, and had there conducted themselves, in a seditious, &c. manner. On the same principle it is relevant to prove resolutions put by one of the defendants as chairman at a large assembly in another county for the same professed object as was avowed at the meeting in question; for, in a question of intention, it is most clearly relevant to show, against that individual, that at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. *Hunt,* 1820 (B. & Ald.).

Much has been written on the 'latitude' of admissibility in this offence. It is, perhaps, ultimately due to the sense of the common law, which expresses the character of a people, that a man is unfairly matched against numbers. As L. Macnaghten put it in *Quinn* v. *Leathem,* 1901, A. C. 511, 'A man may resist without much difficulty the wrongful act of an individual.' Or *ib.* 530, L. Brampton: 'Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful, if done separately or without conspiracy may with conspiracy become dangerous and alarming, just as a grain of gunpowder is harmless, but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine, but administered frequently and in larger quantities with a view to harm may be fatal as a poison.' Cf. L. Lindley, *ib.* 538.

See further on *Evidence,* below.

Overt act] Another remarkable circumstance connected with this

law is, that it renders it possible by a sort of fiction to convert an act innocent in itself into a crime by charging it in the indictment as an overt [= open] act of a conspiracy of which there is no other evidence than the act itself. In other words, if the jury choose to impute bad motives to an act *primâ facie* innocent, they can convict those who combine to do it of conspiracy. Erle J. wrote: 'With respect to the crimes classed under the term 'conspiracy,' the external act of the crime is concert by which mutual consent to a common purpose is exchanged.' (Trade Unions, p. 31.) On an indictment for trade union offences, intimidation, picketing, conspiring to raise wages, &c., Rolfe B. said: 'What the prosecutors of this indictment have done is this, they have not proceeded under the statute [6 G. 4, 129, rpd.] to indict the parties for the alleged illegal act, but they undertake to show that there was a general combination amongst them all to effect these illegal acts, and for that it is they have indicted them. That is a legal course to pursue, and being legal, I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. It would be, however, much more satisfactory to my mind, if the parties were indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is the proof of the conspiracy. It never is satisfactory, although undoubtedly it is legal.' *Selsby, &c.*, 5 Cox C. C. 497, 1847. So on an indictment for a conspiracy to commit an unnatural offence, on evidence which, though weak, tended to show the actual commission of the offence, Cockburn C.J. confirming the passage just cited, said, 'I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others,' &c. *Boulton*, 12 Cox C. C. 93, 1871; cf. the remarks of the same judge at the end of *Gurney*, below, and *Joinder*, below.

'What is an overt act?' said Alderson B., addressing a grand jury in 1848. 'It is any act of conspiracy, conferring or consulting with, or advising, persuading, counselling, commanding or inciting any person —so that it is absurd to say that words may not be an overt act. If I advise you to go and kill your neighbour and you go and kill him, my words are an act, they are an act of advice, an act of incitement, and therefore it is idle to say they are mere words; they are not so, they are an overt act, and may be properly laid as such. Or again, an overt act may consist in any course, act, measure or means whatever done, taken, used, or assented to towards and for the purpose of effecting a traitorous intention': 6 St. Tr. N. S. 7133.

An overt act is defined as 'an act capable of being observed by someone else': 9 Halsbury, 233. See *per* Holt C.J. under *Treason*, in reference to which—in the sense of political disaffection or sedition—questions of *evidence* have been most discussed. The fact that one defendant parted with a document ultimately found on another is not sufficient evidence of an overt act: *Connolly, &c.*, 3 Cr. A. R. 27, 1909: c. q.

Another difficult point ('which is involved in great obscurity': 7th ed.) is whether there *must have been* some overt act.

The authorities seem to stand thus. In the *Poulterers' Case*, 9

Co. 56 *b.*, 1611, Coke says, 'a man shall have a writ of conspiracy, although they do nothing but conspire together, and he shall recover damages, and they may also be indicted thereof . . . these confederacies punishable by law before they are executed, ought to have four incidents. 1. It ought to be declared by some manner of prosecution, as in this case it was, either by making of bonds, or of promises one to the other. 2. It ought to be malicious . . . 3. It ought to be false against an innocent. 4. It ought to be out of court voluntarily.' In *Best,* 2 L. Raym. 1167; 1 Salk. 174, 1705, the marginal note is 'an illegal conspiracy is indictable, though nothing is done in pursuance of it.' This was so contended by counsel in that case, but from the indictment it does not appear that any such contention was necessary, and the judgment is silent on the point.

In *Kinnersley,* 1 Str. 193, 1719, which is frequently referred to as an authority that no overt act need be *proved,* no such point arose. All that was there decided was that *no overt act need be laid in the indictment,* as was even then well settled. Moreover, the court held that verbally charging a man with a criminal offence was an overt act. So also in *Spragg,* 2 Burr. 993, 1760, L. Mansfield expressly reserves his opinion, 'what degree of weight' the objection that it was 'a bare *unexecuted* conspiracy' might have had, pointing out that it was not necessary for the decision of that case. And in *Mulcahy* v. *R.* it was laid down that in the agreement of two or more persons 'the very plot is an act in itself,' 'a conspiracy is a sufficient overt act,' though 'so long as such a design rests in intention only it is not indictable.'

In practice, however, the conspiracy is seldom known except through some overt act.

Indictment] In fact it is usual to set out in the indictment the overt acts by which the object of the conspiracy was to be attained. Cf. *Gill* and *Kenrick,* below. In *Desmond,* below, the agreement once established, an overt act in furtherance by one conspirer was evidence against all.

Where the indictment alleged a conspiracy fraudulently to remove goods, &c., of one H. contrary to the Debtors A., he being a trader and liable to become a bankrupt; but did not allege that defendants conspired in contemplation of or with a view to a bankruptcy, or that H. was adjudged bankrupt; the court said that, although it was not necessary to prove the adjudication, yet they were not prepared to say that the indictment ought not to have alleged the conspiracy to be in contemplation of or with a view to bankruptcy; but the objection, which might have been good on demurrer, was cured by the verdict. *Heymann* v. *R.* See also *Aspinall,* 1876, on the last point.

A form of indictment—no. 13—for *Conspiracy to defraud, as amended* by the Rule Committees, May 3, 1916 (S. R. O., Crim. Proc. Eng.), is appended to the Indictments A., and another—no. 32—for *Conspiracy to incite women to procure their own miscarriage,* will be found S. R. O. *ib.*

Joinder of counts] See that title, and especially *Trevelli.* In *Warren, &c.,* the *Times,* Oct. 31st, 1907, there were counts against five defendants for conspiracies to obtain securities and goods by fraud, and also counts against the different defendants for obtaining securities and goods by fraud. The prosecution proved a conspiracy between two only of the defendants and acts committed by them in pursuance of such conspiracy, and proposed to give evidence of other conspiracies

and misdemeanours to which the other defendants were parties, there being no evidence of a joint conspiracy by all five. The prosecution, having elected to proceed with the charges proved against the first two, Bosanquet C.Sjt. quashed all the counts alleging other misdemeanours against the others on the ground that the inclusion in one indictment of different misdemeanours committed by different defendants was embarrassing to the court, unfair to the defendants, and contrary to the established practice; and that the court, having control of its own proceedings, could quash part of the indictment as a misuse of the process of the court. (From MS. note of Bosanquet C.S.) The quashed counts were good in themselves. The two were convicted. In *Perryman,* 42 L. T. Newspaper, 683, 1907: 'Lawrence J. explained this ruling as meaning that when separate and independent conspiracies were charged they should not be included in one indictment, but that it did not preclude the inclusion in one indictment in cases where a conspiracy was formed and other persons later came in and joined an existing conspiracy': 1 Russ. Cri. 181.

Agency] An overt act committed by any one of the conspirators is sufficient, on the general principles of agency, to make it the act of all.

Political, &c. conspiracies—speeches] *Stephen,* 2 Hist. Cr. L. 377, thinks that the first instance of a prosecution *of this sort* was *Yorke* (or *Redhead*), 25 St. Tr. 1003, 1795. How entirely obsolete a charge of that nature (which was sustained) is to-day may be gathered from Rooke J.'s summing up (1152): 'A judge . . . cannot sit here and do his duty unless he stops a man the moment he *says a word to slander the laws.* I cannot suffer the acts of the *legislature* to be *censured.*'

Conspiracy for seditious purposes is in every respect in the same position in law as any other conspiracy; to treat it apart is misleading.

Other instances] It was said by L. Ellenborough that a mere agreement to commit a civil trespass would not be the subject of indictment. *Turner,* 13 East, 228, 1811. But this decision is not at all borne out by the definitions above referred to; and in *Rowlands,* below, L. Campbell had no doubt whatever that it was wrongly decided. In *Turner,* the conspiracy was to go, armed with offensive weapons, and take hares by night in a preserve, and to resist, if necessary—specifically a crime under 39-40 G. 3, 50, rpd.

It was held that a *conspiracy to hiss* an actor or damn a play would be indictable: *Macklin* v. —, 1775: apparently, there was a criminal information also: 6 Wentworth's Pleadings, 443; perhaps *Leigh,* 1 C. & K. 28 *n.*, or *Lee,* 1774; *Clifford* v. *Brandon,* 2 Camp. 358, 1810; *Gregory* v. *Duke of Brunswick,* 6 M. & G. 953, see 205, 1844; *Anon.*, 6 T. R. 628, 1778: 'although each [defendant] might have done so separately.' So a conspiracy to impoverish A. B., a tailor, and to prevent him carrying on his trade: *Eccles,* 1 Lea. 274; 3 Dougl. 337, 1783. In *Carlisle,* D. & P. C. C. 337; 23 L. J. M. C. 109; 6 Cox C. C. 366, 1854, S. sold a mare to B. for 39*l.*, and before the price was paid, B. and C. conspired together falsely and fraudulently to represent to S. that the mare was unsound, in order to induce S. to accept 27*l.* instead of 39*l.*; it was held that this was indictable conspiracy.

Market-'rigging'] So to conspire to raise the price of funds by spreading false reports: *De Berenger,* 3 M. & S. 67; 15 R. R. 414,

1814; or of any vendible commodity: *Aspinall and others,* below (and *Hilbers,* 2 Chit. K. B. 163, 1815: no combination was alleged, no information was granted); see *Conspiracies in Restraint of Trade;* or to conspire to raise a false claim to property by contracting a marriage: *Robinson,* 1 Lea. 37, 1746; or to conspire to induce persons to take and pay for shares in a new company, to which was to be transferred the business of an old company known to the conspirers to be hopelessly insolvent and worthless. *Gurney and others,* 11 Cox C. C. 414, 1869. See below. A mock auction with sham bidders to inveigle the public into paying grossly excessive prices may imply a conspiracy: *Lewis, &c.,* 10 Cox C. C. 404, 1869, explaining *Levine, ib.* 374 (as mere 'puffing'), which see under *False Pretences.*

Defendants were charged with having conspired to obtain a quotation of shares in the Stock Exchange List, in order to induce persons who should thereafter buy and sell shares to believe that the company was duly formed and constituted, under the rules of the Stock Exchange, and was entitled to have that quotation. The Q. B. held the count good, although there was no averment that the object sought was to injure persons induced to deal in the shares. Cockburn C.J. and Blackburn J. thought it would have been more prudent to add some such averment, so as to make the offence more distinct, but held that the object of the conspiracy could be sufficiently inferred from the preceding averments. That judgment was affirmed in the C. A., which further held the insufficiency to be cured by the verdict. *Aspinall.*

'*False pretences*'] 'here do not mean such false pretences as would support an indictment for obtaining . . . by false pretences: see *Hudson,* Bell C. C. 263, 1860': *per* A. L. Smith L.J., *Scott* v. *Brown, &c.,* 1892, 2 Q. B. 724, where the C. A. and Wright J. held that an agreement to 'make a market' artificially for shares, even by a real purchase so as to give the appearance of a genuine premium, in order to deceive the public, is an indictable conspiracy. See *Means used,* below.

A conspiracy to charge an innocent person with an offence is indictable: *Best,* above; and if the object be extortion it is immaterial whether the charge be true or false, successful or unsuccessful, if any of the means resorted to be unlawful. Hawk. P. C. 1, 72, 3, 4; 1 Russ. Cri. 163; *Hollingberry,* 4 B. & C. 329, 1825, where the jury found a conspiracy, with such an object, to indict though not falsely; held to be a verdict of guilty. But several persons may combine together to carry on a prosecution in a legal manner. Hawk. *ib.* s. 7; *Murray,* Matth. Dig. Cr. L. 90, 1823; 1 Russ. Cri. 162.

Any conspiracy to pervert the course of justice is indictable: Hawk. P. C. 1, 21, 15, and 72, 2; *Bushel* v. *Barrett,* Ry. & M. 434, 1826; *Macdaniel,* Fost. C. C. 130; 19 St. Tr. 808, Feb. 1756; Lea. 45, 1759—to which see the other reference; *Jolliffe,* 1791; *Mawbey,* 6 T. R. 619, 1796; *Claridge* v. *Hoare,* 14 Ves. 65, 1807; *Thompson,* 16 Q. B. 832; 20 L. J. M. C. 183; 5 Cox C. C. 166, 1851, below; or by abuse of legal process to enforce payment of money which was known to be not due. *Taylor,* 15 Cox C. C. 265 and 268, 1883: Q. B. D. See *Perversion of Justice.* 'And it is under the head of conspiracy that many forms of swindling are reached by the criminal law': 1 Russ. Cri. 166.

Class 3.

There are numerous instances in the books of conspiracies against morality and public decency held indictable; such as a conspiracy to seduce a young woman: *L. Grey;* or to procure an infant female to

have illicit carnal connexion with a man: *Mears;* or to procure a girl whether, &c. chaste or unchaste, to become a common prostitute: *Howell* (where 'the dicta of Bramwell B. go too far': 1 Russ. Cri. 159 *j*); see under *Abduction.* A conspiracy to take away a young heiress from the custody of her friends, for the purpose of marrying her to one of the conspirators, has been held to be indictable: *Wakefield,* 1827. Also a conspiracy to prevent the burial of a corpse, though only for the purposes of dissection. *Young,* cited 2 T. R. 734, 1788; 2 Chit. Crim. L. 36. Many combinations to cause a nuisance have been held criminal: 1 Russ. Cri. 155.

Conspiracies to get paupers married are indictable if any unlawful means be used. But there were attempts to go further, and to hold that the conspiracy to persuade paupers to marry by their own consent was itself indictable, as being an injury to the parish which has to support the woman. But this notion is now completely exploded. In such a case, Buller J. directed an acquittal, holding it necessary to show that defendant had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage, without the voluntary consent or inclination of the parties themselves; and that the act of marriage being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue *means;* and this, he said, had been several times ruled by different judges: *Fowler,* East P. C. 461, 1788, where the parish officers had given the husband two guineas; *Seward,* above. Where it is stated to have been by threats and menaces, it need not be averred that the marriage was against the consent of the parties, though that fact must be proved. *Parkhouse,* East P. C. 462, 1792; 1 Russ. Cri. 156. In *Edwards,* 8 Mod. 321, 1725, the K. B. thought that 'a conspiracy to let lands of ten pounds a year value to a poor man in order to get him a settlement' was indictable.

Evidence—the existence of the conspiracy] See *Evidence,* above. Acts of some of the conspirers in the absence of others, may be given against any of them. The rule is applied by East as follows: 'In this [high treason], as in other cases founded in conspiracy, the conspiracy or agreement among several to act in concert together for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner. And this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts.' But it may also be done by 'evidence of the acts of the prisoner, and of any other with whom he is attempted to be so connected, concurring together at the same time and to the same purpose or particular object': P. C. 96. But it is observed by Starkie that, 'Although in general . . . the act or declaration of one man is not evidence against another who is charged as a fellow-conspirator, until such a privity and community of design has been established between them as affords a reasonable presumption that the act or declaration of one is the act or the declaration of the other . . . and although . . . such a connection must be established before the act, &c. . . . of one . . . can properly be used as evidence to show the designs of another, yet in some peculiar instances where it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from this rule, and evidence of the acts and conduct of others has been admitted to prove the

existence of a conspiracy previous to the proof of the defendant's privity.' 2 Ev. 326, 3rd ed. (1842), where Buller J. is cited as saying, 'There are two things to be considered in an indictment of this sort: first, whether any conspiracy exists; next, what share the prisoner took in the conspiracy'; and 'But before it [the evidence] can affect the prisoner materially, it is necessary to make out another point, viz. that he consented to the extent that the others did.' *Hardy,* in 1794, at 451; cf. 476, where it was also said by Eyre C.J., at 473: 'It is perfectly clear that in the case of a conspiracy, the general evidence of the thing conspired is received, and then the party . . . is to be affected for his share in it.' Starkie adds: 'although the courts, in cases of conspiracy have, out of convenience, and on account of the difficulty in otherwise proving the guilt of the parties, admitted the acts and declarations of strangers to be given . . . in order to establish the fact of a conspiracy it is to be remembered that this is an inversion of the usual order for the sake of convenience, and that *such evidence is, in the result, material so far only as the assent of the accused* to what has been done by others *is proved.*' On a prosecution for a conspiracy to raise the rate of wages, proof was proposed of an association for that purpose, of meetings, of rules, of subscriptions, &c., and L. Kenyon permitted a member of the society to prove these matters, and that he and others acted under them in execution of the conspiracy charged as evidence *introductory* to the proof that they were members of the society, and equally concerned; but added, that it would not be evidence to affect them until they were made parties to the same conspiracy. *Hammond,* 2 Esp. N. P. C. 719, 1799. So in many cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused have taken, *e.g.* in *L. Stafford.* 1 Russ. Cri. 194; *Deasy,* 15 Cox C. C. 334, 1883. The point may be considered as settled finally in *The Queen's Case,* B. & B. 310, where the following opinion was given by Abbott C.J. on behalf of the judges: 'We are of opinion that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shown that the individual defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to shew the true meaning and character of the acts of the individual defendants, and on that account, we presume, it is permitted. But it is to be observed, that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the court, whereby the judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if upon such opening it should appear manifest that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine,* and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.'

Specific crimes and conspiracy to commit them] Two defendants were jointly indicted for attempting to poison, and were acquitted, the evidence that poison was used failing; on an indictment, found at the same time, for the conspiracy to poison, Parke J. directed an acquittal, there being no further evidence: *Maudsley, &c.,* 1 Lew. 51, 1830.

Order of proof] It has been held, that the prosecution may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or it may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by defendant the next day, it was held, that directions given by one of the party, on the day of their meeting, where they were to go, and for what purpose, were admissible, and the case was said to fall within *Hunt,* 1820, where evidence of drilling at a different place two days before, and hissing an obnoxious person, was held receivable. *Frost,* at 149-50; 245 in St. Tr.; *Cuffey,* 7 St. Tr. N. S. 467, 1848. So in his direction to the jury, if the judge discusses separately the case of each actor first, he must be careful to connect each with the conspiracy; where he 'entirely omitted the question of conspiracy,' c. q.: *Bailey and Underwood,* 1913, and *Ashdown,* 1916.

'Upon an indictment for a conspiracy the evidence is either direct, of a meeting and consultation for the illegal purpose charged, or more usually, from the very nature of the case circumstantial.' 2 Stark. Ev. 324, 3rd ed. Thus, a husband, his wife, and their servants were indicted for a conspiracy to ruin a card-maker; each had given money to his apprentices to put grease into the paste, and so spoil the cards, but no evidence was given of any two of them being present at the same time or of any communication between them; but Pratt C.J. ruled that as the defendants were all of one family and concerned in making cards, this was evidence to go to a jury. *Cope,* 1 Str. 144, 1719. On a trial for conspiracy to take away a man's character by means of a pretended communication with the Cock-lane ghost, L. Mansfield directed the jury that it was not necessary to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances; the judges of the K. B. agreed. *Parsons, &c.,* 1 W. Bl. 392, 1763. On a trial for a conspiracy 'to ruin' Macklin, the actor, 'in his profession,' L. Mansfield overruled the objection that evidence must be given by the prosecution of 'a *previous* meeting of the accused, for the purpose of confederating to carry their purpose into execution,' saying 'if a number of persons met together for *different* purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character, of a third person, that was a conspiracy, and it was not necessary to prove any previous 'consult' or plan among the defendants, &c.' *Lee,* 1774; *M'Nally* on Evid. 634, 1802.

If on this charge two persons by their acts are pursuing the same object, and often by the same means, the one performing part of an act, and the other completing it for the attainment of the object, the jury may draw the conclusion that there is a conspiracy. If a conspiracy be formed, and a person join it afterwards, he is equally guilty with the original conspirers. So, if, on a charge of conspiracy to annoy a broker, who distrained for church-rates, one of the defendants, the other being present, excited the persons assembled at a public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants went with them; but evidence of what a person, who was at the meeting, said some days after, when he himself was distrained on for church-rates, is not admissible: *per* Coleridge J., *Murphy,* 1837. See also *Blake,* 6 Q. B. 126; 13 L. J. M. C. 131, 1844.

Hearsay from other conspirers] Cf. *Confessions.* It is still a question whether the declarations of some of the persons engaged in the

conspiracy, may be given in evidence against others, in order to prove its existence; and on principle such evidence appears to be inadmissible. The opinions of the judges on this question have been at variance. In *Hardy*, above, 24 St. Tr. at 453, high treason in conspiring the death of the king, 'it was proposed to read a letter written by *Martin* in London, and addressed, but not sent, to *Margarot* in Edinburgh, both being members of the Corresponding Society, on political subjects, calculated to inflame the minds of the people in the North; Eyre C.J. was of opinion that this letter was not admissible, being in the nature of a confession only, and therefore not evidence against any but the party confessing; two of the judges agreed that a bare relation of facts by a conspirator to a stranger was merely an admission which might affect himself, but which could not affect a conspirator, since it was not an *act* done in the prosecution of that conspiracy; but that in the present instance the writing of a letter by one conspirator, having a relation to the subject of the conspiracy, was admissible, as *an act* to show the nature and tendency of the conspiracy alleged, and which therefore might be proved as the foundation for affecting the prisoner with a share of the conspiracy. Buller J. was of opinion that the evidence of the conversations and declarations by parties to a conspiracy, was in general, and of necessity, evidence to prove the existence of the combination. Grose J. was of the same opinion; but added that he considered the writing *as an act* which showed the extent of the plan.' Mr. Starkie remarks, 'Upon the last point it is observable that of the five learned judges who gave their opinions, three of them considered the writing of the letter to be an act done; and that three of them declared their opinion that a mere declaration or confession, unconnected with any act, would not have been admissible.' 2 Ev. 328, 3rd ed. 'In the same case [at 447], it was proposed to read a letter written by Thelwall [another conspirator] to a private friend, containing several of the addresses of the society, and three of the judges were of opinion that the evidence was inadmissible, since the letter amounted to nothing more than a declaration, or mere recital of a fact, and did not amount to any transaction done in the course of the plot for the furtherance of the plot; it was a sort of confession by T., and not like a fact done by him; as in carrying papers and delivering them to a printer, which would be a part of the transaction. Two of the judges were of opinion that the evidence was admissible, on the ground that everything said and *à fortiori* everything done by the conspirators was evidence to show what the design was.' *Ib.*

The same authority says, 'It seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy; although consultations for the purpose, and letters written in prosecution of the design, though not sent, are admissible.

Buller J., indeed, in *Hardy*, seems to have considered mere declarations of strangers to be evidence to prove the existence of a conspiracy upon the ground of *necessity*. There appears, however, to be no authority for admitting such evidence in criminal cases upon the plea of necessity, which, in principle, is inadmissible.

The existence of a conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger that a conspiracy existed

amongst others to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on principles fully established, would not make the assertion evidence of the fact against strangers.' Cf. *Murphy*, above.

Acts, &c., done by other conspirers—letters] After the evidence of a conspiracy is established, and the particular defendants have been proved to be parties to it, the acts of other conspirers may, in all cases, be given in evidence against them, if done in furtherance of the common object; as also many letters written and declarations made by those others, if they are part of the *res gestæ* and not mere admissions. See 1 Phill. Ev. 157, 10th ed.; *Hardy*, at 452, 475; *Algernon Sidney*, 9 How. St. Tr. 1663, at 841 and 848 (but this case is notoriously of little authority). It was on this principle that the C. C. A. upheld the admissibility of a letter between two conspirers mentioning defendant against the latter on his trial for conspiring to get corrupt commissions. 'No doubt,' said Lawrence J., 'there was a time in the case when the statements in it were not admissible against Col. Whitaker . . . the fact that it was sent was always admissible. When it was proved' by a variety of evidence that defendant was connected with the subject-matter of the latter he 'must then explain the circumstances in which he was being paid. This raises a cloud of suspicion against' W., 'the *onus* is changed,' and he 'must explain the payments': *Whitaker*, 1914, 3 K. B. 1283; 84 L. J. K. B. 225; 24 Cox C. C. 472; 79 J. P. 28; 10 Cr. A. R. 245.

'It seems to make no difference as to the admissibility of the act or declaration of a fellow-conspirer against a defendant whether the former be indicted or not, or tried or not with the latter, for the making one a co-defendant does not make his acts or declarations evidence against another, any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted.' 2 Stark. Ev. 329, 3rd ed. Defendant was charged with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots; it was proved that both had been members of a Chartist association, and that on the 3rd of November defendant had been at Jones's house, and was heard to direct the people there assembled to go to the racecourse, where Jones had gone on before with others; it was held that a direction given by Jones, in the forenoon of the same day, to certain persons to meet on the racecourse, was admissible; and it being further proved that Jones and the persons assembled on the racecourse went thence to the New Inn; it was held, that what Jones said at the New Inn was admissible, as it was all part of the transaction. *Shellard*. A. and B. charged with conspiracy to defraud C. by a deed which falsely represented that A. owned certain property; B.'s defence is that he honestly believed the representation, but was duped by A. Letters between A. and B. not communicated to C., *before* the execution of the deed, in which A. made similar representations to B. (but *not subsequent* letters relating to the execution), held admissible in the 'anomalous' circumstances for B. and as part of the correspondence had been put in *against* him: *Whitehead*, Dow. & Ry. Cases at N. P. 61, 1823, as explained Phips. 87. *Winkworth*, 4 C. & P. 444, 1836: defendants came with a mob to prosecutor's house, and one of the mob went up to the prose-

cutor, and civilly, and as he believed with a good intention, advised him to give them something to get rid of them, which he did. To show that this was not *bonâ fide* advice, but in reality a mode of robbing him, it was proposed to give evidence of other demands of money made by the same mob at other houses, at different periods of the same day, when some of the defendants were present. Five judges were of opinion that what was done by the mob, before and after the particular transaction at the prosecutor's house but in the course of the same day, and when any of the defendants were present, might be given in evidence. Where a number of persons were charged with murder committed by blowing up the wall of a prison in the course of a conspiracy to liberate a prisoner there (who, it was apparently suggested, was privy to the conspiracy), it was held, such conspiracy having been proved to exist, that acts of that prisoner (not jointly indicted) within the prison and proof of articles found on him, were admissible against the accused. *Desmond, &c.*, 11 Cox C. C. 146, 1868, above.

The means used] Where the act itself, which is the object of the conspiracy, is illegal, it is not necessary to state or prove the means agreed on or pursued to effect it. *Eccles*, above. But where the indictment charged conspiring 'to cheat and defraud the lawful creditors of W. F.,' L. Tenterden thought it too general, in not stating what was intended to be done or the persons to be defrauded or any overt act. *Fowle*, 4 C. & P. 592, 1831; but see *De Berenger;* in *Gurney*, above, an intent to defraud the general public and not any particular person was ruled by Cockburn C.J., citing, with approval, *De Berenger*, to be sufficient; and see above, *Aspinall and others*, but cf. *White* v. *R.*, 13 Cox C. C. 318, 1876: Ir. Q. B. So where defendants were charged with a conspiracy 'to cheat and defraud the said H. B. of the fruits and advantages' of a verdict, L. Denman C.J. held it bad, as being too general. *Richardson*, 1 Moo. & R. 402, 1834. But in *Wright* v. *R.*, 14 Q. B. at 168, 1849, the same judge sustained an indictment 'where the statement of the means used' was 'so interwoven with the charge of conspiracy as to show upon the face of' it 'an unlawful conspiracy.' Where the charge was of conspiring, by divers false pretences, &c., to obtain from A. divers large sums of money, and to cheat and defraud him thereof, it was held, that the *gist* of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and that it was not necessary to set out the specific pretences; Bayley J. said, 'When parties have once agreed to cheat a particular person of his money, although they might not then have fixed on any means for that purpose, the offence of *conspiracy* was complete.' *Gill*, 2 B. & Ald. 204; 20 R. R. 407, 1818; cf. *Taylor* v. *R.*, 1895, 1 Q. B. 25; 18 Cox C. C. 45. In *Parker*, 3 Q. B. 292, 1842, below, Williams J. spoke of *Gill*, as 'the case of the greatest laxity.' But in *Sydserff* v. *R.*, 11 Q. B. 245, 1847, an indictment that the defendants 'unlawfully, fraudulently, and deceitfully, did conspire, combine, confederate, and agree together to cheat and defraud' the prosecutor 'of his goods and chattels,' was held good on writ of error; and the court in giving judgment impliedly, if not expressly, upheld the decision in *Gill*. See on this point *King* v. *R.*, 1844, where the Ex. Ch. reversing a judgment of the Q. B., said that an indictment 'would be defective as not containing a *direct and positive* averment that the defendants did conspire to cheat, &c. [named] persons, which an indictment for a conspiracy where the conspiracy itself is the crime ought

certainly to contain. The averment describing the offence ought to be direct and positive' (809); *Rowlands,* 17 Q. B. at 686; 2 Den. C. C. R. 364; 21 L. J. M. C. 81; 5 Cox C. C. 466, 1851: Q. B.; and *Latham* v. *R.*

An indictment charged that A. and B. conspired by false pretences, &c., to obtain from F. divers sums of money, and to cheat, &c. him thereof. The *means* were not further stated. It was, however, held that this was sufficient, and that the indictment was sustained by proof that A. and B. conspired to make a representation, knowing it to be false, that certain horses were the property of a private person, and not of a horse dealer, thereby inducing F. to buy them. *Kenrick,* 5 Q. B. 49, 1843; 1 Dav. & M. 208; 12 L. J. (N. S.) M. C. 135; explaining *Pywell,* 1 Stark. N. P. C. 402, 1816 (where the headnote is wrong: *E. A. Sanders,* 14 Cr. A. R. 9, 1919). See also *Blake,* above.

Defendants were charged with conspiring by false pretences to obtain from persons named divers goods, &c., and to cheat, &c. them thereof, and then did by false pretences, which were stated, obtain from them those goods, &c., and did cheat, &c. them thereof, &c.—it was held bad in arrest of judgment in not stating *whose* the goods, &c. were; the goods, said L. Denman C.J. must be described as belonging to some one. *Parker,* above.

Similar acts—cumulative instances] On an indictment for conspiracy to cause themselves to be believed persons of considerable property, in order to defraud tradesmen, evidence was given of defendants having hired a house in a fashionable street, and represented themselves to a furnisher as persons of large fortune. A witness was then called to prove that, at a different time, they had made a similar representation to another tradesman. This evidence was objected to, on the ground that the prosecution could not prove various acts of this kind, but was bound to select and confine himself to one. L. Ellenborough, however, said, 'This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence.' *Roberts,* 1 Campb. 399, 1808. See *Similar Acts.*

The object of the conspiracy] The object of the conspiracy must be proved as laid. An indictment against A., B., C., and D. charged that they conspired together to obtain, 'viz. to the use of them the said A., B., and C. and certain other persons to the jurors unknown,' a sum of money for procuring a person an appointment in the Customs from the Treasury. D., although the money was lodged in his hands, as a banker, to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction. L. Ellenborough said, 'The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think as to D. that it is not. He is charged with conspiring to procure this appointment through the medium of C., of whose existence, for aught that appears, he was utterly ignorant. When a conspiracy is charged, it must be charged truly,' and he directed D.'s acquittal: he had no doubt that the indictment might have been drawn so as to include D. 'Even if the manner in which the money was to be applied was unknown, this might have been stated on the face of the indictment, and then no evidence of its application would have been required.' The other defendants were convicted. *Pollman,* 2 Campb. 233, 1809.

Indictment—other persons] In an indictment for conspiring to defraud D. *and others,* which charged the obtaining of the goods of D. *and others,* as the word *others* last cited must mean partners of D., it must mean that throughout, and evidence of attempts to defraud persons not the partners of D. is inadmissible. *Steel,* 2 Moo. C. C. 246; Carr. & M. 337, 1841. A. was indicted for conspiring with Y. and Z. and 'other persons' unknown; the only evidence was against A., Y., and Z., and the jury found that A. conspired either with Y. or Z., but they did not know which; Y. and Z. were then acquitted; it was held that A. must be acquitted, for 'other persons' could not mean the co-defendants. *Thompson,* above.

Where a count charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding was held bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. *O'Connell* v. *R.*

On a count against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that four of them are guilty of conspiring to effect some, but otherwise not guilty, is bad in law and repugnant: inasmuch as the finding that the three were guilty was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy, whereas by the same finding it appears that the other five were guilty of conspiring to effect only some of the objects. *Ib.*

A count charging defendants with conspiring to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitutions of the realm, is bad; first, because 'intimidation' is not a technical word, having a necessary meaning in a bad sense; and secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. *Ib.* Cf. *Manning,* above, which turned on this case.

A mother and daughter were indicted for conspiring with G. to defraud various tradesmen. G. obtained goods on credit, always on the suggestion of defendants, never intending, as they knew, to pay for them, and sold them to them for much less than the value. They gave him a reference when necessary. G., who could not be indicted for larceny, was the chief witness against them; the case against the mother was withdrawn, but the other woman was found guilty, with the concurrence of Bramwell L.J. and Denman J. If, said the former, she was not guilty of conspiracy, she was not guilty in law. *Orman,* 14 Cox C. C. 381, 1880.

Railway officials were indicted in one count for conspiring with the other defendants, eight in all, to steal and sell to the latter used but uncancelled tickets; both sellers and buyers were rightly indicted together, and a verdict that some did and some did not conspire is not upon the face of it bad for repugnance. *Quinn, &c.,* 19 Cox C. C. 79, 1898.

Spouses] See *Married Women.*

Particulars] Where the conspiracy was charged with 'divers other

persons,' Walton J. made an order for the name[s] to be given forthwith: *Perrin, &c.*, 72 J. P. 144; 24 T. L. R. 487, 1908.

Where the counts were framed in a general form, the prosecutor was ordered to furnish defendants with a particular of the charges, and the particular was to give the same information to them that would be given by a special count, specifying the pretences. But the judge refused to compel the prosecutor to state therein the specific acts with which they were charged, and the times and places of those acts. *Hamilton,* 7 C. & P. 448, 1836. See further *Particulars,* and cf. under *Embezzlement.*

Venue] The *gist* of the offence being the conspiring together, and not the act done in pursuance thereof, the venue in principle ought to be laid in the county in which the conspiracy took place, and not where, in the result, it was put into execution. *Best,* 1705; 1 Russ. Cri. 178; and see *Kohn.* But it was said that 'there seems no reason why the crime of conspiracy, amounting only to a misdemeanour, may not be tried wherever one distinct overt act of conspiracy is in fact committed, as well as the crime of high treason, in compassing and imagining the death of the king, or in conspiring to levy war.' *Brisac,* 4 East, 164, 1803: K. B. So where the conspiracy, as against all the defendants, was proved from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it in different counties, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of them in the county where the trial was had, though no proof against all was offered in that county, and, indeed, the acts of some of the individuals were wholly confined to other counties. *Bowes,* 1787, cited in *Brisac.*

In *Meany,* treason-felony, Ir. R. 1 Ch. 500; 10 Cox C. C. 506, 1867: C. C. R., the venue was 'the county of the city of Dublin,' and the trial was there; no overt act was done by defendant therein, he in fact not being in the country at the time of any of the overt acts laid being done; they were proved to be done within the venue by members of a conspiracy, not named in the indictment, in America and Ireland, of whom he, being a British subject, was an active one in America at all material times; seven of eleven judges held that there was jurisdiction to try in that venue, as the other defendants' acts were his acts.

Conspiring to murder] By 24-5 V. 100, 4: 'All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her Majesty or not, and whether he be within the queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the queen's dominions or not, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude for any term not more than ten years.'

'He' here always refers to the person aimed at, *not* the criminal, though grammatically where the word occurs the third and fourth times it might refer to the conspirer, &c. But this s. does not claim —and could not (see under *Jurisdiction*)—absolutely universal jurisdiction for English and Irish courts—except over British subjects. In *Bigamy* and *Murder* the point is carefully provided for. *Greaves* on the Crim. Law Acts (1861), p. 19, says on this s., pointing out that *any one* in England conspiring to murder a *foreigner abroad* always

was liable at common law: 'having with no small care examined all the authorities . . . I may be pardoned for saying that it is perfectly clear to me that the killing of any person anywhere in the world, whether on land or sea, under such circumstances that if the killing had been in England it would have amounted to the crime of murder has ever been murder in contemplation of the law of England* . . . wherever a murder has taken place on land abroad the Court of the Constable and Marshal had jurisdiction to try it according to the civil law . . . and did try such offences from the earliest times.'

He clearly means that the *offender abroad* is a British subject (or, we may take it, in conspiracy to murder, a *foreigner* on British territory).

Conspiracy is within the Vexatious Indictments A., and is in some cases triable at Q. S.

Conspiracy to 'pirate' music] This is indictable, though to infringe a copyright is not criminal: *Willetts, &c.*, 70 J. P. 127, 1906. But the 'piracy' is not larceny at common law: *per* Bosanquet C.-Sjt., 72 J. P. 104, 1907.

* This may well be so: *e.g.*, an English Court might accept a conviction for murder by a French Court as proof that a murder had been committed in France, but it could not *try a Frenchman* or other *foreigner* for it.

CONSPIRACIES IN RESTRAINT OF TRADE.

Conspiracies in restraint of trade are dealt with partly by the common law and partly by statutes. Stated broadly—at common law all combinations to effect alterations in the rate of wages were illegal conspiracies, but practically this has been abolished by the Trade Union code, viz. 34-5 V. 31; 39-40 V. 22; 6 E. 7, 47, the Trade Disputes A.; 2-3 G. 5, 30—the four together being the Trade Union Acts; and 38-9 V. 86, Conspiracy and Protection of Property A. But it is only in respect of 'trade disputes,' defined 6 E. 7, 47, 5 (3), that the common law of restraint of trade has been abrogated; see 39-40 V. 22, 16. 'Disturbance of Markets,' as in *De Berenger's*, better known as *Cochrane's case*—a 'conspiracy . . . by false rumours to raise the price of the public funds and securities'—though, in effect, due to the common law doctrine, has not been affected; nor the case of *Eccles*, 1783. Historically the principle has been almost entirely developed in respect of the wage-earning classes. The first Act of the code just mentioned practically overruled all the cases on the combination of workmen up to 1871, and it does not seem, therefore, worth while to reproduce them here. The Act of 1906 only affects criminal law incidentally, by amending the 1875 Act. See, generally, Criminal Conspiracies, by R. S. (afterwards Mr. Justice) Wright (1873).

Contracts] The *obiter dictum* that 'the parties to a contract in restraint of trade would be indictable' is clearly wrong: *per* Halsbury C., *Mogul, &c. Co.* v. *McGregor, &c.*, 1892, A. C. 39; and L. Bramwell, *ib.* 46.

Statutes—trade dispute] 6 E. 7, 47, 5, 3, runs: 'In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and workmen, and between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. . . .'

Strikes] By 38-9 V. 86, 3: 'An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute . . . shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.' The omitted words are, 'between employers and workmen'; by s. 5 (3) of 6 E. 7, 47 (s. 1 of which inserts here a paragraph on *actions*). S. 3 continues:

'Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of parliament.' See *e.g.* 14-15 V. 100, 29.

'Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the sovereign.

A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable, under the statute making the offence punishable, to be imprisoned either absolutely or at the discretion of the court as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.'

This s. 'distinctly legalises strikes in the broadest terms': *per* L. Coleridge C.J., *Gibson* v. *Lawson, Connor* v. *Kent, Curran* v. *Treleaven,* 1891, 2 Q. B. at 558; 55 J. P. 485; 17 Cox C. C. 354.

S. 4: 'Where a person employed by a municipal authority or by any company or contractor upon whom is imposed by Act of parliament the duty, or who have [*sic*] otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part, wholly or to a great extent of their supply of gas or water, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds or to be imprisoned for a term not exceeding three months, with or without hard labour.

Every such municipal authority, company, or contractor, as is mentioned in this section shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority or company or contractor, a printed copy of this section in some conspicuous place where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable dispatch.

If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notice as aforesaid, they or he shall incur on summary conviction a penalty not exceeding five pounds for every day during which such default continues, and every person who unlawfully injures, defaces, or covers up any notice so posted up as aforesaid in pursuance of this Act, shall be liable on summary conviction to a penalty not exceeding forty shillings.'

S. 5: 'Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.'

For s. 6, see *Apprentices.*

'*Rattening*'] S. 7: 'Every person who, with a view to compel any other person, to abstain from doing or, to do any act which such other person has a legal right to do or abstain from doing, wrongfully or without legal authority:—

Intimidation] (1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or,

(2) Persistently follows such other person about from place to place; or,

(3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,

(4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,

(5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.'

The rest of the s. is repealed by 6 E. 7, 47, 2 (2); s. 2 (1) of which substitutes for it:

'It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.'

'Such other' means *any other: per* the Court of Appeal, *Lyons* v. *Wilkins,* 1899, 1 Ch. at 268; its meaning is to be sought in the first paragraph of this s.

This s. is not confined to trade disputes: *per* Chitty L.J., *Lyons* v. *Wilkins;* it would embrace the case of besetting a man's house with a view to compel him not to receive guests or visitors. It is immaterial whether the person 'beset' is an employee or not. *Farmer* v. *Wilson,* 19 Cox C. C. 502; 69 L. J. K. B. 496; 64 J. P. 486, 1900.

To charges under sub-ss. 2 and 4 of this s. (7) the defence was sub-s. 1 of 6 E. 7, 47, 2, above: Palles C.B. said that a 'mere attending' is 'more temporary than 'watching'''; defendants had followed in procession a shopkeeper who had dismissed one of them; some waited outside his house; it was left to the jury to say with what object they 'watched'; if it was to compel the employer to take back the employee they ought to convict. *Wall,* 21 Cox C. C. 401, 1907.

Where the secretary of a trade union gave notice to an employer that unless the non-unionists were discharged, the unionists would strike, but no violence or threat of any sort was used, though the non-unionists had good reason to believe that they would get no other employment if discharged, and the employer had reasonable ground for expecting that violence would be used and that great injury from the strike would result to him, so that he discharged the non-unionists, it was held by the Q. B., five judges, that as there was no threat of violence, there was no intimidation within this s., and that the mere fact of the employer reasonably apprehending injury did not make the notice indictable nor criminal (nor actionable); probably intimida-

tion must be limited to threats of personal violence, as in *McKeevit,* 1890, unreported, *per* Cave J. (So J.P. report, summarising *in one Gibson* v. *Lawson,* and the other two cases, above.)

Where there was intimidation within this s. and a 'blackleg' was assaulted by the throwing of eggs, though this was proved against two only, the others in their company and acting in concert were properly convicted. *Young, &c.* v. *Peck,* 23 Cox C. C. 270, 1912: K. B. D.; as there was likely to be a riot the police could prosecute as well as the man assaulted. In s. 19 of the Criminal Law and Procedure (Ir.) A. 1887, 'intimidation' 'includes any words or acts intended and calculated to put any person in fear of any injury or danger to himself or to any member of his family or to any person in his employment or in fear of any injury to or loss of property, business, employment, or means of living.' The expression in s. 2 (2) of that A. 'intimidation *to* or *towards*' is contrasted with the wording of s. 7 (1), above, by L. O'Brien C.J. in *M'Carthy* (or *Lanktree* v. *M'Carthy*), 1903, 2 Ir. R. 146: K. B. D.

Indictment, &c.] If the allegation of offence follows the statute an indictment is not bad for omitting 'being an act . . . to do': *Hulme,* 9 Cr. A. R. 77, 1913, anticipating Rule 5 (2) of the Indictments A. Cf. *J. Stephenson,* 1912.

In a conviction under this s. it is necessary to specify the acts which the defendant intended to compel the prosecutor to do or abstain from doing. *McKenzie,* 1892, 2 Q. B. 519; 61 L. J. M. C. 181; 17 Cox C. C. 542, where the conviction did not follow the terms either of the s. or of the summons; the court thought the defect one of substance and not merely of form. 'The gist . . . of this offence is not the following . . . in a disorderly manner, but such a following as to prevent a person doing such acts as he has a right to do.' But 'a commitment under this s. for 'following in a disorderly manner with a view to compel one T. to abstain from working as a shoe finisher in the employment of one C. D., a shoe manufacturer, carrying on business in the parish of E.' is a good one, inasmuch as it contains a sufficient description of a specified act from which the complainant was compelled to abstain.' *Ex parte Wilkins,* 64 L. J. M. C. 221; 18 Cox C. C. 161, 1895. Where a conviction under this s. for injuring property did not specify what property, it was quashed. *Smith* v. *Moody,* 1903, 1 K. B. 56; 20 Cox C. C. 369; 19 T. L. R. 7; 72 L. J. K. B. 43; 67 J. P. 69. 'Used violence to or intimidated' is bad for duplicity, as the words express two offences. *Edmondes,* 59 J. P. 776, 1895.

Picketing] A picket who silently follows a person whom he wishes to go on strike may be, even if he is alone, guilty of an offence under sub-s. 5. *Smith* v. *Thomasson,* 16 Cox C. C. 740; 54 J. P. 569, 1890; *a fortiori* if there is a crowd of disorderly people. If language is used which may or may not be meant to intimidate, it is for the jury to say: *A. E. Baker,* 7 Cr. A. R. 89, 1911.

Trial by jury] By s. 9, where imprisonment, or a penalty of more than 20*l.* may be imposed, the accused may elect to have the case treated as indictable, in which case the justices *must* so treat it (and cannot fine): *Mitchell,* 23 Cox C. C. 273, 1912: K. B. D.

By s. 15, 'the word 'maliciously' used in reference to any offence under this Act [*e.g.* in ss. 4, 5, 9], shall be construed in the same manner as it is required by' 24-5 V. 97, 58.

S. 16: 'Nothing in this Act shall apply to seamen or to apprentices to the sea service'; *i.e.* the penalties and punishments prescribed by this Act do not apply to seamen; it is not meant that any one may commit those offences on seamen: *per* Day J., *Kennedy* v. *Cowie*, 1891, 1 Q. B. 771; 60 L. J. M. C. 170; 17 Cox C. C. 320. Seamen under the Merchant Shipping Acts (1894—1916), are persons actually employed or engaged on board ship. Persons whose calling or occupation is that of seamen, but who are not so employed or engaged in fact are not exempted by this s. *Lynch*, 1898, 1 Q. B. 61; 67 L. J. Q. B. 59; 18 Cox C. C. 677: C. C. R.

CONSTABLE, OFFENCES I. AGAINST.

See under *Apprehension.*

II. BY.

See under *Larceny* and *Office-holder,* and in Index.

CONTAGIOUS AND INFECTIOUS DISEASE, DISSEMINATING.

See under *Nuisance.*

CONTRACT, CRIMINAL BREACH OF.

See under *Conspiracies in Restraint, &c.*

CONTRACT, MAKING ILLEGAL.

See *Employers.*

CONVERSION.

See ss. 20-1 of the Larceny A. 1916.

CONVEYANCE OF PROPERTY, FRAUDULENT.

By 13 El. 5, 1, 'feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels' made to *defeat creditors* are, ss. 2, 3, void, 'and also [the offender] being thereof lawfully convicted shall suffer imprisonment for one half-year without bail or mainprise.' The only case on indictment known is *W. Smith and anor.*, 6 Cox C. C. 31, 1852: feigned conveyance to defeat judgment for damages; Maule J. held that there might be indictment before action brought, and that the specific facts making the fraud need not be averred. The conspiracy alleged against *Cox and Railton* was of the same nature as in *W. Smith.*

CONVICTS, OFFENCES BY.

See Index.

CORONERS, OFFENCES BY.

By 50-1 V. 71, 8 (2): 'A coroner who is guilty of extortion or of corruption or of wilful neglect of his duty, or of misbehaviour in the discharge of his duty, shall be guilty of a misdemeanour, and in addition to any other punishment may, unless his office is annexed to any other office, be adjudged by the court before whom he is so convicted, to be removed from his office. . . .' By (1) the Lord Chancellor may 'remove' him 'for inability or misbehaviour in the discharge of his duty.'

By s. 9, an offence against the A. in transmitting the proper documents in cases of homicide to the court of trial may be *summarily* punished by that court by a fine. By s. 10, neither he nor his partner may act as solicitor in a charge on his inquest: penalty, liability to s. 8 (2) above, *and* a (maximum) fine of 50*l.* by the court of trial. By s. 17, he may take for remuneration as coroner nothing not authorised by statute.

Triable at Q. S. See also under *Office-holders* and *Dead Bodies.*

CORPORAL PUNISHMENT, CRIMINAL.

See *Chastisement.*

CORPORATION, OFFENCES BY.

See Index.

CORROSIVES, USE OF.

See *Explosives.*

CORRUPT PRACTICES.

See under *Bribery, Elections* and *False Personation.*

CORRUPTION.

The Prevention of Corruption A. 1906, 6 E. 7, 34, runs:—

1.—(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal; he shall be guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

(2) For the purposes of this Act the expression 'consideration' includes valuable consideration of any kind; the expression 'agent' includes any person employed by or acting for another; and the expression 'principal' includes an employer.

(3) A person serving under the Crown or under any corporation or any municipal, borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.

2.—(1) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

(2) The Vexatious Indictments Act, 1859, as amended by any subsequent enactment, shall apply to offences under this Act as if they were included among the offences mentioned in section one of that Act.

(3) Every information for any offence under this Act shall be on oath.

(5) A court of quarter sessions shall not have jurisdiction to inquire of, hear, and determine prosecutions on indictments for offences under this Act.

(6) Any person aggrieved by a summary conviction under this Act may appeal to a court of quarter sesssions.

This unrestricted right, independent of sentence, is rare; another instance is 50-1 V. 28, Merchandise Marks A. 2 (5).

Two men bribed servants of a rival company to their own to disclose a secret of manufacturing silica and the names of persons supplying moulds; the C. C. A. declined to reduce the sentences of four (concurrent) terms of six and four months' imp. w. h. l. *Huessener* and *Schroeder*, 6 Cr. A. R. 173, 1911.

Prevention of Corruption A. 1916, 6-7 *G.* 5, 64] By s. 1, the maximum sentence on misdemeanours indicted under 52-3 V. 69 or 6 E. 7, 34, 'where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with His Majesty or any Government Department or any public body or a sub-contract to execute any work comprised in such a contract' shall be seven, and the minimum three years' p. s.: 'Provided that nothing in this section shall prevent the infliction in addition to penal servitude of such punishment as under' these Acts 'may be inflicted in addition to imprisonment or prevent the infliction in lieu of penal servitude of any punishment which may be inflicted under' them.

By s. 2, if 'in any proceedings' under those Acts 'it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body, the money, gift or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.'

By s. 4 (1), 'public body' in this A. and in 52-3 V. 69 includes 'local and public authorities of all descriptions.'

By (3) 'a person serving under any such public body is an agent within' 6 E. 7, 34, and 'agent' and 'consideration' here mean what they do in that A. as here amended.

See title *Information.*

COUNTERFEITING COIN.

See *Coining.*

CREDIT—OBTAINING, BY FRAUD.

The three heads of s. 156 of the Bankruptcy A. 1914, reproduce verbally s. 13 of the Debtors A. 1869 (except that in *b* 'delivery' is omitted between 'gift' and 'transfer'), which s. is general and not confined to bankrupts, &c.; maximum sentence, one year's imp. w. h. l. is the same under both. It follows that the bankruptcy cases on this s. may be usefully consulted.

Obtaining credit] The expression 'credit' was given a wide meaning by the C. for C. C. R., and it has been held that it does not matter how short the period of credit may be, and that if a man parts with his goods 'without insisting on prepayment or interchangeable payment,' he gives credit. Where, therefore, defendant making no verbal representation of his ability to pay, but being in fact penniless, ordered and consumed a meal at a restaurant, it was held that he was rightly convicted of obtaining credit by fraud under s. 13 of 32-3 V. 62, the Debtors A., or (*b*) of s. 156 of 4-5 G. 5, 59 (but not of larceny nor of obtaining by false pretences, which see). *William Jones*, 1898, 1 Q. B. 118; 19 Cox C. C. 87; 67 L. J. Q. B. 41; 77 L. T. 503: C. C. R.

Where a judgment had been recovered against a person not a bankrupt, and on the very next night he removed his property from his house in order to defeat the creditor who had obtained the judgment, it was held that he could be brought within (*c*) or (3); but, inasmuch as the intent charged was to defraud his 'creditors,' and there was no proof of such intent except in the case of the judgment creditor, nor that there were other creditors, c. q. *Rowlands*, 8 Q. B. D. 530; 15 Cox C. C. 31; L. J. M. C. 51, 1882: C. C. R.

A plaintiff in an action for unliquidated damages is not a creditor of the defendant within 4-5 G. 5, 59, 156 *b*, until judgment is recovered and signed: *Hopkins*, 1896, 1 Q. B. 652; 65 L. J. M. C. 125: C. C. R.

In *Benson*, 1908, which see, L. Alverstone C.J. said that the words 'any other fraud' (in 1 or *a*) 'have for many years been treated as constituting a different kind of offence from that of false pretences,' pointing out that in *Jones*, above,* there was no false pretence: c. q. because a count had been so amended as to substitute one charge for another; 'the fact that the evidence may be the same to establish both cases is immaterial.' But see now s. 5 (2) of Ind. A. 1915.

'Other' implies that the 'false pretences' must be fraudulent: *Muirhead.*

When defendant obtained a ring without payment on the understanding that he would return it on a stated date and purchase a more valuable one, but he did not do so, but pawned the ring, the C. C. A. thought there might be a question whether 'credit' was obtained by fraud, but their powers enabled them to dismiss the appeal: *Armitage,*

* According to 21 Cox C. C. 634, the case was *James*, 1871—'a material part of an indictment cannot be amended.'

3 Cr. A. R. 80, 1909. The intent to defraud must be proved and the jury must be directed on it: *Brownlow.*

'If a man makes statements of fact which he knows to be untrue, and makes them for the purpose of inducing persons to deposit with him money which he knows they would not deposit but for their belief in the truth of his statements, and if he intends to use the money so obtained for purposes different from those for which he knows the depositors understand from his statements that he intends to use it—then, although he may intend to repay the money if he can, and although he may honestly believe and may even have good reason to believe that he will be able to repay it, he has an intent to defraud' under this s. (1) or (*a*). *Carpenter,* 22 Cox C. C. 618; 76 J. P. 158, 1911: *per* Channell J.

If a man buys without any intention to pay that is 'fraud other than false pretences': *H. Thompson,* 5 Cr. A. R. 9, 1910. That charge is not necessarily sustained by proof of obtaining by a false pretence, though a count, charging a conspiracy to obtain goods on credit fraudulently, might be. *A. Steel,* 5 Cr. A. R. 289, 1910; the credit alleged must be obtained by the defendant: *ib.*, where it turned out that the fraudulent representation was not made by defendant, but by a person with whom he was in collusion. When defendant sold horses for cash which he promised to refund within a limited time if they were not satisfactory, but did not in fact repay, it was held that this was not obtaining credit (but money) by fraud, and a conviction for the former was quashed: *G. Green,* 9 Cr. A. R. 127, 1913.

This charge is frequently combined with that of false pretences and of obtaining a chattel, &c. by fraud or false pretences; see *Norman,* 1914, and *D. Johnston,* below.

Indictment] Under s. 13 (1) of the Debtors A. it was held sufficient to charge the having obtained credit '*under* false pretences,' or 'by means of other fraud,' without setting out the false pretences by means of which the debt or liability was incurred; '*under*' is here used advisedly instead of 'by.' *Pierce,* 56 L. J. M. C. 85; 16 Cox C. C. 213, 1887: C. C. R., following *Watkinson,* 12 Cox C. C. 271, 1872: C. C. R., and dissenting from *Bell,* 12 Cox C. C. 37, 1871.

Evidence] The admissibility of *Similar Acts* is discussed generally under that title; see *Wyatt,* 1904, which 'covered' *Walford,* 71 J. P. 215, 1907: C. C. R.—'the same kind of practice was admissible when only separated by a short interval of time' from that charged: *per* L. Alverstone C.J.

It was held in *Richman* that on a trial under this s. and for frauds in bankruptcy persons who supplied goods to the bankrupt (and who, the prosecution suggested, had been defrauded by him) ought not to have been asked whether had they known that he had disposed of his place of business they would have supplied them.

When a pretence of being financially strong is alleged, defendant's banking account may be admitted: *Fryer.*

Sentence] When the same act was variously charged as obtaining goods by false pretences and credit by fraud, and the sentence for the former was three years' p. s., and for the latter twelve months' imp. w. h. l. (concurrent), the former was quashed, the C. C. A. saying that when they were in doubt they took the view that the jury found the *lesser* offence: *D. Johnston,* 1913.

CREMATION.

See under *Dead Bodies.*

CROPS, OFFENCES RELATING TO.

See under *Arson.*

CRUELTY.

See under *Child, Lunatics,* and *Servants.*

CUSTOMS (H.M.'s), OFFENCES AGAINST.

See *Smuggling.*

DAMAGE, CRIMINAL.

See *Injury.*

DEAD HUMAN BODIES—OFFENCES RELATING TO.

Disposal] Any one whose duty it is to dispose decently of a dead human body is guilty of a nuisance if, having the means, he does not do so; if he have not, he is not bound to incur a debt, *e.g.* to the poor law authorities for burial: *Vann,* 2 Den. 325, 21 L. J. M. C. 20; 5 Cox C. C. 379, 1851: c. q. At common law there is a *primâ facie* obligation on 'the individual under whose roof a poor person dies' to bury, &c. decently: *per* Denman C.J., *Stewart,* 12 A. & E. 773, 1840.

Although larceny cannot be committed of a dead body (East P. C. 652, citing 12 Co. 113; see also 3 Inst. 203), no one having any right of property therein, yet it is an offence to remove a body without lawful authority—punishable with fine and imprisonment as a misdemeanour. An indictment charged, *inter alia,* that defendant, a certain dead body of a person unknown . . . 'wilfully, unlawfully, and indecently' did take and carry away, with intent to sell and dispose of the same for gain and profit, &c. &c. He had taken the body from some burial-ground, though from which was uncertain, and was found guilty on this count; it was considered by many judges that this was so clearly indictable that no case was reserved. *Gilles,* 2 Russ. Cri. 1862; R. & R. 366 *n.,* 1820. So to take up a buried body, even for the purpose of dissection, is indictable. *Lynn,* 2 T. R. 733; 1 Lea. 497, 1788; in *Cundick,* Dowl. & Ry. N. P. C. 13, 1822, an undertaker employed by a gaoler to bury a convict executed was convicted of selling the body to a surgeon to be dissected though there was no evidence of a sale or of the surgeon's intention. And it makes no difference what are the motives of the removal if it is without lawful authority. See *Sharpe,* D. & B. C. C. 160; 26 L. J. M. C. 43; 7 Cox C. C. 214, 1857, where defendant acted from motives of filial affection. He had committed a trespass against the owner of the soil; but there seems to be no doubt that even without trespass the offence is still complete.

The burial of the dead is the duty of every parochial priest and minister, and if he neglect or refuse to perform the office, he may, by the express words of canon 68, be suspended by the ordinary for three months; 'and if any temporal inconvenience arise, as a nuisance, from the neglect' to inter 'he is punishable also by the temporal courts by indictment or information.' *Andrews* v. *Cawthorne,* Willes, at 538 *n.* 1744, citing *Taylor,* 1721. But see now the Burials A. 43-4 V. 41, 1, amended 63-4 V. 15, 8. It is a misdemeanour to bury in a ground closed by law: 16-7 V. 134, 3; also summarily justiciable: 18-9 V. 128, 2.

Preventing a body from being interred has likewise been considered indictable. Thus a workhouse servant and another person were indicted for such a conspiracy. *Young,* 1788. Digging up a disused burial-ground for building purposes is a misdemeanour at common law, though the human remains are reverently treated. *Jacobson,* 14 Cox C. C. 522, 1880; *a fortiori* when they are used indecently:

Kenyon, 36 L. J. Newsp. 571, 1901, where part of the sentence was binding over in a recognisance to pull down a building. To leave a dead body exposed in a highway is a nuisance at common law, as it is 'calculated to shock and disgust the passers-by and outrage public decency.' *Clark,* 15 Cox C. C. 171, 1883.

For the interment of dead bodies cast on shore, see 48 G. 3, 75, and 49-50 V. 20.

By s. 7 of 2-3 W. 4, 75 (amended 34-5 V. 16): 'It shall be lawful for any executor, or other party, having lawful possession of the body of any deceased person, and not being an undertaker or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless to the knowledge of such executor or other party such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination.' S. 8 provides for the person lawfully in the possession of a dead body directing and permitting anatomical examination, where the deceased shall, during his life, have directed it, 'unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination.' By s. 10, professors of anatomy, and other experts therein described, being duly licensed are not liable to punishment for having in their possession human bodies according to the provisions of the Act. The 18th s. makes offences against the Act misdemeanours, and the punishment imprisonment not exceeding three months, or fine not exceeding fifty pounds.

In *Feist,* D. & B. C. C. 590; 27 L. J. M. C. 164; 8 Cox C. C. 18, 1858, defendant was master of a workhouse, and had lawful possession of the bodies of deceased paupers. He was in the habit of having the semblance of a funeral with a view of preventing the relatives requiring that the bodies should be buried without being subject to anatomical examination, and the jury found that but for that deception the relatives would have required the bodies to be so buried. The bodies, instead of being buried, as was supposed by the relatives, were delivered to a hospital for anatomical purposes—for which the master was paid. He was found guilty of offences at common law in disposing of a body for the purpose of dissection, &c., but the question was reserved whether he was protected by s. 7, above. The C. for C. C. R. held that he was, as the requirement mentioned in that s. had not been actually made. 'It may be,' said Pollock C.B. 'that he prevented the relatives from requiring, &c. . . . but if that was wrong . . . he should have been prosecuted for that wrong. It may be that he was guilty of a conspiracy with the undertaker . . . and if so he should have been prosecuted for that conspiracy. . . . I do not think it a convenient mode of administering the criminal law to impute an offence at common law and then require the defendant to justify his conduct by bringing himself within a particular statute, when in truth his intention was not to infringe the common law at all, but . . . that particular statute. . . . If by acting a lie he prevented the requirement from being made, he should have been prosecuted for that.' Willes J. pointed out that this was an offence specially provided for by

7-8 V. 101, 31. '*Quære* whether an indictment would have lain for causing the funeral service to be performed over the empty coffins?': *Greaves,* in 1 Russ. Cri. 1871 *v.*

Duty of the coroner] To bury a person who has died a violent death, before the coroner has investigated it, is punishable as a misdemeanour, and the coroner ought to be sent for, since he is not otherwise bound *ex officio* to take the inquest. *Clerk,* 1 Salk. 377, 1702; *Anon.,* 7 Mod. 10, 1702. A coroner has jurisdiction to hold and is justified in holding an inquest if he honestly believes that his information warrants it, and it is a misdemeanour to dispose of the body to prevent an inquest. *Stephenson,* 13 Q. B. D. 331; 53 L. J. M. C. 176; 15 Cox C. C. 679, 1884: C. C. R. And 'if a dead body in prison or other place, whereupon an inquest ought to be taken, be interred, or suffered to lie so long that it putrify before the coroner hath viewed it, the gaoler or township shall be amerced.' Hawk. P. C. 2, 9, 23; see 31-2 V. 24, 5, amended 50-1 V. 71, 45. Where the duty of informing the coroner is not specifically imposed by statute, 'it is the duty of those who are about the deceased to give immediate notice to the coroner or his officer or to the nearest officer of police.' *Jervis* on Coroners, p. 6, 6th ed. (1898).

Cremation] Cremation is not illegal at common law unless it amounts to a public nuisance. *Price,* 12 Q. B. D. 247; 53 L. J. M. C. 51; 15 Cox C. C. 389, 1884. Cremation is now regulated by 2 E. 7, 8, of which s. 8 (2) and (3) run: 'Every person who shall wilfully make any false . . . representation or sign or utter any false certificate with a view to procuring the burning of any human remains, shall (in addition to any penalty or liability which he may otherwise incur) be liable to imprisonment with or without hard labour not exceeding two years.

(3) Every person who with intent to conceal the commission or impede the prosecution of any offence procures or attempts to procure the cremation of any body, or with such intent makes any declaration or gives any certificate under this Act, shall be liable to conviction on indictment to penal servitude for a term not exceeding five years.' In *Byers,* 71 J. P. 205, 1907, it was held that this Act applied only to crematoriums and not to simple burning.

By 53 V. 5, 319: 'If the manager of an institution for lunatics, or the person having charge of a single patient, omits to send to the coroner notice of the death of a lunatic within the prescribed time, he shall be guilty of a misdemeanour.' The prescribed time is forty-eight hours from the death. Rules of the Commissioners in Lunacy, June 26, 1895; Rule 27 (1).

For retaining in a dwelling-room the body of a person who has died of an infectious disease, see 53-4 V. 34, 10; for the county of London, see 54-5 V. 76, and amending Acts, under *Nuisance.*

Triable at Q. S.

DEBTORS, FRAUDULENT.

See under *Bankrupts.*

DECEIT, CRIMINAL.

See *False Pretences;* also *Cheating, Fraud, &c.*

DECOYING CHILD.

See *Abduction.*

DEEDS, OFFENCES IN RESPECT OF.

See Index.

DEER—OFFENCES RELATING TO.

'Tame deer are personal property and the subject of larceny at common law. Whether they are tame or not is a matter to be decided upon the facts of each case, but the presumption is in favour of their being so when they are kept in a park for ornament and profit rather than for sport': 15 Halsbury, 262. 'Wild deer are not the subject of larceny at common law': *ib.*

By 24-5 V. 96, 12: 'Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and whosoever having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed, by this or by any former Act of parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping.'

By s. 13: 'Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony.' Conclusion as in s. 12, above.

The word 'deer' in 7-8 G. 4, 29, rpd., includes all ages and both sexes, 'a fawn,' therefore. *Strange,* 1 Cox C. C. 58, 1843. In s. 26, *ib.* 'wherein deer shall be usually kept' meant 'enclosed land' only: *Money,* 2 Russ. Cri. 1328: 1847.

Killing outside 'the forest, chase, &c.,' is a defence under this s., even though the killing was illegal and done by trespassing on land. *Threlkeld* v. *Smith,* 20 Cox C. C. 38, 1901.

Deer-keepers, &c., may seize guns] By s. 16: 'If any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person intrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer, and if any such offender

shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this Act, every such offender shall be guilty of felony.' Conclusion as in s. 12, above. When the demand was not made, under rpd. 16 G. 3, 30, 9, a conviction was bad: *Amey*, R. & R. 500, 1823.

Pulling a deer-keeper to the ground, and holding him there while another person escapes, is not a beating, within 7-8 G. 4, 29, 29, rpd. There must be a beating in the popular sense of the word; proof of a bare legal battery only is insufficient: *Hale*, 2 C. & K. 326, 1846.

Triable at Q. S.

DEFAMATION.

See *Libel*.

DEFECTIVES—OFFENCES I. BY, II. AGAINST.

Classification] See 3-4 G. 5, 28, 1, under *Mental Unsoundness*.

I.

Sentence] By s. 8 (1): 'On the conviction . . . of any person of any criminal offence punishable in the case of an adult with penal servitude or imprisonment, or on a child brought before a court under s. 58 of the Children Act, 1908, being found liable to be sent to an industrial school, the court, if satisfied on medical evidence that he is a defective . . . may either (a) postpone sentence or make an order for committal to an industrial school and direct that a petition be presented to a judicial authority under this Act with a view to obtaining an order that he be sent to an institution or placed under guardianship; or (b) in lieu of passing sentence or making an order for committal to an industrial school, itself make any order which if a petition had been duly presented under this Act the judicial authority might have made, which order shall have the like effect as if it had been made by a judicial authority on a petition under this Act.' Judicial authority is defined by s. 19, and means a justice *so specially appointed* or a county court judge or a police or stipendiary magistrate.

(2) 'The court may act either on the evidence given during the trial or other proceedings, or may call for further medical or other evidence.

(3) Where the court so directs a petition to be presented against a person, it may order him to be detained in an institution for defectives or in a place of safety for such time as is required for the presentation of the petition and the adjudication thereof.

(5) The police authority must provide evidence of such an accused being defective, and must give notice thereof to his parent or guardian.'

II.

By s. 55: 'If any manager, officer, nurse, attendant, servant or other person employed in an institution or certified house or approved home, or any person having charge of a defective, whether by reason of any contract or of any tie of relationship or marriage or otherwise, ill-treats or wilfully neglects the defective, he shall be guilty of a misdemeanour.'

By s. 56: '(1) Any person (a) who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act; or (b) who procures or attempts to procure any woman or girl who is a defective to have unlawful carnal connection, whether within or without the King's dominions with any person or persons; or (c) who causes or encourages the prostitution whether within or without the King's dominions, of any woman or girl who is a defective; or (d) who being the owner or occupier of any premises or having or acting or assisting in the management or control thereof, induces or knowingly suffers any woman or girl who is a defective to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally; or (e) who with intent that any woman or girl who is a defective should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, takes or causes to be taken such woman or girl out of the possession and against the will of her parent or any other person having the lawful care or charge of her; shall be guilty of a misdemeanour and shall be liable upon conviction on indictment to be imprisoned with or without hard labour for any term not exceeding two years, unless he proves that he did not know and had no reason to suspect that the woman or girl was a defective.

(3) Without prejudice and in addition to the provisions of the Criminal Law Amendment Act, 1880, no consent shall be any defence in any proceedings for an indecent assault upon any defective if the accused knew or had reason to suspect that the person in respect of whom the offence was committed was a defective.

(4) No indictment under this section shall be tried at quarter sessions.'

(5) On a trial for rape there may be a verdict of the misdemeanour under (1) (a), above.

(6) This s. is within the schedule and s. 4 of the Crim. Ev. A. 1898.

Sentence] By s. 60 (1), misdemeanours under the A. are punishable on indictment 'by fine or by imprisonment' for two years with hard labour (maximum).

By s. 61 there is an unrestricted right of appeal to Q. S. from the summary jurisdiction.

Obstruction] By s. 54 (1), to obstruct any commissioner or other authority in the exercise of their powers under this A. is a misdemeanour.

DENTISTS

convicted of crime may be removed from the professional register, but not 'on account of a conviction for a political offence out of Her Majesty's dominions, nor . . . for an offence which . . . does not either from the trivial nature of the offence or from the circumstances under which it was committed, disqualify a person for practising dentistry': 41-2 V. 33, 13.

DEPRAVING THE BOOK OF COMMON PRAYER.

See under *Religion*.

DESERTION.

See *Mutiny*.

DICE, GAMING WITH.

See *Gaming*.

DISORDERLY CONDUCT.

See *Riot, Brawling, Affray, &c.*

DISORDERLY HOUSE—KEEPING.

See under *Nuisance*.

DISTURBING PUBLIC WORSHIP.

'To disturb a priest of the Established Church in the performance of divine worship appears to be a misdemeanour at common law': *Parry,* 1686; Tremaine's P. C. 239; 9 Halsb. 477 *t.* And it seems that any disturbance of a congregation assembled according to law would be indictable at common law: Hawk. P. C. 1, 16, 32, and 63, 24-33; *Anon.,* 1 Keb. 491, 1664, more particularly if arising out of any previous conspiracy for the purpose.

An early statute still in force is 1 Mar., st. 2, c. 3.

By 52 G. 3, 155, 12: 'If any person or persons . . . do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorised by this Act, or any former Act or Acts of parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties, to be bound by recognisances in the penal sum of fifty pounds, to answer for such offence, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said quarter sessions, shall suffer the pain and penalty of forty pounds.'

By 9-10 V. 59, 4, 'all laws now in force' to protect religious meetings are to protect all lawful meetings for religious purposes whatsoever 'and the persons there assembled.' The jury must be directed whether defendant acted 'wilfully . . . contemptuously': *Dinnick.*

On an indictment found at the sessions under the Toleration Act, 1 W. & M. 18, 15 (otherwise 18), for disturbing a dissenting congregation, it was held that, upon conviction, each defendant was liable to the penalty of twenty pounds imposed by that statute. *Hube,* 1792.

This offence may be tried at the sessions, or in the K. B., or at the assizes, if removed by *certiorari* from the sessions. *Hube; Wadley,* 4 M. & S. 508, 1815, under 52 G. 3, 155, 12, above.

Now, however, 23-4 V. 32, which abolishes the jurisdiction of the ecclesiastical courts in cases of brawling, provides for the recovery in a summary manner of a penalty of not more than five pounds for any disturbance in any recognised place of worship whatsoever, whether during the celebration of divine service or not. The A. applies to clergymen as well as to laymen. *Vallancey* v. *Fletcher,* 1897, 1 Q. B. 265; 66 L. J. Q. B. 297; 18 Cox C. C. 572; *Kensit* v. *Dean, &c., of St. Paul's,* 20 Cox C. C. 829, 1905.

See also 24-5 V. 100, 36.

'All affrays in a church or church-yard are esteemed very heinous offences . . . therefore mere quarrelsome words . . . are penal here': 4 Black. Comm. 146.

DOCKS AND DOCKYARDS—OFFENCES RELATING TO.

See Index.

DOCUMENTS, LARCENY, &c. OF.

See Index and *Deeds.*

DOGS—OFFENCES RELATING TO.

Stealing dogs] By 6-7 G. 5, 50, 5: 'Every person who (1) steals any dog after a previous summary conviction of any such offence; or (2) unlawfully has in his possession or on his premises any stolen dog or the skin thereof, knowing such dog or skin to have been stolen, after a previous summary conviction of any such offence; or (3) corruptly takes any money or reward directly or indirectly under pretence or upon account of aiding any person to recover any stolen dog or any dog which is in the possession of any person not being the owner thereof, shall be guilty of a misdemeanour': maximum sentence, eighteen months' imp. w. h. l.

A dog is not a 'chattel' within rpd. 7-8 G. 4, 29, 53 (false pretences). *Robinson,* 1 Bell C. C. 34; 28 L. J. M. C. 58; 8 Cox C. C. 115; 5 Jur. (N. S.) 203; 7 W. R. 203, 1859; dogs never were the subject of larceny at common law.

See also under *Cattle.*

Triable at Q. S.

DRILLING, UNLAWFUL.

See *Unlawful Assembly.*

DRIVING, FURIOUS, &c.

See *Furious Driving.*

DRUGS, OFFENCES BY MEANS OF.

See under *Abortion* and *Poisoning.*

DRUNKENNESS

may be now said to be a crime (and, possibly, even indictable under 35-6 V. 94, 12, as amended 2 E. 7, 28, 8: *per* L. Alverstone and Phillimore J., *C. J. Briggs*, 1 Cr. A. R. at 208 and 192, 1908) in view of the powers over *Habitual Drunkards* in the Inebriates Acts and the Children A. 1908 (s. 26). See further that title under *Judgment*.

The Inebriates Act, 1898, 61 & 62 Vict. c. 60.

Criminal Habitual Drunkards.

I.—(1.) Where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence, and the offender admits that he is or is found by the jury to be a habitual drunkard, the court may, in addition to or in substitution for any other sentence, order that he be detained for a term not exceeding three years, in any state inebriate reformatory, or in any certified inebriate reformatory, the managers of which are willing to receive him.

(2.) In the proceedings on the indictment, the offender shall, in the first instance, be arraigned on so much only of the indictment as charges the said offence, and if on arraignment he pleads guilty, or is found guilty by the jury, the jury shall, unless the offender admits that he is a habitual drunkard, be charged to inquire whether he is a habitual drunkard, and in that case it shall not be necessary to swear the jury again.

Provided that, unless evidence that the offender is a habitual drunkard has been given before he is committed for trial, not less than seven days' notice shall be given to the proper officer of the court by which the offender is to be tried, and to the offender that it is intended to charge habitual drunkenness in the indictment.

II.—(1.) Any person who commits any of the offences mentioned in the first schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable upon conviction on indictment, or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory, the managers of which are willing to receive him.

By 62-3 V. 35, 1, the expenses of any prosecution or indictment under s. 2 shall be payable 'out of local funds' under 8 E. 7, 15, by s. 9 (6) of the latter.

See further, *Irresponsibility for Crime*.

DUELLING

See *Affray* and Index.

DURESS, CRIMINAL.

See *Imprisonment; Huggins;* and for distinction from *Robbery,* that title and *Knewland.*

DWELLING-HOUSE, LARCENY, &c. IN.

See *Tenants, &c.*

For *Housebreaking,* see under *Burglary.*

By s. 46 (2) of the Larceny A. 1916, ''dwelling-house' does not include a building although within the same curtilage with any dwelling-house and occupied therewith, unless there is a communication between such building and dwelling-house, either immediate or by means of a covered or enclosed passage leading from one to the other.'

Larceny in dwelling-houses] By s. 13 of 6-7 G. 5, 50: 'Every person who steals in any dwelling-house any chattel, money, or valuable security, shall—(a) if the value of the property stolen amounts to five pounds; or (b) if he by any menace or threat puts any person being in such dwelling-house in bodily fear; be guilty of felony, and on conviction thereof liable to penal servitude for any term not exceeding fourteen years.'

Triable at Q. S.

Suspects] See that title.

Stealing in a dwelling-house] was held not to have been committed in *Campbell,* Lea. 564; East P. C. 644, 1792, where the landlady of the house gave a lodger a bank-note to get changed, which he stole, for 'the property stolen must be such as is usually under the protection of the house,' and 'a taking from the person,' *i.e.* from personal care and custody, is not within 12 Ann. 7, rpd. The distinction is now of little importance; it was for the court: *Thomas,* below; 2 Russ. Cri. 1115, who thinks that the rpd. statutes applied only 'to property deposited in a house . . . for safe custody.' So, where defendant obtained money from the prosecutor, in the dwelling-house of

another, by *ring-dropping*, this also was held not to be within that A. *Owen*, East P. C. 645; Lea. 572, 1792. The same point was ruled in subsequent cases.

On the other hand, it was held that stealing things left in a house to the value of 5*l.* by the *owner* of the house was within rpd. 7-8 G. 4, 29, s. 12. *Bowden*, 2 Moo. C. C. 285, 1843; but according to East, *ib.* the reverse was held under 12 Ann. 7.

Where a lodger invited the prosecutor to take part of his bed, without the knowledge of his landlord, and stole his watch from the bed-head, it was held by a majority that he was properly convicted of stealing in a dwelling-house. *Taylor*, R. & R. 418, 1825, under 12 Ann. 7, 7. Where goods were left by mistake at a house in which defendant lodged, and were placed in his room, and carried away by him, they were held to be within the protection of the house. *Carroll*, 1 Moo. C. C. 89, 1825. If a man on going to bed put his clothes and money by his bedside, these are under the protection of the dwelling-house, and not of the person. *Thomas*, Car. Sup. 295, 1827. Where a man went to bed, having put his watch in his hat on the table or by the bedside, and his companion stole the watch while the man was asleep, Parke B. and Patteson J., after referring to *Taylor*, above, were of opinion that as he was asleep the property was sufficiently under the protection of the house to bring it within the s. *Hamilton*, 8 C. & P. 49, 1837. Perhaps had the prosecutor been awake in *Taylor's case*, the property was sufficiently within his *personal* control to make the indictment under that s. unsustainable. 2 Russ. Cri. 1115. But where a person put money *under his pillow*, and it was stolen whilst he was asleep, this was held not within 12 Ann. 7, above. *Anon.*, 2 Stark. Crim. Pl. 467, 1812; *Challenor*, 1824, Dickin. Quar. Sess. 245, 5th ed.

Indictment] Where the house belonged to the husband, but the things stolen were his wife's jewellery, a conviction on an indictment laying the property in him was quashed; an amendment, it was held emphatically, should not have been refused at the trial. *Murray*, 1906, 2 K. B. 385; 75 L. J. K. B. 593; 70 J. P. 295; 22 T. L. R. 596; 21 Cox C. C. 250: C. C. R.

'The Married Women's Property A. 1882, puts the wife in the position of an independent person.' See now Indictment Rule 6 (1).

Evidence] Possession of stolen watches, &c., three months after the breaking in is no evidence of *that* crime: *J. Bailey*, 1917: c. q.

Value of the goods stolen] The value of the property must be proved and found, and there should be a direction on it; when there was not, sentence was reduced: *H. Harris*, 12 Cr. A. R. 54, 1916.

It must appear not only that they were of the value of 5*l.*, but likewise that goods to that value were stolen 'at one and the same time,' for a number of distinct larcenies cannot be added together. *Petrie*, Lea. 294, 1784; *Farley*, East P. C. 740, 1786. But if the property of several persons lying together in one bundle or chest, or even in one house, be stolen together at one time, the value of all may be put together, for it is one entire felony. East P. C. 740. And where, under 12 Anne, above, property stolen at one time was worth 40*s.*, but a part of it only, not amounting to 40*s.*, was found on defendant, the court left it to the jury to say whether he had not stolen the remainder, which they accordingly found. *Hamilton*, Lea. 348, 1784.

Where defendant, who was in prosecutor's service, stole several pieces of lace, which were together but not separately worth 5*l.*, and sent them all out of his master's house at one time, it was held that the offence was made out, although he might have stolen the lace a piece at a time. *Jones,* 4 C. & P. 217, 1830, following a case mentioned 2 Russ. Cri. 1117, where there are other cases.

See similar cases under *Malicious Injury II.* and *Trees.*

'*Menace . . . bodily fear*'] 'Where a delivery of the thing out of the house is obtained by any artifice from any person therein': East P. C. 623; 'or an assault': 2 Russ. Cri. 1111; it is within the s.; see *Menaces* under *Burglary.* 'Where the prosecutor, in consequence of the threat of an armed mob, fetched provisions out of his house and gave them to the mob outside the door, this was held not to be a stealing in the dwelling-house: *Leonard,* Cheshire Spec. Comm. 1842.' Mr. Greaves thinks this decision was wrong because 'any asportation . . . under the effects of terror is in contemplation of law the asportation of the party causing the terror.' *Ib.*

ELECTIONS—OFFENCES AT.

(Other than Bribery and False Personation.)

'*False statement*] of the withdrawal of a candidate' to help *another* is an illegal practice: 46-7 V. 51, 9 (2). But by (3) the *candidate* is only liable hereunder for such practice by an agent if it is his *election* agent.

Parliamentary elections] By the Ballot A. 1872, 35-6 V. 33, s. 3: 'Every person who . . .

(3) Without due authority supplies any ballot paper to any person; or

(4) Fraudulently puts into any ballot box any paper other than the ballot paper which he is authorised by law to put in; or

(5) Fraudulently takes out of the polling station any ballot paper; or

(6) Without due authority destroys, takes, opens, or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election;

Shall be guilty of a misdemeanour, and be liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years with or without hard labour, and if he is any other person, to imprisonment for any term not exceeding six months with or without hard labour.

Any attempt to commit any offence specified in this section shall be punishable in the manner in which the offence itself is punishable.

In any indictment or other prosecution for an offence in relation to the nomination papers, ballot boxes, ballot papers, and marking instruments at an election, the property in such papers, boxes, and instruments may be stated to be in the returning officer at such election, as well as the property in the counterfoils.'

When defendant threw some fluid through the aperture of the ballot box, which discoloured loose voting papers therein deposited by voters, she was held to be within sub-s. 6: *Chapin*, 22 Cox C. C. 10, 1909.

On a trial for having fraudulently placed papers purporting to be, but to defendant's knowledge not being, ballot papers in the ballot box, the counterfoils, voting papers, and marked register, produced under an order duly made by authority of the statute, may be given in evidence, and the face of the voting papers may be inspected so as to show how the votes appeared to have been given. *Beardsall*, 1 Q. B. D. 452; 45 L. J. M. C. 257; 13 Cox C. C. 193, 1876: C. C. R.

By 46-7 V. 51 (amended), offences at elections have been extended and more clearly defined, and stringent regulations for the conduct of elections have been made. Many of these offences are punishable on summary conviction.

Most of the offences punishable on indictment, such as corrupt practices, &c., &c., are treated under *Bribery*, where the ss. on legal proceedings are set out. See also *False Declarations* and *Personation*.

By s. 41 (4): 'If any person makes any agreement or terms, or enters into any undertaking in relation to the withdrawal of an election petition, and such agreement, terms, or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are, whether lawful or unlawful, not mentioned in the aforesaid affidavits [for leave to withdraw a petition, sub-s. 1], he shall be guilty of a misdemeanour, and shall be liable, on conviction on indictment, to imprisonment for a term not exceeding twelve months, and to a fine not exceeding 200*l.*'

By 7-8 G. 5, 64, 34: '(1) A person other than the election agent of a candidate shall not incur any expenses on account of holding public meetings or issuing advertisements, circulars or publications for the purpose of promoting or procuring the election of any candidate at a parliamentary election unless he is authorised in writing to do so by such election agent.' By (2) a contravention of (1) is 'a corrupt practice other than personation' within the 1883 A., but a court of conviction 'under this section may, if they think it just in the special circumstances of the case, mitigate or entirely remit any incapacity imposed by' s. 6 of that A.

Municipal elections] By 45-6 V. 50, 74 (1): 'If any person forges or fraudulently defaces or fraudulently destroys any nomination paper . . . knowing it to be forged, he shall be guilty of a misdemeanour, and shall be liable to imprisonment for any term not exceeding six months, with or without hard labour. (2) An attempt to commit any such offence shall be punishable as the offence is punishable.'

Other elections] The provisions of the Municipal Elections (Corrupt and Illegal Practices) Act, 47-8 V. 70, are by Sched. I. extended to the elections of members of local boards, improvement commissioners, poor law guardians, and members of school boards. But for the last, see now 2 E. 7, 42, and 3 E. 7, 24. And by s. 75 of the Local Government Act, 1888, 51-2 V. 41, the provisions of the Municipal Corporations Act, 1882, as amended by 47-8 V. 70, are applied to the election of county councillors.

For offences when voting for a public library, see 55-6 V. 53, Public Libraries A. Sched. I.

Personation] See *False Personation.*

False answers] See under *False Declarations.*

ELECTRICITY, LARCENY, &c. OF.

By s. 10 of 6-7 G. 5, 50: 'Every person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny' under s. 2, which see.

EMBEZZLEMENT.

The precise character of this crime cannot be understood apart from that of larceny. 'The proper conception of it [theft] is that it is a violation of a person's possession of the thing, accompanied with an intention to misappropriate the thing.' In the case of an alienor handing a thing 'to the servant of the alienee, . . . the alienor has parted with the property, the right to possession, and also the possession, because he has parted finally with the control of the thing and has no control over the alienee's servant. In whom then is the possession? It was held not to be in the alienee, for he has not yet received the thing, and delivery to his servant for him was not held to vest the possession in him as against the servant (though it would be enough to entitle the master to sue or prosecute a stranger for trespass to the servant's possession), and as the possession must be in some one it must be in the servant until he does some act amounting to a submission, attornment or delivery to the master.' (*Pollock* and) *Wright* on Possession (1888), p. 118 and p. 130. Hence, when there was no violation of the possession as in the common case where an employee had received or got something for, *i.e.* for the benefit of or to deliver to his employer, and had misappropriated it, the common law declined to recognise such an act as larceny because the thing had never reached the employer's possession. It dealt severely enough with any invasion of possession, for felony implied a trespass which was early synonymous with sin. And it is safe to assume that the farther back we go the more true it is that the great bulk of offences against property were larcenies. But as society grew, it became obvious that the effect on the despoiled person was the same whether the wrong-doer brought himself within the common law or escaped it by avoiding any violation of possession. It was easy to create the statutory crime of embezzlement by making the employee's possession the possession of the employer, and that of obtaining by false pretences by making fraud in obtaining anything voluntarily surrendered punishable. The purely legal difficulties that arose were almost entirely due to uncertainty of the facts of the case, especially when the defence was unknown, as it was often, until all the evidence was given, uncertain what crime, if any, had been committed; 'if it was wholly uncertain,' said Stephen J. in 1883, 'which of the two' [embezzlement or larceny] the accused 'had committed, he might have to be acquitted of both': 3 Hist. Cr. L. c. 28. For juries were for long limited strictly to verdicts on the indictment tried, and defendant was not allowed to plead to anything of which he could not be convicted thereon. But recent legislation has made great changes. Though the Larceny A. 1916, does not alter the substantive law in that of 1861 (except, perhaps, minutely), yet the Criminal Justice Administration A. 1914, by removing the latter disability, and above all, the Indictments A. 1915, by authorising all charges arising out of the same group of facts to be tried at the same time, have together very much

simplified procedure in the three great classes of misappropriation of property, and have practically assimilated the trials of these offences (except in the matter of punishment).

It was held not to be larceny when a banker's clerk who received money from a customer appropriated it without putting it in the till, and the reason given was that, as the employer had never had possession of the money he had never been wrongfully deprived of the possession of it, which was a necessary ingredient in larceny. *Bazeley,* Lea. 835; East P. C. 571, 1799. The effect of 39 G. 3, 85, rpd., passed in consequence of this case, and of subsequent statutes, is to make the master's possession commence from the moment that his property comes into the servant's hands. See *Read,* 1878.

Although even now the offences are distinct, yet the further power of the C. C. A. to *substitute* one verdict for another under s. 5 (2) of the C. A. Act has got rid of a former difficulty—that the jury must make the correct *finding* on the facts, *i.e.* whether larceny or embezzlement (or c. q. as in *Gorbutt,* D. & B. C. C. 166, 1857). Hence many of the old cases are now useless: *e.g. Masters,* 1848; *Sullens,* 1 Moo. C. C. 129, 1826; *Gill,* D. & P. C. C. 289; 23 L. J. M. C. 50; 6 Cox C. C. 295, 1854; following *Headge,* R. & Ry. 160; Lea. 1033, 1809; cf. *Grove,* 1835.

See also *Servants* under *Larceny.*

Some *larceny* cases illustrate negatively embezzlement: see *Constructive Possession* and *Not Larceny by Servants* thereunder, especially *Murray,* 1830, and *Masters,* 1848.

By clerks or servants] By 6-7 G. 5, 50, 17: 'Every person who—(1) being a clerk or servant, or person employed in the capacity of a clerk or servant (a) steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer [this clause, not in the displaced s., was probably designed to adopt many case-decisions: see under *Larceny*]; or (b) fraudulently embezzles the whole or any part of any chattel, money, or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer; (2) being employed in the public service of His Majesty, or in the police of any place whatsoever—(a) steals any chattel, money, or valuable security belonging to or in the possession of His Majesty, or entrusted to or received or taken into possession by such person by virtue of his employment; or (b) embezzles or in any manner fraudulently applies or disposes of, for any purpose whatsoever, except for the public service, any chattel, money, or valuable security entrusted to or received or taken into possession by him by virtue of his employment; (3) being appointed to any office or service by or under a local marine board—(a) fraudulently applies or disposes of any chattel, money, or valuable security received by him (whilst employed in such office or service) for or on account of any local marine board, or for or on account of any other public board or department, for his own use or any use or purpose other than that for which the same was paid, entrusted to, or received by him; or (b) fraudulently withholds, retains or keeps back the same or any part thereof, contrary to any lawful directions or instructions which he is required to obey, in relation to his offence or service aforesaid; shall be guilty of felony': maximum sentence, fourteen years' p. s.; 'and in the case of a clerk or servant or person employed for the purpose or in the capacity of a clerk or servant, if a male under the age of sixteen years, he is liable to be once privately

whipped, in addition to any other punishment to which he may by law be liable.'

Venue] See s. 39 (1).

Officers of the Banks of England or Ireland] By s. 19: 'Every person who being an officer or servant of the Bank of England, or of the Bank of Ireland secretes, embezzles or runs away with any bond, deed, note, bill, dividend warrant, warrant for the payment of any annuity, interest or money, security, money or other effects of or belonging to the Bank of England or Bank of Ireland, and entrusted to him or lodged or deposited with the Bank of England or Bank of Ireland, or with him as such officer or servant, shall be guilty of felony, and on conviction thereof liable to penal servitude for life.'

Not triable at Q. S.

Indictment] By s. 40 (2): 'An allegation in an indictment that money or bank-notes have been embezzled or obtained by false pretences can, so far as regards the description of the property, be sustained by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to any person and such part has been returned accordingly.'

Verdict] By s. 44 (2): 'If on the trial of any indictment for any offence against s. 17 of this Act' [above] 'it is proved that the defendant stole the property in question, the jury may find him guilty of stealing, and thereupon he shall be liable to be punished accordingly,' and *vice versâ*. No similar provision exists in the case of embezzlement and obtaining by false pretences. See *Larceny and Cognate Crimes*.

Co-partnership, &c.] By s. 40 (4): 'If any person who is a member of any co-partnership, or is one of two or more beneficial owners of any property, steals or embezzles any such property of or belonging to such co-partnership or to such beneficial owners, he shall be liable to be dealt with, tried and punished as if he had not been or was not a member of such co-partnership or one of such beneficial owners.'

'*Valuable security*'] By s. 46 (1), this 'expression includes any writing entitling or evidencing the title of any person to any share or interest in any public stock, annuity, fund or debt of any part of His Majesty's dominions or of any foreign state, or in any stock, annuity, fund or debt of any body corporate, company, or society, whether within or without His Majesty's dominions, or to any deposit in any bank, and also includes any scrip, debenture bill, note, warrant, order, or other security for payment of money or any accountable receipt, release, or discharge, or any receipt or other instrument evidencing the payment of money or the delivery of any chattel personal, and any document of title to lands or goods as hereinbefore defined.'

By officers of local marine boards] By 57-8 V. 60, 248: (1) 'A person appointed to any office or service by or under a local marine board shall be deemed to be a clerk or servant within the meaning of

s. 68 [now s. 17, above] of the Larceny Act, 1861 (relating to embezzlement).' Sub-s. 2 is almost identical with s. 17 (3) (a), (b), above; it concludes: 'that person shall be guilty of embezzlement within the meaning of the said s. 68 . . .' [now s. 17, above].

Post officials] See *Post Office.*

By officers of savings banks] See under *Larceny.*

Of warehoused goods] By 39-40 V. 36, 85: 'Every person taking out any goods from any warehouse without payment of duty, or who shall aid, assist, or be concerned therein, and every person who shall destroy or embezzle any goods duly warehoused, shall be deemed guilty of a misdemeanour, and shall, upon conviction, suffer the punishment by law inflicted in cases of misdemeanour; but if such person shall be an officer of customs or excise not acting in the due execution of his duty, and shall be prosecuted to conviction by the importer, consignee, or proprietor of such goods, no duty shall be payable for or in respect of such goods, and the damage occasioned by such destruction or embezzlement shall, with the sanction of the Commissioners of the Treasury, be repaid or made good to such importer, consignee, or proprietor by the Commissioners of Customs.'

Of woollen, silk, and other manufactures] By 6-7 V. 40, various offences, partaking of the nature of embezzlement, are punished. *Edmundson,* 28 L. J. M. C. 213; 8 Cox C. C. 212, 1859, under s. 10 of 17 G. 3, 56 (the unrepealed part of which, despite 6-7 V. 40, 1, is thus still alive in *all* its extent for procedure and punishment). See *Workmen.*

Evidence] When the contract of service is in writing it must be produced (against defendant) or notice given: *Clapton,* 3 Cox C. C. 126, 1848: acquittal directed. Defendant is entitled to ask whether the deficiency is in money or stock: *Clarke,* 1905, below. When the cheque, the subject of the charge, could not be found, the counterfoil was held admissible against defendant, Pigott B. saying, 'Defendant promises to send a cheque for a specific amount on a certain day. On that day a cheque is sent for that amount, and now a counterfoil of that amount on that day is tendered': *Wilkinson,* 10 Cox C. C. 537, 1867.

Similar acts] Evidence may be given of other acts of embezzlement to show that a wilful embezzlement and not a mere mistake has been committed.

In *Richardson,* 1860, three acts of embezzlement were charged. Defendant's duty was to make various payments on account of his employers, and to keep weekly accounts of the money so expended. The sums so expended were correctly entered, but in casting up the items at the end of each week the totals were made to exceed the real amount. In accounting with his master, he took credit for the larger sums. In order to show that this was not the result of innocent mistake on his part, evidence was tendered that in numerous weeks, both before and after that charged, similar mistakes, always in his favour, had been made. This was objected to, but two judges thought that it was admissible to counteract an obvious defence. Where defen-

dant had to account weekly, and he was charged with embezzling the gross weekly amounts, evidence was admitted of the separate items making up the gross amounts, partly on the ground that the fact of having omitted to account for the separate items would go to show that the not accounting was not mere accident. *Balls,* L. R. 1 C. C. R. 328; 40 L. J. M. C. 148; 12 Cox C. C. 96, 1871. In *Stephens,* 16 Cox C. C. 387, 1888: C. C. R., there were three counts for embezzlement; on the third there was an acquittal, and it was held that the jury on *any* one count might consider the evidence given on either of the others.

See *Similar Acts* in Index.

Election] Where there was only one count charging on one day, and the evidence was that the total sum charged had been received in parts on different days, the prosecution was confined to one sum on one day: *Williams,* 6 C. & P. 626, 1834.

Who is 'a clerk or servant'?] The question whether or not the defendant comes within the A. ought to be left to the jury. 'Generally speaking, the question whether a person employed is a clerk or servant depends on so many considerations that it should be left to the jury,' *per* Bovill C.J., *Negus,* L. R. 2 C. C. R. 34; 12 Cox C. C. 492; 42 L. J. M. C. 62, 1873, below.

The words of 7-8 G. 4, 29, 47, rpd., 'clerk or servant, &c.,' were virtually the same as in rpd. s. 68; and under them it was always considered that there must be something more than a mere casual temporary employment for the particular occasion when the offence is committed.

General cases] A female servant was within 'servant or clerk, &c.,' in 39 G. 3, 85, rpd.: *Smith,* R. & R. 267, 1814; so likewise was an apprentice. *Mellish, ib.* 80, 1805.

'Clerk,' 'servant,' 'officer'] A director of a limited company who is also employed as a servant to collect moneys for them, is within the A. *Stuart,* 1894, 1 Q. B. 310; 63 L. J. M. C. 63; 17 Cox C. C. 723: C. C. R. The clerk or servant, *e.g.* 'steward,' of a corporation, although not appointed duly nor under the common seal, is a servant within 39 G. 3, 85, above. *Beacall* and *Wellings,* 1 C. & P. 457; 310, 454; 1 Moo. C. C. 15, 1824; within 7-8 G. 4, 29, above; *Williams* v. *Stott,* 1 Cr. & M. 675, 1833, below. The clerk of a chapelry, who receives the sacrament money, is not the servant either of the curate or of the chapel-wardens, or of the poor of the township, within 7-8 G. 4, 29, above. *Burton,* 1 Moo. C. C. 237, 1829. The paid master of a charity-school was held not to be the servant of the treasurer or committee for the purpose of receiving one single contribution, a totally different employment. *Nettleton,* 1 Moo. C. C. 259, 1830; cf. *Smith, &c.,* 1823, below. A person was chosen at a court leet held by the Warwick Corporation, as chamberlain (unpaid) of certain commonable lands. The duties of the chamberlain were to collect monies from the commoners, &c., wherewith to keep the common in order, and to account for the balance at the end of the year to two aldermen. The Court of Exchequer held that he was not 'a servant, &c.' *Williams* v. *Stott,* above.

Servantship must to a certain extent depend on the contract in each case: *A. Solomons,* 1909, below.

Overseers] The accountant and treasurer of the overseers of the poor is a clerk within 39 G. 3, 85, above. *Squire,* R. & R. 349, 1818; 2 Star. N. P. C. 349; cf. *Tyers,* R. & R. 402, 1819; *Ward,* Gow 168, 1819. 12-13 V. 103, 15, enacts: 'In respect of any indictment or other criminal proceeding, every collector or assistant-overseer appointed under the authority of any order of the poor-law commissioners, or the poor-law board, shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen.' Cf. *Carpenter,* L. R. 1 C. C. R. 29; 35 L. J. M. C. 169; 10 Cox C. C. 246, 1866. A similar provision is contained in some local Acts. And although the mode of appointing assistant-overseers has been altered by the Local Government A. 1894, they are still when appointed the servants of the inhabitants of the parish. *Smallman,* 1897, 1 Q. B. 4; 66 L. J. Q. B. 82; 18 Cox C. C. 451: C. C. R. An under-bailiff of a county court is not the servant of the high-bailiff, though employed by him to make levies under the process of the court (but of the Registrar). *Glover,* L. & C. 466; 33 L. J. M. C. 169; 9 Cox C. C. 500, 1864; cf. *Parsons,* below.

Societies] See *Friendly Society's Funds, &c.* In *Tongue,* 30 L. J. M. C. 49; 8 Cox C. C. 386, 1860: C. C. R., below, the paid secretary of a money club was held to be within rpd. 7-8 G. 4, 29.

The treasurer of a registered friendly society cannot be indicted for embezzlement, because he is an accountable officer, not a servant. By 18-9 V. 63, rpd., the Friendly Societies A., the monies of the society were vested in trustees. The treasurer received no salary, and had to give security on which the trustees were empowered to sue. He had to account to the trustees when required, and to pay over the balance. *Tyree,* L. R. 1 C. C. R. 177; 38 L. J. M. C. 58; 19 L. T. 657; 17 W. R. 334; 11 Cox C. C. 241, 1869: c. q.

Illegal society] Where a society, in consequence of administering to its members an unlawful oath, was an unlawful combination, it was held that a person charged with embezzlement as clerk, &c., could not be convicted. *Hunt,* 8 C. & P. 642, 1838. And see *Milligan* v. *Wedge.* But where a society is legal, though some of its rules are void as being in restraint of trade, *e.g.* a trade union (even before the Trade Union Acts), a servant may be convicted of embezzlement. *Dodd,* 18 L. T. 89, 1868; *Stainer,* L. R. 1 C. C. R. 230; 39 L. J. M. C. 54; 18 W. R. 439; 11 Cox C. C. 483, 1870; *Tankard,* 1894, 1 Q. B. 548; 63 L. J. M. C. 61; 70 L. T. 42; 42 W. R. 350; 58 J. P. 300; 17 Cox C. C. 719; 10 R. 149: C. C. R.; cf. under *Larceny,* where see *Servant.* See *Trade Union Code* in Index.

Employment for single act, &c.] See on 7-8 G. 4, 29, 47, above. When a drover, acting as such from time to time, but not serving in any other way, was ordered to drive the cattle to a purchaser and receive the money, which he did, and appropriated it, the judges, overruling the recorder who wished to follow *Nettleton,* were unanimous that he was a servant within the meaning of the A. *Hughes,* 1 Moo. C. C. 370, 1832, below. But in *Milligan* v. *Wedge,* 12 A. & E. 737, 1840, where the buyer of a bullock employed a licensed drover (whom by the by-laws of the City he could alone employ) to drive it from Smithfield to his slaughter-house, Coleridge J. on a question of the liability of the owner of the bullock for negligence in driving it outside the City, held that no relation of master and servant was

created between him and the drover; though it was between the latter and the boy actually driving. But see *Clerk* and *Lindsell* on Torts, 6th ed., p. 108.

Defendant was a carrier whose *only* employment was to carry unsewed gloves from a manufacturer at A. to sewers who resided at B., to carry them back when sewed, and to receive the money for the work and pay it to the glove sewers, deducting his charge. On several occasions he appropriated the sewers' money. It was held that he was not the servant of the sewers so as to be an embezzler; his offence was a breach of trust, as he was a mere bailee of the money. *Gibbs,* D. & P. C. C. 445; 24 L. J. M. C. 63; 6 Cox C. C. 455, 1855. Where the relation of master and servant arose, a majority of the judges held that a sum was embezzled though it was obtained in the conduct of a single transaction out of the ordinary course of service. *Smith,* R. & R. 516; 1 Lew. 86, 1823; *Tongue,* above, and *Spencer,* R & R. 299, 1815, below; cf. *Nettleton,* above. Note that the words 'by virtue of his employment' were omitted in s. 68 of the 1861 A. (but occurred in s. 70 and occur in its successor, s. 17 (2), above). These words 'were advisedly omitted in order to enlarge the enactment and get rid' of the following decisions: *Mellish,* 1805; *Crew,* 1 Lew. 88, 1823; *Snowley,* 4 C. & P. 390, 1830; *Thorley,* 1 Moo. C. C. 352, 1832; *Hawtin,* 1836, and others; *Greaves,* Crim. Stat. p. 117; cf *Townsend,* 1841. See below. But where defendant's main employment was to get orders on commission, and his employer himself got an order and asked him to collect the money, which he did and appropriated it, it was ruled that he was a mere volunteer. *Mayle,* 11 Cox C. C. 150, 1868.

Agent not servant] The prosecutors, who were manure manufacturers, engaged defendant, who kept a refreshment house at B., to get orders which they supplied from their stores. He was to collect the money, and pay it at once to them, and send a weekly account, and was called agent for the B. district. Subsequently, the prosecutors sent manure to stores at B., which were under his control; he took them in his own name and paid the rent, which they repaid him. He supplied manure from these stores, but the first-mentioned mode of supplying orders might, if convenient, have been used. He received a salary of 1*l.* per annum besides commission. It was held that the relation was one not of master and servant, but of principal and agent, and therefore he could not be guilty of embezzlement. *Walker,* D. & B. C. C. 600; 8 Cox C. C. 1, 1858. See *Beaumont,* below.

Defendant was a member of a friendly society, and one of a joint committee appointed by his own and another society to manage an excursion. He sold the tickets, but did not pay over the money received to the proper person; he was to have no remuneration. It was held he was wrongly convicted, under s. 68, above, of embezzlement. *Bren,* 1 L. & C. 346; 33 L. J. M. C. 59; 9 Cox C. C. 398, 1863. This appears, however, to have been decided partly upon the ground that he was a joint owner of the money.

Payment by commission] In *May,* 1 L. & C. 13; 30 L. J. M. C. 81; 8 Cox C. C. 421, 1861, a company had told defendant that they would not appoint him as their agent, but that for all business he did for them they would pay him a commission. The court held that he could not be convicted of embezzlement under rpd. 7-8 G. 4, 29, for not accounting for moneys received, because he was 'a commission

agent and no more,' and even if he had been a clerk or servant, he was not employed to receive money.

In *Bowers,* L. R. 1 C. C. R. 41; 35 L. J. M. C. 206; 10 Cox C. C. 250; 14 L. T. 671; 12 Jur. 550; 14 W. R. 803, 1866, however, it was held that a person who was employed to get orders for goods and to receive payment for them, but who was at liberty to get the orders and receive the money where and when he thought proper, being paid by a commission on the goods sold, was not a clerk or servant; he had first received a salary and a commission, but a subsequent agreement was come to by which the salary was stopped and the commission continued; and it was held that though under the first agreement he was a servant, the state of things under the second—disposing of his time as he thought best—was inconsistent with that relation. *Negus,* above. See also *Hall,* 13 Cox C. C. 49, 1875: C. C. R.; and *Harris,* 17 Cox C. C. 656, 1893, where the C. for C. C. R. followed *Bowers* with great reluctance.

Where the prosecutor said, 'I paid the prisoner commission, but no salary; he was not obliged to be at my office at any particular time, excepting on Friday and Saturday to account for what money he had received for me; I did not give the prisoner directions to go to any particular place for orders; he went where he pleased,' it was held that he was not a clerk or servant. *Marshall,* 11 Cox C. C. 490, 1870: C. C. R. But where defendant was bound by the terms of his agreement 'diligently [to] employ himself in going from town to town . . . and soliciting orders,' he was ruled, by Lush J., to be a clerk or servant, who said: 'If a person says to another carrying on an independent trade, 'If you can get any orders for me I will pay you a commission,' and that person receives money and applies it to his own use, . . . he is not a 'clerk or servant'; but if a man says 'I employ you, and will pay you, not by salary, but by commission,' then the person employed is a servant'—the test being, is there any control over the employed? *Turner,* 11 Cox C. C. 551, 1870.

A person who acts as a traveller for various mercantile houses, takes orders and receives moneys for them, and is paid by a commission, is a *clerk* within 39 G. 3, 85, rpd. Defendant was convicted for embezzling the property of his employers. He was employed by them and other houses as a traveller, to take orders for goods, and to collect money for them from their customers. He did not live in the house with them. He was paid by a commission on all goods sold, whether he received the price or not, provided they proved good debts. He had also a commission upon all orders that came by letter, whether from him or not. He was not employed as a clerk in the counting-house, nor in any other way as a servant. The employers did not allow him anything at all for travelling expenses. The judges upheld the conviction for embezzling such money. *Carr,* R. & R. 198, 1811, below, affirmed in *Tite,* 1 L. & C. 29; 30 L. J. M. C. 142; 8 Cox C. C. 458, 1861.

Shareholders, part owners, &c.] In *Atkinson,* 2 Moo. C. C. 278, 1843, it was held by a majority that a clerk to a joint-stock banking company might be convicted of embezzling the money of the company, notwithstanding that he was a shareholder.

A member of a certified friendly society, who was the paid secretary and acted as treasurer, but without being elected to that office, received, as treasurer, moneys due from the members, and gave correct receipts, but made false entries in the book kept by him as secretary, and

appropriated some money. A conviction for embezzlement was held to be right. *Proud,* 1861. But see *Marsh,* 3 F. & F. 523, 1862: an *unenrolled* club; cf. *Hall,* below; and see also *Bren,* above, where Martin B. said that in the case of *Proud* the property of the society was vested in trustees.

See further, s. 40 (4), above, and *Neat* and under *Larceny by Part Owners.* A 'co-partnership,' however, at law denotes a society formed for the purpose of gain; and where defendant embezzled the funds of a Young Men's Christian Association, having for its object the spiritual benefit of its members, and not the acquisition of gain, it was held that he could not be convicted as a co-partner, but it seems he might have been as a joint 'beneficial owner.' *Robson,* 16 Q. B. D. 137; 55 L. J. M. C. 55; 15 Cox C. C. 772, 1888: C. C. R.

Profit-sharers] Payment by or out of profit does not prevent the payee being a servant. Defendant was employed by a colliery owner to take his coals, sell them, &c. As pay he was allowed two-thirds of the profit over cost price. It was objected on a trial that the money was the joint property of himself and the employer; but the judges held that he was a servant within rpd. 39 G. 3, 85, and that the mode of paying him for his labour did not vary the nature of his employment, nor make him less a servant than if he had been paid so much a chaldron or a day; and in respect of the cost price at the colliery, that part of the total sum he received *solely* on his master's account as his servant, and by embezzling it he became guilty of larceny. *Hartley,* R. & R. 139, 1807, followed in *A. Solomons,* 1909, 2 K. B. 980; 79 L. J. K. B. 8; 73 J. P. 467; 25 T. L. R. 747; 2 Cr. A. R. 288, where payment was by percentage of gross takings. See also *Wortley,* below. Defendant was paid proportionately to what he did for his employers. It was his duty to receive orders, to take the necessary materials from their stock, to work them up and deliver them out, to receive the price and pay over the whole of it. He thus received three shillings, for which he did not account; his share would have been one. A conviction for embezzling the three shillings was held good despite a doubt whether this was not a fraudulent concealment of the order, and an embezzlement of the materials. *Hoggins,* R. & R. 145, 1809. A partner in a firm with the consent of the other partners, contracted to give his clerk one-third of his own share of the profits; it was held that the clerk might be convicted of embezzlement. *Holmes,* 2 Lew. C. C. 256, 1811.

Defendant was a cashier and collector to commission agents. He was paid partly by salary and partly by a percentage on the profits, but was not to contribute to the losses, and had no control over the management of the business. It was held that he was a servant within rpd. 7-8 G. 4, 29, and not a partner as between himself and his employers, whatever might be the case between himself and third parties. *M'Donald,* 1 L. & C. 85; 9 Cox C. C. 10, 1861.

Defendant entered into the following agreement with the prosecutor: 'S. W. agrees to take charge of the glebe land of J. B. C., his wife undertaking the dairy, poultry, &c., at 15*s.* a week till Michaelmas, 1850; and afterwards at a salary of 25*l.* a year, and a third of the clear annual profit after all expenses of rent, rates, labour, and interest on capital, &c., are paid, on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side to be given; at the expiration of which time the cottage to be vacated by S. W., who occupies it as bailiff in addition to his salary.' It was held that this

agreement created not a partnership but the relation of master and labourer, and that S. W. might be convicted of embezzlement. *Wortley,* 2 Den. C. C. 333; 21 L. J. M. C. 44; 5 Cox C. C. 382, 1851.

More than one master] In *Leech,* 3 Stark. 70, 1821, defendant was in the employment of B. and R. as their book-keeper; while in this situation he stole certain bank-notes, the private property of B. Being indicted for embezzlement as the servant of B., it was objected that he was the servant of the partners and not of individuals; but it was held that he was the servant of each, and compared to *Carr,* above, where it was held that 'a traveller employed by several houses to receive money is the individual servant of each.' In *Batty,* 2 Moo. C. C. 257, 1842, it was held that a person employed by A. B. to sell goods for him at certain wages might be convicted of embezzlement as the servant of A. B., though at the same time he was employed by other persons for other purposes.

A coachman employed by one proprietor of a coach to drive a certain part of the journey, and to receive and hand money over to him, was guilty of embezzling the money of that proprietor, though when received by the latter it belonged to his partners and him. *White,* 8 C. & P. 742; 2 Moo. C. C. 91, 1839.

A railway station was maintained at the joint expense of four companies, and managed by a committee, who appointed and paid defendant, amongst other clerks. He appropriated a part of the amount paid to him for the carriage of a parcel; it was held that he might be indicted either as the servant of the four companies, or of the eight directors forming the committee. *Bayley,* D. & B. C. C. 121; 26 L. J. M. C. 4; 7 Cox C. C. 179, 1856. See also *Carr,* and *Tite,* above.

In whose employment] Sometimes there is no doubt that the person indicted is a clerk or servant, or employed in that capacity, but it is difficult to say precisely who his employer is. The judges held that a clerk of a savings bank was properly described as clerk of the trustees, although he might in fact have been elected by the managers. *Jenson,* 1 Moo. C. C. 434, 1835, followed in *Hall,* 1 Moo. C. C. 474, 1836, where it was held that the secretary (and member) of an unenrolled society appointed by the society *generally,* might be described as the servant of the trustees: cf. *Marsh,* above. And the clerk of a friendly society, if appointed by the society or the trustees, may be described as the servant of the trustees. *Miller,* 2 Moo. C. C. 249, 1842. See 59-60 V. 25, 87 (as amended).

In *Beaumont,* D. & P. C. C. 270; 23 L. J. M. C. 54; 6 Cox C. C. 269, 1854, one W. had engaged with a railway company to find horses and carmen to deliver the company's coals, and that he or his carmen should deliver to the company all moneys received from customers. Defendant was one of W.'s carmen. No account was apparently kept between W. and the company. It was held by a majority of eleven judges that there was privity between defendant and the company, and that he was the agent of the company and not of W., and that the money was received by him on their account and not on the account of W., and that consequently an indictment against him, as the *servant* of W., could not be supported. A very similar case was that of *Thorpe,* D. & B. C. C. 562; 8 Cox C. C. 29, 1858. The chief difference between the two appears to be that in the latter the master was liable to account to the railway company for the money received by his carmen; in the former not, and as defendant clearly 'received

the money . . . on account of his master' (s. 17, above), although 'in the name of the company,' the C. for C. C. R. unanimously thought he was a servant.

In *Foulkes,* L. R. 2 C. C. R. 150; 44 L. J. M. C. 65; 13 Cox C. C. 63, 1875, defendant's father was clerk to a local board, and held other appointments. Defendant lived with his father, and assisted him in his office and in the business of the board. In his father's absence he acted for him at the meetings of the board, and when present he assisted him; he was not appointed or paid by the board, and there was no evidence that he received any salary from his father. Acting for his father, he received some money for the board, and appropriated a part of it. It was held, that there was evidence that he was 'employed as a clerk or servant.' For *whose* servant a given person is, cf. *Quarman* v. *Burnett,* 6 M. & W. 499, 1840; *Jones* v. *Scullard,* 1898, 2 Q. B. 565; 67 L. J. Q. B. 895; 79 L. T. 386; 47 W. R. 303, and other cases cited *Clerk* and *Lindsell* on Torts, 6th ed., pp. 108-9.

Persons in the service of the crown] Defendant, a constable, was, with the sanction of the treasury, employed as agent by the inspector of prisons, who was authorised to receive the contributions of parents towards the maintenance of their children committed to reformatory and industrial schools, to collect, &c. such contributions under rpd. Acts. Defendant received and misappropriated such moneys, which were the property of the treasury. It was held that he was, while so employed, in the public service of the Queen, and could be convicted of embezzlement under 24-5 V. 96, 70, rpd. *Graham,* 13 Cox C. C. 57, 1875: C. C. R. But where the high bailiff of a county court duly appointed defendant a bailiff to assist him, it was held that he was not a person 'employed in the public service of her Majesty' within that s., but that he was the servant of the high bailiff. *Parsons,* 16 Cox C. C. 498, 1888, discussing *Glover,* and *Graham,* above.

'*For or in the name or on the account of his master, &c.*'] It has been held not to be necessary, even under rpd. 39 G. 3, 85, that the servant should have been acting in the ordinary course of his employment when he received the money, provided that he was employed by his master to receive the money on that particular occasion. Defendant was employed to collect the tolls at a particular gate, which was all that he was hired to do; but on one occasion his master ordered him to receive the tolls of another gate, which he did, and embezzled them: *Smith,* 1823, above.

So, where a man was hired as a journeyman miller, and not as a clerk or accountant, or to collect money, but was in the habit of selling small quantities of meal on his master's account, and of receiving money for them, it was held that 39 G. 3, 85, was intended to comprehend masters and servants of all kinds, 'whether originally connected in any particular character and capacity or not.' *Barker,* Dow. & Ry. N. P. C. 19, 1822.

Where defendant was entrusted to receive from porters such moneys as they had collected from customers in the course of the day, the receiving immediately from the customers, instead of through the porters, was held to be 'by virtue of his employment.' *Beechey,* R. & R. 319, 1817; *Spencer,* 1815; *Hughes,* 1832. In *Tongue,* above, the C. for C. C. R. followed these cases. And see *Hastie,* 1 L. & C. 269; 32 L. J. M. C. 63; 9 Cox C. C. 264, 1863.

Although it is no longer necessary to show that the money was

received 'by virtue of the employment,' yet it is essential to show that the money was the master's property; and where a servant, contrary to express orders, and not for, or on account of his master, but by using his master's barge for his own advantage, earned freight-money, it was held that such money was not received by him on account of his master, and was not his master's property: c. (for embezzlement) q. *Cullum,* L. R. 2 C. C. R. 28; 12 Cox C. C. 469; 42 L. J. M. C. 64, 1873. In *Gale,* 2 Q. B. D. 141; 46 L. J. M. C. 134; 13 Cox C. C. 340, 1876: C. C. R., defendant's—a head manager's—duty was to indorse cheques and pay them to the cashier at the bank; but instead of doing so, he got a friend to give him cash for two cheques which he appropriated. He was charged with embezzlement, not of the cheques, but of the money, and it was held that he had *received* the money for and on account of his masters (whether it had been so paid or not). In *Read,* 3 Q. B. D. 131; 14 Cox C. C. 17; 47 L. J. M. C. 50, 1878: C. C. R., below, a gamekeeper killed wild rabbits on his master's land without authority, and sold them; it was held that he could not embezzle them, as he did not receive them into possession 'for or on account of his master.' On *Cullum* and *Read,* Wright J. observes, *Possession, &c.,* p. 191: if the servant 'does not receive the thing ['on its way to the vendee'] in the course of his employment at all, he is held to commit no crime.'

Mere non-application of money] The bare non-application of money in the manner directed or 'default of payment' is not sufficient for embezzlement. For all that appeared in *Smith,* 1814, where a master had given a servant money to pay some one who never got it, the servant had never appropriated the money at all. The same remarks apply to *Hodgson,* 1828, where it was admitted that defendant had made no false entry (in contrast with *Hall,* 1821), and that he had charged himself in the books with all the moneys which he had received, but it was charged (under rpd. 7-8 G. 4, 29) that he had not sent on one amount to his employers; but, on the other hand, it is clearly settled that any one, by making an admission in his account that he has received the money, does not thereby necessarily free himself from the charge of embezzlement, if there be other circumstances—as there were here—from which the jury may infer that the money was fraudulently appropriated. *Lister,* D. & B. C. C. 118; 7 Cox C. C. 203, 1856; cf. *Grove* and *Jones,* below. Any doubt on this point arises from not keeping clearly in view the distinction between the offence and the evidence of it: 2 Russ. Cri. 1394 *j.* See *Guelder,* 30 L. J. M. C. 34; 8 Cox C. C. 362, 1860: C. C. R.

Venue] See s. 39 of the Larceny A. 1916. There is sometimes difficulty in ascertaining the precise time when the embezzlement takes place, which affects the venue. 9 Halsbury, 654, enumerates the possible places where the crime can be committed: (1) where defendant refuses to account; (2) where he ought to but does not account (if there is no other evidence of the crime); (3) where he accounts falsely; (4) where he received and misappropriated.

In general there can be no evidence of the act of embezzlement until the receiver of the money refuses to account, or falsely accounts, for it. Where defendant received in Shropshire, and told his master in Staffordshire that he had not received it, the question was, whether he was properly convicted in the former county: the conviction was held right. Lawrence J. thought that embezzlement being the offence,

there was no evidence of any offence in Shropshire, and that he was improperly indicted in that county.

Not accounting] But the other judges were of opinion, that the indictment might be in Shropshire where he received, as well as in Staffordshire, where he *embezzled* the money, by *not accounting for it to his master;* that 39 G. 3, 85, rpd., having made receiving money and embezzling it a larceny, made the offence a felony where the property was first taken, and that the offender might, therefore, be indicted in that or in any other county into which he carried the property. *Hobson,* East P. C. Add. xxiv.; R. & R. 56, 1803. The converse of this is the following case, where the doctrine, that the not accounting is the evidence of the embezzlement, was also laid down. Defendant was indicted in Middlesex. He received the money in Surrey, and returning into Middlesex, denied to his master the receipt. L. Alvanley C.J., after referring to *Hobson,* said, 'The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into Middlesex. . . . It is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars Bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within' 39 G. 3, 85, '*until he is called upon by his master to account. . . .*'

Refusing to account] This was the first act from which the jury could with certainty say, that the prisoner intended to embezzle the money . . . 'nor could the offence be complete *until he refused* to account to his master.' *Taylor,* 3 Bos. & Pul. 596; Lea. 974; R. & R. 63, 1803. Defendant was a travelling salesman, whose duty it was to go into Derbyshire every Monday to sell and receive there, and return and account to his master in Nottinghamshire every Saturday. He received two sums in Derbyshire, but did not return. Two months afterwards he was met by his master in Nottinghamshire, who asked him what he had done with the money, and he said he had spent it. It was held that he was rightly indicted in Nottinghamshire, there being some evidence to go to the jury of an embezzlement in that county, but chiefly on the ground of the not accounting. *Murdoch,* 2 Den. C. C. R. 298; 21 L. J. M. C. 22; 5 Cox C. C. 360, 1851. Where there was evidence of a conversion in Yorkshire and of a letter sent by defendant to Middlesex, 'indirectly or inferentially,' denying the receipt of the money, he was held to have been rightly tried in Middlesex, where the offence was completed, though it was generally agreed he might have been tried in Yorkshire. The important question is, was a material part of the crime committed in Middlesex?: *per* Field J. *Rogers,* 3 Q. B. D. 28; 47 L. J. M. C. 11; 14 Cox C. C. 22, 1877: C. C. R.

It is impossible to avoid seeing that these decisions are coloured with the error, that a denial of the receipt or an omission to account is necessary to constitute the crime of embezzlement, and that the distinction already adverted to between the offence and the evidence of it, is not always kept in view. *Dawson,* 1888, and see the dissenting judgment of Huddleston B. in *Rogers.* It is, however, only reasonable,

where there is no other indication of the time at which the money was appropriated, to conclude that this act took place at the same time as the first indication of it, viz. the refusal to account, or the omission to do so at the proper time.

Not accounting to an employer may sometimes be evidence of larceny from a third person, *e.g.* where the question of theft of lead from the seller by the buyer's foreman might have been solved by evidence, whether he had accounted to the latter or not for the price of what he had sold, as there was none: c. q.: *C. Sturgess,* 9 Cr. A. R. 120, 1913.

General deficiency in account] A banker's clerk admitted that he had taken 900*l.* of the bank's, but whether he had first put it into a till, as was his duty, or had intercepted it from the customers could not be shown; there was no false entry; he was acquitted of larceny but convicted of embezzlement. It was urged that his admission only went to 'deficiency in account,' and seven judges held the conviction wrong, but eight judges, after very considerable doubt, upheld it, thinking that the receipt of, and non-accounting for, any particular sum needed not to be proved, and were of opinion that there was sufficient evidence to go to the jury of his having received certain moneys on a particular day, and for them to find he had embezzled the sum. *Grove,* 7 C. & P. 635; 1 Moo. C. C. 447, 1835. But Alderson B. after stating that *Grove's* case proceeded more on the particular facts than on the law, said, 'It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen.' *Jones,* 8 C. & P. 288, 1838. *Grove* is no longer considered to be good law. It was the duty of a clerk to receive money for his employer, and pay wages thereout, and to keep accounts and pay over balances. He entered his payments at 10*l.* too much, and two months after, in accounting with his employer, by this means made his balance 10*l.* too little, and paid it over accordingly. Williams J. held that he could not, on these facts, be convicted of embezzlement, without its being shown that he had received some particular sum on account of his employer, and had converted either the whole or part of it to his own use. *Chapman,* 1 C. & K. 119, 1843; and see *Wolstenholme,* 11 Cox C. C. 313, 1869. Perhaps *C. T. Cooper,* 3 Cr. A. R. 100, 1909, is an authority that general deficiency without proof of embezzlement of specific sums does not constitute the crime, but the facts of the case made any discussion of the law unnecessary. In *T. Coles,* 5 Cr. A. R. 36, 1910, it was held that if defendant admitted having the sum charged, the defence of general deficiency could not be set up, and it was assumed that such a defence is good. 'The tendency of legal opinion is to hold that proof of a general deficiency will not be sufficient, and that there should be proof that some specific sum has been embezzled': 2 Russ. Cri. 1397 (1909).

There is still likely to be much difficulty on this point. Where a person is employed in the receipt and payment of money it is almost impossible to prove anything more than a deficiency in account, and if the words of Alderson B. in *Jones,* above, were to be taken in their strictest sense, it would be impossible ever to procure a conviction for embezzlement where there were running accounts between the parties.

In *Moah,* D. & P. C. C. 626; 25 L. J. M. C. 66; 7 Cox C. C. 60, 1856, under 2 W. 4, 4, 1, rpd., defendant was an officer of inland

revenue, and he was allowed to retain in his hands a balance of 300*l.* According to his accounts sent in to the Board, there stood an admitted balance against him of more than 5,000*l.*, which he said he was not prepared to hand over, nor any part of it. He was then reminded that there was a sum of 300*l.* excise duties, which he had received at a particular place on the previous Monday (not, apparently, included in his accounts). He then handed over 281*l.* odd, and said that was all the money he had in the world: 'he had spent the rest in an unfortunate speculation'—which may only have referred to the 300*l.* It was held that a conviction might be sustained for embezzling 300*l.*; about the 5,000*l.*, the court thought it was doubtful, though inclining to the same view.

Mixing funds of another with those of defendant] When this was done without any criminal intention a conviction under a s. of the Seychelles Penal Code against 'embezzling' was quashed by the Privy Council: 14 A. C. 221; *Lanier* v. *R.*, 24 Cox C. C. 53; 83 L. J. P. C. 116; 32 T. L. R. 53.

Where a claim of right is set up (though unfounded)] A vessel carried culm from Swansea to Plymouth, where it weighed 215 tons, for which the master received payment. When asked for his account by the owners, he delivered a statement acknowledging the delivery of 210 tons, and the receipt of freight for so much. Being asked whether this was all that he had received, he answered that there was a difference of five tons between the weighing at Swansea and Plymouth, and that he had retained the balance for his own use, according to a recognised custom between owners and captains in the course of business; there was no evidence of the alleged difference of weight, or of the custom. Cresswell J. held that this did not amount to embezzlement. 'Embezzlement necessarily involved secrecy; the concealment, for instance, by the defendant of his having appropriated the money. If, instead of denying his appropriation, a defendant immediately owned it, alleging a right or an excuse for retaining the sum, no matter how frivolous the allegation, and although the fact itself on which the allegation rested were a mere falsification; as if, in the present case, it should turn out that there was no such difference as that asserted by the defendant between the tonnage . . . at Swansea and at Plymouth, or that there was no such custom as that set up,' it would not amount to embezzlement whatever else it might be. *Norman*, C. & M. 501, 1842.

Absconding] Where defendant sent to receive money due to her master, on receiving it went off to Ireland, Coleridge J. held that that was evidence from which the jury might infer that she intended to embezzle the money, and she was convicted. *Williams*, 7 C. & P. 331, 1836.

Particular sum embezzled doubtful] Where defendant receives several sums of money, and his accounts do not fix him with the embezzlement of any particular one at a particular time, the crime is very difficult of proof: *Moah*, above. In *Hall*, R. & R. 463; 3 Stark. 671, 1821, defendant received on account of his masters 18*l.* in one-pound notes; he immediately entered in their books 12*l.* only as received, and accounted only for 12*l.* On the same day he also received 104*l.* for them, and paid over 116*l.* odd. It was urged for him that

this money might have included all the eighteen pound notes, and if so, he could not be said to have embezzled any of them. But a great majority of the judges held the conviction right, holding that from the time of making the false entry (cf. *Hodgson,* 1828) it was an embezzlement. Abbott C.J. thought that the point should have been left to the jury.

Where an embezzlement of *money* was alleged, and the evidence was that defendant had embezzled a *cheque,* but not that he had converted it into money, c. q. *Keena,* L. R. 1 C. C. R. 113; 37 L. J. M. C. 43; 11 Cox C. C. 123, 1868.

Money or goods?] So on indictment for *money,* there could not be a conviction for *goods,* and as there was nothing to show in which the deficiency was, c. q.: *Clarke,* 69 J. P. 150, 1905: C. C. R., where L. Alverstone C.J. said that it was not possible to amend the indictment.

In *Stephens,* 1888, the evidence that defendant had issued certain tickets or had had the money for them was purely inferential, but this was held to justify a conviction.

Other particulars] Though it is not necessary to aver from whom the money, &c. was received, the judge may order the prosecutor to furnish defendant with a particular of the charges. *Bootyman.* Where three acts of embezzlement were averred, defendant moved, on affidavit, for an order directing the prosecutor to furnish such a particular; notice of the motion had been given. Vaughan B. said, 'I think the prosecutor ought at least to give the names of the persons from whom the sums of money are alleged to have been received, and, if the necessary information be refused, I will, on an affidavit of that fact, grant an order, and put off the trial.' *Hodgson, ib.* See *Anon.,* 1 Chit. Rep. 698, 1819, where a particular was refused a defendant by the K. B. of 'divers goods' for defrauding of which he was indicted, chiefly on the ground that an indictment for conspiracy is sometimes necessarily vague: cf. under *Conspiracy.*

Officers, &c. of the Banks of England and Ireland] It was held that it was not sufficient, in order to bring defendant within 15 G. 2, 13, 12, rpd., that he should be an officer of the bank, and as such have access to a cancelled bank-note (which he had sold, merely to show the Bank of England how easily it could be defrauded and to get a reward); it must appear also that he was *intrusted* with it, and, therefore, a conviction was wrong. *Bakewell,* R. & R. 35, 1802.

Where defendant was indicted under that s. for embezzling 'certain bills, commonly called exchequer bills,' and it appeared that the bills had been signed by a person for the government not legally authorised to sign them, it was held that he could not be convicted. *Aslett,* 2 Lea. 954, 1803. He was again indicted, under the same s., for embezzling, &c. 'certain effects' or securities of the bank, and being convicted, the judges were of opinion that these bills or papers were *effects* within the s.; 'for they were issued under the authority of government as valid bills, and the holder had a claim on the justice of government for payment.' *Aslett,* R. & R. 67; Lea. 958; 1 N. R. 1, 1804.

Triable at Q. S., except under s. 19 of Larceny A. 1916.

EMBRACERY.

See *Maintenance.*

EMPLOYEE, OFFENCES BY AND AGAINST.

See *Apprentice; Employer; Servant; Workman.*

EMPLOYERS, OFFENCES BY.

Truck Acts, 1831-96] By 1-2 W. 4, 37, s. 1 (amended): 'In all contracts hereafter to be made for the hiring of any artificer or for the performance by any artificer of any labour, the wages of such artificer shall be made payable in the current coin of this realm only and not otherwise'; any other contract is illegal and void.

By s. 9: 'Any employer of any artificer . . . who shall by himself or by the agency of any other person or persons directly or indirectly enter into any contract or make any payment hereby declared illegal, shall for the first offence' be fined 10*l.* at most, for the second 20*l.* at most, 'and in case of a third offence any such employer shall be and be deemed guilty of a misdemeanour, and being convicted thereof shall be punished by fine only, at the discretion of the court, so that the fines shall not in any case exceed the sum of one hundred pounds.' The words omitted were rpd. by S. L. R. A. 1891.

S. 20 (amended) is: 'Nothing herein contained shall extend to any domestic servant.'

'*Artificer*'] by 50-1 V. 46, 2, includes 'any workman as defined' in 38-9 V. 90, 10, and any one to whom this A. applies the 1831 A.

'*Workman,*' 38-9 *V.* 90, 10] in this A. 'does not include a domestic or menial servant, but, save as aforesaid, means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour . . . has entered into or works under a contract with an employer, whether the contract . . . be a contract of service or a contract personally to execute any work or labour.'

By 50-1 V. 46, 11: 'Any employer or his agent' contravening this A. is liable to the penalties of s. 9, above; by s. 12 (1), such agent or other person in fact being guilty is also liable, and by (2) the employer charged may exculpate himself by inculpating 'the actual

offender' and showing that he used 'due diligence' and had no knowledge, &c. of the offence.

Deductions—fines, &c.] Except as provided by 59-60 V. 44, wages must be paid in full; any contract to the contrary or offence under *this* A. is within the penalty of s. 9, above.

Factories and workshops] The occupier is similarly bound as regards his workers, and liable to s. 9 by 6-7 G. 5, 31, 7 (5).

ENCOURAGING CRIME.

See *Aider, &c.; Inciting, &c.*

ENCOURAGING UNCHASTITY.

See *Children.*

ENEMY, ADHERENCE TO.

See under *Treason.*

ENTRIES, FALSE.

See *False Entries.*

ESCAPE.

See *Prison Breach, i.e.* escape with force, and *Rescue, i.e.* with force and the aid of others.

In *Hobert,* Cro. Car. 209; 79 E. R. 784, 1631, the K. B. thought that *prison breach* is against the gaoler's will, but *escape* is with his consent; in both, the prisoner is punishable, and 'every place where any person is restrained of his liberty is a prison': cf. 28-9 V. 126, 4.

'All persons are bound to submit themselves to the judgment of law,' and therefore, if any one, being in custody, 'frees himself from it by any artifice . . . (he) is guilty of a high contempt, punishable with fine and imprisonment.' Hawk. P. C. 2, 17, 5.

Manner of escape] And if by the consent or negligence of the gaoler the prison doors are opened, and the prisoner escape, or otherwise, without making use of any force or violence, he is guilty of a misdemeanour (only). *Ib.* 2, 18, 9; 1 Hale P. C. 611.

Lawful custody] 'It must be proved that the party was in custody upon a criminal charge, otherwise the escape is not a criminal offence.' 1st ed. of this work: founded, apparently, on Hawk. 2, 19, 3. Cf. 1 Russ. Cri. 555; but in *Allan,* C. & M. 295, 1841, it was held that to aid a person confined under the remand of the Commissioners for the Relief of Insolvent Debtors (and not on a criminal charge) to escape from custody, was a common law misdemeanour. See *Rescue.* The conviction may be proved in the usual manner, under 14-15 V. 99, 13.

Through an officer] See under *Office-holders.* He must be a known officer of the law. Thus, where the constable of the Tower committed a prisoner to the house of a yeoman warder, the latter was held not to be such an officer as the law took notice of, and that he could not therefore be guilty of a negligent escape; it was merely a breach of trust against the constable. *Hill,* 1694; 2 Burn's Justice, 4, 30th ed. But 'whoever *de facto* occupies the office of gaoler is liable to answer for such an escape, and it is no way material whether his title to such an office be legal or not.' Hawk. P. C. 2, 19, who also says, s. 29, that it is the better opinion that the sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself; and that either the sheriff or the bailiff may be charged for that escape. 1 Hale P. C. 597; 1 Russ. Cri. 558. But this is opposed to the authority of L. Holt, who says that the sheriff is not answerable criminally but civilly for the acts of his bailiff. *Fell,* 1 Salk. 272; which, however, is contradicted by the report in 1 L. Raym. 424, 1689. See under *Sheriffs, &c.*

Arrest] To charge an officer it must appear that there was an actual arrest. Therefore, 'If an officer, having a warrant to arrest a man, see him shut up in a house and challenge him as his prisoner, but

never actually have him in his custody, and the party get free, the officer cannot be charged with an escape.' Hawk. *ib.* s. 1. In *Simpson* v. *Hill,* 1 Esp. 431, 1795, giving in charge to a constable who did not take into custody was held not to be imprisonment. The arrest must be justifiable in order to render the escape criminal; 'it seems to be a good general rule that wherever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape.' Hawk. *ib.* s. 2. A lawful imprisonment must also be continuing at the time of the escape; and, therefore, if an officer suffers a criminal who was acquitted and detained for his fees [abolished by 55 G. 3, 50] to escape, it is not punishable. *Ib.* s. 4.

'*Voluntary*' (i.e. *wilfully aiding*) *escape*] It is not every act of releasing a prisoner that will render an officer subject to the penalties of voluntarily permitting an escape. The better opinion appears to be that the act must be done *malo animo,* with an intent to defeat the course of justice. See also, therefore, under *Perversion of Justice* for the common law. Thus, 'it seems agreed that a person who hath power to bail is guilty only of a negligent escape by bailing one who is not bailable; neither can I meet with any authority . . . to support the . . . opinion that the bailing of one who is not bailable, by one who hath no power to bail, must necessarily be esteemed a voluntary escape. . . . Also there are some cases wherein an officer' has 'knowingly given his prisoner more liberty than he ought to have had, as to go out of prison on promise of returning, &c. . . . and yet seems to have been only adjudged guilty of a negligent escape. . . . The judgment to be made of all offences of this kind must depend on the circumstances of the case, as the heinousness of this crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning,' and the intention and motives of the officer, &c. Hawk. *ib.* s. 10.

Retaking] It is laid down in some books that after a voluntary escape the officer cannot retake the prisoner by force of his former warrant, for it was by the officer's consent. But if the prisoner return, and put himself again under the custody of the officer, the latter may lawfully detain him, and bring him before a justice in pursuance of the warrant. 2 Burn's Justice, Escape, s. 5, 30th ed., citing Dalt. ch. 169; Hawk. 2, 13, 9, who, however, observes that the purport of the authorities seems to be no more than this, 'that a gaoler who hath been fined for an escape shall not avoid the judgment of his fine by retaking the prisoner. But I do not see how it can be collected from hence that he cannot justify the retaking him.' *Ib.* 2, 19, 12.

Negligent escape] 'A negligent escape is where the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again before he hath lost the sight of him.' Dalt. ch. 159, as cited 2 Burn's Justice, above, s. 4. Thus if a thief suddenly, and without the assent of a constable, hang or drown himself, this is a negligent escape. *Ib.* 'If a prisoner for felony break the gaol, this seems to be a negligent escape, because there wanted either that due strength in the gaol that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it.' 1 Hale P. C. 601. But on this passage it has been remarked that it would be competent to a person

charged with a negligent escape in such circumstances to show 'that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security.' 1 Russ. Cri. 558.

Where a prisoner escapes through the negligence of the gaoler, but the latter makes such fresh pursuit as not to lose sight of him until he is retaken—which may be done in any county—this is said not to be an escape in law; but if he loses sight of him, and afterwards retakes him, the gaoler is liable to be punished criminally. The sheriff or gaoler, though he had no other means of retaking his prisoner, would not be justified in killing him in such a pursuit. Hawk. P. C. 2, 19, 12, 13; 1 Hale, P. C. 602. Cf. under *Homicide.*

Escape from private custody] The evidence on an indictment against a private person, will in general be the same as on one against an officer. A private person may be guilty either of a voluntary or of a negligent escape where he has another lawfully in his custody. Even where he arrests merely on suspicion of felony, yet he is punishable if he suffer the prisoner to escape. Hawk. 2, 20, 2. And if in such case he deliver the prisoner to another private person, who permits the escape, both, it is said, are answerable. *Ib.* But if he deliver over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody there is an escape, he is not liable. *Ib.* s. 3. This is the proper course for a private person: 1 Russ. Cri. 562.

Punishment] A negligent escape in an officer is punishable [now] by a fine, at the discretion of the court. Hawk. 2, 19, 31; 1 Hale P. C. 600.

A voluntary escape in an officer amounted to formerly his being an *accessory* to the offence of the prisoner and he forfeited his office: s. 30. And the officer could be punished before the conviction of the principal party, *i.e.* be fined and imprisoned for a misdemeanour (though not for the principal offence). Hawk. *ib.* s. 26; 1 Hale P. C. 598, 599; 4 Bl. Comm. 130. 'The effect of the existing law of accessories on voluntary escape has not been judicially determined': 1 Russ. Cri. 560.

Where a private person is guilty of a negligent escape, the punishment is fine or imprisonment, or both. Hawk. 2, 20, 6.

'It is not now the practice to indict a prisoner for escape before trial, since if he is retaken he can be sufficiently punished on conviction.' Encyc. Laws, Eng.: Escape.

Statutes.

By 31 E. 3, 14 (1357), 'the escapes of thieves and felons . . . and also escapes of clerks convict out of their ordinaries' prison' shall be levied, &c. Hawk. *ib.* says, 'it is certain that justices of gaol delivery may punish justices of peace for a negligent escape' in bailing non-bailable persons.

For 16 G. 2, 31, see *Rescue.*

See 14-5 V. 100, 29, where no distinction is made between escapes due to the fault of the custodian or not: 1 Russ. Cri. 555 *g.*

By 23-4 V. 75, 12, it is a felony to aid in the escape of *criminal*

lunatics; extended by 47-8 V. 64, 11: maximum sentence, four years' p. s.

Aiding, &c.] By 28-9 V. 126, the Prison A. 1865, s. 37: 'Every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any person, conveys or causes to be conveyed into any prison any mask, dress, or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years.'

5 Ann. 9 (or 6 Ann. 12), s. 1, deals only with civil remedies for the escape of civil prisoners.

Prisoners of war] By 52 G. 3, 156, aiding alien enemy prisoners of war to escape on land or on the high seas was punishable by transportation for seven or fourteen years or life. Except in this case and where the prisoner's crime was not triable at Q. S., these offences are triable at Q. S.

Escaping convict killed] See under *Homicide.*

ESCAPE FROM PENAL SERVITUDE.

Perhaps the only surviving 'transportation'-enactment now of any practical importance is 5 G. 4, 84, 22, which, as amended by 4-5 W. 4, 67, makes a convict illegally 'at large' (*i.e.* escaped), within the dominions of the crown, liable to penal servitude for life. See also 20-1 V. 3, 3. In view of the modern system of convict settlements, whereby the prisoners spend much time not within walls, so that, in case of escape, technically a 'breach' may be impossible, this s. may contain the only penalty for that offence. For Parkhurst and Pentonville prisons specially, see 1-2 V. 82, 12, and 5-6 V. 29, 24, respectively. A convict at large within the dominions of the crown outside the United Kingdom may be dealt with under the Fugitive Offenders Act, 1881, 44-5 V. 69.

Evidence] By s. 24 of 5 G. 4, 84, the certificate of the clerk of the court, &c., is made evidence of the conviction and sentence. The 'signature and official character of the person signing' must be proved. If the certificate is made by the clerk or officer of a court out of Great Britain, it is admissible when verified by the seal of the court or the signature of the judge. The 'effect and substance' of the former conviction must be stated; merely stating that there was a conviction 'of felony' is not sufficient. *Sutcliffe*, R. & R. 469, *n.*, 1788; *Watson, ib.* 468, 1821.

When such a certificate was put in and purported to be signed by J. G., 'deputy clerk of the peace' for the county of L., 'and clerk of the courts of general quarter sessions of the peace,' &c., 'and having the custody of the records of the courts of general quarter sessions,' &c., and it was proved that Mr. H. was clerk of the peace for L., and that he had three deputies, partners, of whom J. G. was one, and that each of them acted as clerk of the peace; and that for forty years they had kept the sessions' records at their office, Coltman J. held that the conviction and sentence was sufficiently proved. *Jones*, 2 C. & K. 524, 1847; see also *Parsons*, L. R. 1 C. C. R. 24, 1866, both under 8-9 V. 113, 1. In *Finney*, 2 C. & K. 774, 1849, Alderson B. held, that the fact of the sentence being in force at the time defendant was found at large, was sufficiently proved by the certificate of his conviction and sentence, *the judgment not having been reversed*, although on the face of such certificate it did not appear that the sentence (viz. fourteen years) was one which could have been inflicted on him, for his offence, viz. mere larceny. This presumes *omnia rite esse acta*.

Aiding, &c.] The punishment is the same as that of the principal.

Not triable at Q. S.

Reward to discoverer of convict at large] The judge at the trial has power to order the county treasurer to pay the reward (20*l.*) under s. 22 above. *Emmons*, 2 Moo. & R. 279, 1840.

EXPLOSIVES, INJURY BY.

Danger to human life] By 24-5 V. 97, the Malicious Damage A. 1861, s. 9: 'Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down or damage the whole or any part of any dwelling-house, any person being therein, or of any building whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for life, or to be imprisoned, and if a male under the age of sixteen years with or without whipping.'

Danger to any buildings, &c.] By s. 10: 'Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods, or chattels, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding fourteen years, or to be imprisoned . . . and if a male under the age of sixteen years with or without whipping.'

Danger to ship, &c.] By s. 45: 'Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any ship or vessel any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony.' Punishment same as in s. 10.

Making, &c. gunpowder, &c.] By s. 54: 'Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years with or without hard labour . . . and if a male under the age of sixteen years with or without whipping.' 24-5 V. 100, 64, is almost identical. Triable at Q. S.

Intent to murder] By 24-5 V. 100, Offences Against the Person A. 1861, s. 12: 'Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent to commit murder, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.'

Injuries to person] By s. 28: 'Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony.' Conclusion as in s. 9, above.

Not triable at Q. S.

Sending, &c. explosive, &c. substances] By s. 29: 'Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to, or cause to be taken or received by any person, any explosive substance, or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon, or otherwise apply to any person any corrosive fluid, or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony.' Punishment same as in s. 9, above.

Boiling water is 'destructive matter' within a rpd. A.: *Crawford*, 2 C. & K. 129; 1 Den. C. C. 100, 1845.

Not triable at Q. S.

Where defendant threw an 'electric fuse detonator' out of a railway carriage window, which when handled exploded and hurt the handler, Denman J. thought there was no evidence of a wounding (which must be 'direct'), but that it was for the jury whether defendant intended that this man (or any man) should pick it up: *Saunders*, 14 Cox C. C. 180, 1879, under ss. 28, 29.

Intent to do bodily injury] S. 30: 'Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony.' Punishment same as in s. 10, above. Triable at Q. S.

See also under *Nuisance*.

Malice] See 24-5 V. 97, 58.

Persons endangered within 24-5 V. 97, 9] It would seem that the endangering of life, to be within this s., must result from the damage done to the building alleged in the indictment, but it includes the case of persons outside the building whose lives are imperilled by anything proceeding from it. *McGrath*, 14 Cox C. C. 598, 1881. Danger by damage done to *other* buildings not so mentioned, but injured by the explosion, is not evidence of that alleged, but evidence of the damage done to them is admissible to show the character of the explosion, the extent of the damage, and its tendency to injure the particular building. *Ib.*

Whether life be endangered or not may be a difficult question; the acquittal directed in *Brown*, 3 F. & F. 821, 1863, was justly disapproved by Mr. Greaves: 1 Russ. Cri. 866 *q*.

Explosive substance] It must be shown under s. 10 that the substance thrown was in a condition to explode at the time it was thrown. The throwing of a bottle of gunpowder with an unlighted fuse, which by itself would not explode, would not be within it. *Sheppard*, 11 Cox C. C. 302, 1868.

Explosives A. 1875, 38-9 V. 17] This being an A. 'to amend the law with respect to manufacturing, keeping, selling, carrying, and importing gunpowder, nitro-glycerine, and other explosive substances,' made various offences punishable by fine or imprisonment; by s. 91, such offences may be prosecuted on indictment; by s. 92, a person accused of any offence the penalty for which exceeds 100*l.*, may object to be tried summarily.

Explosive Substances A. 1883] By 46-7 V. 3, 2: 'Any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property, shall, whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for life, or for any less term (not less than the minimum term allowed by law), or to imprisonment, with or without hard labour, for a term not exceeding two years.'

S. 3: 'Any person who within or (being a subject of her Majesty) without her Majesty's dominions unlawfully and maliciously—

(*a*) does any act with intent to cause by an explosive substance or conspires to cause by an explosive substance an explosion in the United Kingdom, of a nature likely to endanger life or to cause serious injury to property, or

(*b*) makes, or has in his possession or under his control, any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in the United Kingdom, or to enable any other person by means thereof to endanger life or cause serious injury to property in the United Kingdom,

shall, whether any explosion does or not take place, and whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for a term not exceeding twenty years, or to imprisonment, with or without hard labour, for a term not exceeding two years, and the explosive substance shall be forfeited.'

S. 4: (1) 'Any person who makes, or knowingly has in his possession or under his control, any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it, or does not have it in his possession or under his control, for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony, and, on conviction, shall be liable to penal servitude for a term not exceeding fourteen years, or to imprisonment for a term not exceeding two years with or without hard labour, and the explosive substance shall be forfeited.'

If several persons unite in a common design for the manufacture of explosive substances each is responsible for the articles in the possession of the others. *Charles,* 17 Cox C. C. 499, 1892.

(2) 'In any proceeding against any person for a crime under this section, such person and his wife, or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.'

For s. 5, see under *Aiders, &c.*

By s. 6 provision is made for inquiry by order of the Attorney-General, into offences under this A. before justices, and for the apprehension of absconding witnesses. See p. 173.

S. 7: (1) 'If any person is charged before a justice with any crime under this Act, no further proceeding shall be taken against such

person without the consent of the Attorney-General, except such as the justice may think necessary by remand, or otherwise, to secure the safe custody of such person.'

Where this consent was not obtained, c. q. because the proviso to s. 4 (1) of the C. A. Act does not apply when the court has no jurisdiction: *Bates,* 1911.

Venue] '(3) For all purposes of and incidental to arrest, trial and punishment, a crime for which a person is liable to be punished under this Act, when committed out of the United Kingdom, shall be deemed to have been committed in the place in which such person is apprehended or is in custody.

(4) This Act shall not exempt any person from any indictment or proceeding for a crime or offence which is punishable at common law, or by any Act of parliament other than this Act, but no person shall be punished twice for the same criminal act.'

S. 8 provides for search and seizure of explosives.

S. 9. 'In this Act, unless the context otherwise requires, the expression 'explosive substance' shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement.' Any part of a vessel which when filled with an explosive substance is adapted for causing an explosion is within this s. *Charles,* above.

No charge under this A. is triable at Q. S.

EXPOSURE.

See Index.

EXTORTION.

See *Woodward,* 1707, under *Office-holders; Robbery,* and *Threats,* and cf. *India.*

EXTRADITABLE OFFENCES

hardly come within the scope of this work, but see under *Venue.* There is a summary of 'the Practice in England' in *Clarke* on Extradition, 4th ed. (1903), pp. 230-41.

FACTORS, OFFENCES BY.

See *Agents, &c.*

FALSE DECLARATIONS AND STATEMENTS, ORAL OR WRITTEN.

Of the innumerable indictable offences of this *sort* only the more frequent can be mentioned here; see under *Cheats, Forgery, Perjury,* and the last paragraph of this title.

Elections—parliamentary] By 6-7 V. 18, 81, 82, cf. 35-6 V. 33, 10, two questions only may be put to a person about to vote. See 2 Rogers on Elections, p. 111, 18th ed.

By 1-2 G. 5, 6, the Perjury A. 1911, s. 5: 'If any person knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, and the statement is made—(c) in any oral declaration or oral answer which he is required to make by, under or in pursuance of any public general Act of Parliament for the time being in force, he shall be guilty of a misdemeanour': maximum punishment, on indictment, two years' imp. w. h. l. and fine.

By 46-7 V. 51, 33 (7), as amended, candidates or election agents knowingly making declarations required by that s. falsely are guilty of a 'corrupt practice.'

Municipal] Falsely or fraudulently signing certain declarations under 41-2 V. 26, is made a misdemeanour by s. 25 (amended: Perjury A. 1911).

Before magistrates] 5-6 W. 4, 62, 18 (as amended), is: '. . . whereas it may be necessary and proper in many cases not herein specified to require confirmation of written instruments or allegations, or proof of debts or of the execution of deeds or other matters . . . any justice of the peace, notary public, or other officer now by law authorised to administer an oath' may 'take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this Act annexed.'

Erskine J. held in *Boynes,* 1 C. & K. 65, 1843, that the enacting words were not restrained by those in the preamble of this s., so as to exclude from the statute a declaration by a member of a benefit society that he had sustained a loss by an accidental fire, it being a rule that any full member was to be indemnified in such a case to the extent of 15*l.*, on making a declaration before a magistrate; the preamble, perhaps, included matters *eiusdem generis.*

Registration—births, deaths, and marriages] By s. 3 of 1-2 G. 5, 6: (1) 'If any person (a) for the purpose of procuring a marriage or a certificate or licence for marriage, knowingly and wilfully makes a false oath, or makes or signs a false declaration, notice or certificate required under any Act of Parliament for the time being in force relating to marriage; or (b) knowingly and wilfully makes or knowingly and wilfully causes to be made, for the purpose of being inserted

in any register of marriage, a false statement as to any particular required by law to be known and registered relating to any marriage; or (c) forbids the issue of any certificate or licence for marriage by falsely representing himself to be a person whose consent to the marriage is required by law, knowing such representation to be false, he shall be guilty of a misdemeanour': maximum punishment on indictment, seven years' penal servitude or two years' imprisonment with hard labour and a fine.

'(2) No prosecution for knowingly and wilfully making a false declaration for the purpose of procuring any marriage out of the district in which the parties or one of them dwell shall take place after the expiration of eighteen months from the solemnisation of the marriage to which the declaration refers.'

S. 4 (1): 'If any person—

(a) wilfully makes any false answer to any question put to him by any registrar of births or deaths relating to the particulars required to be registered concerning any birth or death, or wilfully gives to any such registrar any false information concerning any birth or death, or the cause of any death; or,

(b) wilfully makes any false certificate or declaration under or for the purposes of any Act relating to the registration of births or deaths, or, knowing any such certificate or declaration to be false, uses the same as true, or gives or sends the same as true to any person; or,

(c) wilfully makes, gives, or uses any false statement or declaration as to a child born alive as having been still-born, or as to the body of a deceased person or a still-born child in any coffin, or falsely pretends that any child born alive was still-born; or

(d) makes any false statement with intent to have the same inserted in any register of births or deaths;

he shall be guilty of a misdemeanour and shall be liable—(1) on conviction thereof on indictment, to penal servitude for a term not exceeding seven years,' or to imp. w. or w. h. l. for a term not exceeding two years, 'or to a fine instead of either of the said punishments. . . .

(2) A prosecution on indictment for an offence against this section shall not be commenced more than three years after the commission of the offence.'

Registration—professional, &c.] By s. 6: 'If any person (a) procures or attempts to procure himself to be registered on any register or roll kept under or in pursuance of any public general Act of Parliament for the time being in force of persons qualified by law to practise any vocation or calling; or (b) procures or attempts to procure a certificate of the registration of any person on any such register or roll as aforesaid, by wilfully making or producing or causing to be made and produced either verbally or in writing any declaration, certificate or representation which he knows to be false or fraudulent, he shall be guilty of a misdemeanour': maximum punishment, twelve months' imprisonment (*sic*) and a fine.

N.B.—For other *general* provisions of this A. applying to these ss., see under *Perjury*.

6-7 W. 4, 86, 41, *rpd.*] Under this s. it was essential that the false statement should have been made wilfully and intentionally, and not by mistake only: *L. Dunboyne*, 3 C. & K. 1, 1850; and to constitute an offence it was not essential that the purpose for which the false declaration was made should have been effected. *Mason*, 2 C. & K.

622, 1848. An indictment charged that a clergyman had solemnised a marriage, and was about to register in duplicate the (false) particulars already supplied by defendant to the clerk, and entered by him, which the former repeated to the clergyman for the purpose of their being inserted in the register. After the ceremony the clergyman asked defendant if they were correct; he said they were, and the clergyman signed the register. It was held that defendant had been rightly convicted. *Brown,* 1 Den. C. C. R. 291; 17 L. J. M. C. 145, 1848. On such an indictment it is not necessary to prove that the marriage register book is the identical book directed to be furnished by the registrar-general under 6-7 W. 4, 86, 30.

It was a *felony* under 6-7 W. 4, 86, 43 (rpd. by 24-5 V. 95), to cause the registrar to make a false entry of a birth, marriage, or death. *Mason,* above. Apparently, the distinction between s. 41 (wilfully giving false information) and s. 43 was that the former applied to 'one or more particulars' and the latter to 'an entire false entry.' Thus, where a woman duly registered a birth giving particulars all false (except that a child had been born), it was held that this amounted to felony within s. 43, and was not merely the misdemeanour under s. 41. *Dewitt,* 2 C. & K. 905, 1849.

Customs] For making false declarations, see 39-40 V. 36, 168; penalty, one hundred pounds.

Bankruptcy] See that title.

Other instances] A great number of ss. creating such misdemeanours were rpd. by the Perjury A. 1911, which superseded them. Other misdemeanours still exist in respect of registration (the Pharmacy A. 1868, 31-2 V. 121, 14, amended); lunatics, 53-4 V. 5, 317 (prosecution only by order of Commissioners or Attorney-General, &c.), 318; under the Pensions Commutation A., 34-5 V. 36, 9 (where part of the sentence is forfeiture); the Land Transfer A., 1875, 38-9 V. 87, 99, 100; the Merchant Shipping A. 1894, 57-8 V. 60, 67; the Trade Marks A. 1905, 5 E. 7, 15, 66; the Patents A. 1907, 7 E. 7, 29, 89; and in many other cases.

See further for *written* declarations, *Falsification.*

FALSE ENTRIES.

See *Falsification* and under *Embezzlement* and *False Declarations.*

FALSE IMPRISONMENT.

See *Arrest, Illegal.*

'Imprisonment is the restraint of a man's liberty, whether it be in the open field or in the stocks or cage, in the streets or in a man's own house as well as in the common gaol . . . so long as he hath not his liberty to go at all times to all places whither he will without bail or mainprise.' *Termes de la Ley* (1708); approved by C. A., *Meering* v. *Grahame-White, &c. Co.*, 122 L. T. 44, 1920, where *Bird* v. *Jones*, 7 Q. B. 742, 1845, and *Warner* v. *Riddiford*, 4 C. B. N. S. 180, 1858, were cited as law. Cf. p. 581. There may be imprisonment without the prisoner knowing it, *e.g.* if he is asleep: *per* Atkin L.J.

This common law misdemeanour is punishable by fine and imprisonment. 1 East P. C. 428; Buller N. P. 22 a. A wrongful imprisonment amounts to an assault, which title see, and Hawk. P. C. b. 1, c. 60, s. 7; no violence need be used: in *Leslie*, 1860, and Buller, above; *Linsberg*, indictments for false imprisonment included counts for assault, but a count for false imprisonment alone without assault would apparently be good. An imprisonment may, but does not necessarily include a battery. *Emmett* v. *Lyne*. Bow Street magistrates and their officers who forcibly detained a known person against whom no charge had been made (though they believed this was about to be done) were convicted: *Birnie and others*, 5 C. & P. 206, 1832.

For naval or military cases, see under *Mutiny*. For 'restraint of the person,' see *Violence* in Index.

Triable at Q. S.

FALSE NEWS.

See *Press Offences*. Cf. p. 421.

FALSE OATH.

See under *Perjury*.

FALSE PERSONATION.

Common law] 'The bare fact of personating another though for the purpose of fraud,' is no more than a cheat or a misdemeanour at common law. 2 East P. C. 1010; 2 Russ. Cri. 1763. In most cases of this kind more than one are concerned in the offence, and the indictment is for conspiracy; very few cases are to be found of prosecutions at common law for false personation. But where the indictment merely charged that defendant personated one A. B., clerk to H. H., justice of the peace, with intent to extort money from several persons in order to procure their discharge from certain misdemeanours, for which they stood committed, the court refused to quash the indictment on motion, but put the defendant to demur. *Dupee*, 2 Sess. Cas. 11; 2 East P. C. 1010, 1726. 'It might probably have occurred to the court, that this was something more than a bare endeavour to commit a fraud by means of a falsely personating another, for that it was an attempt to pollute . . . public justice.' East, *ib.*

Personating bail, &c.] By 24-5 V. 98, 34: 'Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall in the name of any other person acknowledge any recognisance or bail, or any *cognovit actionem* [= 'a defendant's written confession of an action brought against him, to which he has no available defence,' *Wharton* Law Lex.] or judgment, or any deed, or other instrument, before any court, judge, or other person lawfully authorised in that behalf, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned.'

Of soldiers, seamen, &c.] The false personation of soldiers and seamen was made felony by several statutes. Those still in force are, with respect to soldiers: 7 G. 4, 16, 38; 2-3 W. 4, 53, 49; 44-5 V. 57, 36, and 58, 142; and with respect to sailors: 28-9 V. 124, 8, 9. Cf. 16-17 V. 69, 16, and 6 E. 7, 5 (Summary Jurisdiction). Cf. *Westhorpe* v. *Powley*, 20 Cox C. C. 747, 1904.

Where a statute had the words, 'any officer,' &c., 'entitled, or supposed to be entitled,' &c., it was held for such false personation there must be some evidence to show that there was some person of the name and character assumed, who was either entitled, or might, at least *primâ facie*, be entitled, to the prize-money in question. *Brown*, 2 East P. C. 1007, 1800. Where the prisoner was indicted for personating, &c. the name and character of Peter M'Cann, a seaman on board the *Tremendous*, and it appeared in evidence that there had been a seaman of the name of M'Carn on board the vessel, but no one of the name of M'Cann; the jury expressly finding that he intended to personate M'Carn, the judges held the conviction wrong. *Tannet*, R. & R. 351, 1818.

The offence is the same, though the seaman personated was dead at the time the offence was committed, and no money was obtained. *Martin*, R. & R. 324, 1817; *Cramp, ib.* 327, 1817.

All persons present abetting, &c. the personation of a seaman are guilty within 57 G. 3, 127, rpd. *Pott*, R. & R. 353, 1818, where a woman came and asserted that a personater (convicted) was the real man.

In contravention of 2-3 W. 4, 53, 49, L. instigated B. to personate C. to get certain prize-money. L.'s defence was that he had bought the claim from C., and this there was nothing to disprove. Lush J. directed the jury that if they believed that L. instigated B. to represent himself as C., and that B. knowingly and wilfully represented himself as C., then, whatever B.'s motive may have been, both were guilty. Even if B. believed L. was really C., or had C.'s authority to get the money, yet if he falsely represented *himself* to be C., though authorised by L. to do so, he would be guilty. *Lake, Bird,* 11 Cox C. C. 333, 1869: both guilty.

Obtaining a police pension by personation, fraud, &c., or attempting to do so, is punishable on indictment by two years' imp. w. or without h. l. and loss of 'pension, gratuity or allowance so obtained': 53-4 V. 45, 9.

Of voters] By 35-6 V. 33, 24: 'A person shall, for all purposes of the laws relating to parliamentary and municipal elections, be deemed to be guilty of the offence of personation, who at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead or of a fictitious person, or who, having voted once at any such election, applies at the same election for a ballot paper in his own name.' For this as a corrupt practice and for *punishment,* see under *Bribery.*

The s. goes on: 'It shall be the duty of the returning officer to institute a prosecution against any person whom he may believe to have been guilty of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person at the election for which he is returning officer.' Where owing to wrong information overseers put defendant on the list as *James Cummings* (by which name he had in fact gone) and he answered on oath the question, 'Are you the person whose name appears on the register as James Cummings?' 'Yes,' and voted (as he was entitled to do in his own name), Hawkins J. directed an acquittal: *Fox,* 16 Cox C. C 166, 1887.

'The provisions of the Registration Acts specified [viz. 6-7 V. 18, 13-14 V. 69] in the Third Schedule to this Act, shall in England and Ireland respectively apply to personation under this Act, in the same manner as they apply to a person who knowingly personates and falsely assumes to vote in the name of another person as mentioned in the said Acts.'

47-8 V. 70, 1, makes personation, &c. at municipal elections in all respects a corrupt practice, or just as if it had been committed at a parliamentary election.

Of owners of real estate, &c.] 37-8 V. 36, 1, is: 'If any person shall falsely and deceitfully personate any person, or the heir, executor or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property, he shall be guilty of felony, and, upon conviction, shall be liable to be kept in penal servitude for life.'

2: 'Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act, or at common law, in respect of an offence (if any) punishable as well under this Act as under any other Act, or at common law.'

By s. 3, the offence is not triable at quarter sessions.

Of owners of stocks, &c.—National Debt] 2-3 W. 4, 59, 19, is unrepealed (only) in so far as it deals with personation: Forg. A. 1913. See also 26-7 V. 73, 14 (India stock).

By 24-5 V. 98, 3: 'Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of England, or at the bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of parliament, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavour to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony': maximum punishment, p. s. for life.

Of National Debt stockholder] By 33-4 V. 58, 4: 'If any person falsely and deceitfully personates any owner of any share or interest of or in any such stock as aforesaid [*i.e.* 'as defined in the National Debt A. 1870': s. 3], or of any such stock certificate or coupon as aforesaid, and thereby obtains or endeavours to obtain any such stock certificate or coupon—or receives or endeavours to receive any money due to any such owner, as if such person were the true and lawful owner, he shall be guilty of felony': maximum punishment, p. s. for life.

Under 31 G. 2, 22, 77, rpd., defendant was indicted for personating one I. H., the proprietor of certain stock, and thereby 'endeavouring to receive' from the bank of England the sum of, &c. Representing himself to be I. H., he received, at the bank, a dividend warrant for the sum due, on getting which, instead of carrying it to the pay-office, he walked another way, and, being at once arrested, made no attempt to get the money. It was objected, that there was no proof of his having 'endeavoured to receive' the money, but the judges held this conviction right, as the manner in which he applied for and received the warrant was a personating of the true proprietor, and he thereby endeavoured to receive the money, within A. *Parr,* Lea. 434; East P. C. 1005, 1787.

Of revenue officer] Falsely personating an officer of inland revenue (or of the Commissioners of Customs and Excise: St. R. & O. 1909, p. 243) for the purpose of obtaining admission to any house, or of doing or procuring to be done any act, or for any other unlawful purpose, is made a misdemeanour by 53-4 V. 21, 12.

Of husbands] See under *Rape.*

Of masters, &c.] in order to give servants false characters, seems from 32 G. 3, 56, to have been common; the jurisdiction was summary: see, however, *Connolly,* 3 Cr. A. R. 27, 1909: conspiracy.

Of clergyman] to solemnise matrimony: see 4 G. 4, 76, 21, and *Ellis,* 16 Cox C. C. 469, 1888: 7 years' p. s.

FALSE PRETENCES, OBTAINING BY.

See the introductory remarks under *Embezzlement.* 'The necessity for [this] statutory misdemeanour . . . arose from a difficulty with respect to *animus furandi.* . . . When a person is induced by false pretences to contract to part absolutely with the right of property in the thing and he afterwards in pursuance of that agreement gives up the possession, it was held that as the right of property had been changed by contract, though upon a fraud which made the agreement defeasible there was not at the time of the change of possession an ownership in the former proprietor and consequently there could not then be an intent wrongfully to deprive him of the benefit of ownership': (*Pollock* and) *Wright* on Possession, p. 158; cf. p. 203, cited below, and p. 219: 'the owner . . . by himself or by some person having general or specific authority to act for him on that behalf contracts to part immediately and unconditionally with his rights of property.' See also under *Cheating: Ridgway* and *H. Williams,* 1836, below, illustrate how narrow the border line between that common law offence and this statutory misdemeanour often is.

Distinction from larceny] is of practical value in appreciating the *legal* quality of this crime. 'Where,' says Sir F. Pollock, above, p. 101, 'the giver does intend to pass property to the receiver, being induced thereto by some false representation of the receiver not affecting the substance of the transaction itself, there is a real though not finally valid consent; the agreement is voidable on the ground of fraud, but not void, and third parties giving value in good faith may acquire irrevocable rights under it; and the offence committed, if any, is not theft but obtaining by false pretences. This is . . . well settled. The difficulties in particular cases are really difficulties of fact.'

'. . . It may be a question whether many cases where the facts amounted to theft have not been dealt with (and rightly, as a matter of practical caution) as cases of obtaining by false pretences': *Ib.* p. 108.

See further this point under *Larceny by Trick.*

Hence, negatively, this offence is illustrated by some indictments for larceny which will be found under *Not Larceny;* and cf. *Larceny by Servants, False Accounts,* and *Full Authority.* See also *H. Thompson,* 1862; *Cooke,* 1871; *Solomons,* 1890.

By s. 3 of 62-3 V. 22, the S. J. A. 1899, a court of summary jurisdiction, to explain this offence, 'shall . . . state in effect that a false pretence means a false representation by words, writing, or conduct that some fact exists or existed and that a promise as to future conduct not intended to be kept is not by itself a false pretence.'

By 6-7 G. 5, 50, 32: 'Every person who by any false pretence (1) with intent to defraud obtains from any other person any chattel, money, or valuable security or causes or procures any money to be paid or any chattel or valuable security to be delivered to himself or

to any other person for the use or benefit or on account of himself or any other person; or (2) with intent to defraud or injure any other person fraudulently causes or induces any other person (a) to execute, make, accept, endorse, or destroy the whole or any part of any valuable security; or (b) to write, impress, or affix his name or the name of any other person or the seal of any body corporate or society upon any paper or parchment in order that the same may be afterwards made or converted into or used or dealt with as a valuable security; shall be guilty of a misdemeanour and on conviction thereof liable to penal servitude for any term not exceeding five years.'

Intent] By s. 40 (1): 'On the trial of an indictment for obtaining or attempting to obtain any chattel, money, or valuable security by any false pretence, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the person accused did the act charged with intent to defraud': *Sowerby*, below.

Larceny proved] By s. 44 (4): 'If, on the trial of any indictment for obtaining any chattel, money, or valuable security by false pretences, it is proved that the defendant stole the property in question, he shall not, by reason thereof, be entitled to be acquitted of obtaining such property by false pretences.' The converse is dealt with in (3).

There is no corresponding reciprocity with *Embezzlement*. For some time the maximum sentences for simple larceny and this offence (in its commonest form) have been the same. For the distinctions between the three see under *Larceny*.

Obtaining credit by false pretences] See the Bankruptcy A., 4-5 G. 5, 59, 156.

At gaming] Cheating is a statutory false pretence: 8-9 V. 109, 17.

In conspiracy] See that title.

What is a 'false pretence'?] See generally under *Cheating*. 'Great difficulty has been experienced in deciding where to draw the line between criminal frauds of this nature and those which only give rise to civil remedies [mere dishonesty is not this offence: *G. Baker*, 1910]. On the one hand, the tendency of modern opinion and legislation has been, as far as possible, to make all frauds criminal. On the other hand, the necessity has been felt that the line which separates the criminal law should be clearly drawn. The consequence is, that there is some conflict between the decisions, as will appear from . . . the following cases' (7th, by Stephen J., and later editions of this work).

The phrase occurs as the name of a misdemeanour for the first time in s. 1 of rpd. 30 G. 2, 24. The first *definition* seems to be that in 62-3 V. 22, 3, above, and to be founded on one by the learned writer just cited, who adds (Dig. Cr. L. art. 359): 'and such a representation may amount to a false pretence, although a person of common prudence might easily have detected its falsehood by inquiry and although the existence of the alleged fact was in itself impossible.' But, he adds, 'false pretence' 'does not include (a) a promise as to future conduct not intended to be kept unless such promise is based upon or implies an existing fact falsely alleged to exist; or (b) such untrue commendation or untrue depreciation of an article which is sold as is usual

between sellers and buyers unless such untrue commendation or untrue depreciation is made by means of a definite false assertion as to some matter of fact capable of being positively determined.' 'In order to establish the offence of obtaining money by false pretences it is necessary to prove what was laid down by Buckley J. in *Re London and Globe Finance Corporation, Ltd.* [1903, 1 Ch. 732]: 'To deceive is, I apprehend, to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely, it may be put that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.'' *B. Bennett,* &c., 9 Cr. A. R. 154; 23 Cox C. C. 609; 109 L. T. 747, 1913.

The cases are arranged, as far as possible, under the following heads: 1. The act of obtaining. 2. The nature of the pretences used. 3. The nature of the property obtained.

1. *The 'obtaining.'*

'Obtain' control] The property must be 'obtained' by defendant. Manual possession is not necessary: 'control' is enough. When a letter containing 1*l.*, the fruit of the false pretence, was seized by the police before it came into defendant's possession, the C. C. A., relying on the *Receiving* cases (*Wiley,* &c.), substituted an attempt and reduced sentence: *J. Marston,* 13 Cr. A. R. 203, 1918. In *Kilham,* L. R. 1 C. C. R. 261; 39 L. J. M. C. 109; 11 Cox C. C. 561, 1870, a man by false pretences obtained a horse on hire, and rode him for the day, and returned him in the evening, but never paid the hire. Had he meant to ride away with the horse altogether which he fraudulently pretended to hire, that would have been an obtaining by false pretences, and also a larceny; it was held that the obtaining must, as essentially as in larceny, be coupled with an intention to deprive the owner of his property, and not a mere intention to make use of the thing and return it. 'Obtain' does not mean by way of loan, *i.e.* of a chattel: see *Loans,* below. But where defendant, pretending to come from a neighbour, got change for half-a-guinea on the faith that the neighbour would send that coin later, this was held not larceny: it 'was . . . a *loan* of the silver: . . . money obtained on a false pretence': *Coleman,* 2 Russ. Cri. 1521 *h*; East P. C. 672, 1785; Lea. 303 n. In *Codrington,* 1 C. & P. 661, 1825, defendant, by falsely pretending to the prosecutor that he was entitled to a reversionary interest in one-seventh share of a sum of money, obtained 29*l.* 3*s.* from him. It was proved that the prosecutor agreed to purchase the seventh part of an interest to which defendant would be entitled on the death of a relation; and an assignment was accordingly prepared containing a covenant for title, and the money paid. A previous assignment of the same interest by the defendant to another person was then put in. It was held that this was not indictable, but was only a breach of covenant for title, for which a civil action would lie: a decision which was much doubted apparently in *Adamson,* below, and repudiated by L. Denman in *Kenrick,* 1843, which see.

Loans] Very frequently chattels, moneys, or valuable securities are fraudulently obtained, but only by way of a loan. 'Where a chattel is lent the chattel does not pass, but money that is lent passes as much in a case of loan as on a sale. There was no expectation that the

same money which was obtained would be returned': *per* Crompton J. in *Burgon*. So of the loan of a 'valuable security except' where the identical security is expected back: 9 Halsbury, 698, on the authority of *Burgon* (cheque), but that case does not go so far.

The result of the cases appears to be that it is immaterial whether the prosecutor regarded the matter as a loan or not, but there must be an intention in the mind of defendant to deprive the owner wholly of his property, and not a mere intention to make use of the thing obtained and then return it.

Defendant had accepted a bill drawn on him by the prosecutor for 2,638*l*., which he owed the latter. When the bill became due, the prosecutor asked him if he was prepared to pay it, and he said he had enough all but 300*l*., which he expected to get from a friend. The prosecutor, who was not any longer the holder of the bill, expressed his willingness to advance the 300*l*. himself, and ultimately did so; but defendant, instead of taking up the bill, applied the 300*l*. to his own purposes, and suffered the bill to be dishonoured, and the prosecutor eventually had to pay it: at the time defendant obtained the money, he was in insolvent circumstances. For him it was contended that the representation was not a false pretence within the statute, 'being a mere mis-statement, or at the worst a naked lie,' and *Codrington* was cited; and secondly, that the s. rpd., but corresponding to s. 32, above, did not extend to cases where the prosecutor had only lent, not parted with, the property. Patteson J. said: If the jury 'are satisfied that the prisoner fraudulently obtained the 300*l*. from the prosecutor by a deliberate falsehood, averring that he had all the funds required to take up the bill, except 300*l*., when in fact he knew that he had not, and meaning all the time to apply the 300*l*. to his own purposes, and not to take up the bill, it appears to me that the jury ought to convict the prisoner. In *Codrington*, it does not appear that the prisoner did distinctly allege that he had a good title to the estate which he was selling. As to the money being advanced by the prosecutor only as a loan, the terms of the Act of parliament embrace every mode of obtaining money by false pretences, by loan as well as by transfer.' *Crossley*, 2 Moo. & R. 17; 2 Lew. C. C. 164, 1837: acquittal. Defendant represented to the prosecutor, who lent him 80*l*., that he had built a house worth 300*l*. on certain land, and deposited with the prosecutor a lease of the land as a security, and entered into a bond for 80*l*. and written agreement to execute a mortgage of the land: whereas, in fact, the house was built on other land adjoining, and had already been mortgaged by the defendant. It was held that he was properly convicted of obtaining by false pretences. *Burgon*, D. & B. 11; 25 L. J. M. C. 105; 7 Cox C. C. 131, 1856: C. C. R.

A railway pass was obtained by false pretences. At the end of the journey it would have to be returned to the company. The court having held that it was 'while in the hands of the party using it . . . an article of value' and a 'chattel' within the s., held also that the fact that it was to be returned at the end of the journey did not affect the question. *Boulton*, 1 Den. C. C. R. 508; 19 L. J. M. C. 67; T. & M. 201; 3 Cox C. C. 576, 1849. 'The reasons for this decision do not very clearly appear, but,' unlike the horse case, 'the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use for the only purpose for which it was capable of being applied;' the Court, in *Kilham*, above. *Boulton* was approved and followed in *H. W. Chapman*, 4 Cr. A. R.

276; 74 J. P. 360, 1910, where, however, L. Alverstone C.J. seems to have had some doubt.

What induced the delivery?] The obtaining must be the result of the false pretences, and must not be too remotely connected with them. The 'Particulars of the Offence' now provide for the allegations *relied on*. But

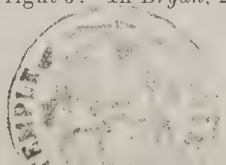
Onus] defendant may show that it was *another* which induced: *Hamilton* v. *R.*, 1845; *Roebuck*.

In *Ady*, 7 C. & P. 140, 1835, an endeavour was made to show that the prosecutor parted with his money with a full knowledge that the pretence was false and to entrap defendant. Patteson J. said, if he did obtain the money by false pretences, and knew them to be false at the time, it did not signify whether it was intended to entrap him or not. But according to subsequent cases perhaps only an *attempt* [below] would be thus proved. In *Gardner*, D. & B. C. C. 40; 7 Cox C. C. 136; 25 L. J. M. C. 100, 1856, defendant represented himself to be and dressed as a naval officer, and by that false pretence at first obtained lodging. He subsequently and without any fresh pretence obtained board as well, and was indicted for obtaining articles of food by falsely pretending he was a naval officer; it was held that the obtaining of the food was too remotely the result of the false pretence. This case may be usefully compared with *Burton*, 16 Cox C. C. 62; 54 L. T. 765, 1886: C. C. R., where defendant was received as a lodger without making any false pretence. After having lodged for a day or two, he falsely stated to his landlady that he had come from another lodging, where he had left some of his clothes, and asked for and obtained board as well as lodging, the landlady believing his statement about his clothes. The jury having found him guilty of obtaining food by false pretences, the court upheld the conviction, explained in *Moreton*, below. In *Mills*, D. & B. C. C. 205; 26 L. J. M. C. 79; 7 Cox C. C. 263, 1857, it was alleged that money was obtained by a false pretence that defendant had cut sixty-three fans of chaff, when in fact he had only cut forty-five. Prosecutor had seen him remove eighteen fans of chaff, from a heap for which he was not entitled to be paid, and place them with that for which he was entitled to be paid; but, notwithstanding, paid him the amount which he demanded. It was held that the conviction was wrong, as the money was not obtained by means of the false pretence.

Attempts] Defendant might, however, be convicted of the attempt: as was a begging-letter writer who obtained money though the giver knew the statements in the letter were false. *Hensler*, 11 Cox C. C. 570; 22 L. T. 691, 1870: C. C. R., followed in *Light*, 84 L. J. K. B. 865; 31 T. L. R. 257; 112 L. T. 1144; 11 Cr. A. R. 111, 1915, where persons suspecting defendant wrote inviting him to state his terms. For *some* statements inducing and *some not*, see *English*, below.

Where the cashier (instead of the works manager) stated what induced his firm to accept an order—which was not part of his work—the C. C. A. varied the verdict to an *attempt* (and altered sentence): *Dargue*, 6 Cr. A. R. 262, 1911.

Inducement by contract] This offence often presupposes some sort of contract: see above, the remarks of Wright J. In *Bryan*, 2 F. & F.



567, 1861, where a contract was obtained for board and lodging by false pretences, and under it defendant subsequently obtained both and sixpence as a loan, an acquittal was directed as it was held, following *Gardner*, above, 'too remote to say that he obtained the goods or the money by the false pretences': it was the contract he so obtained. [See *Contract*, below.] It may be that the indictment was only for the sixpence. See *Martin*, below. Where there was an offer to provide paying work if a deposit was sent, and when it was sent an offer to return it if the sender was dissatisfied with the conditions of the work, it was held to be criminal because the applicant received something different from what he was led to expect. The intent to defraud consisted in relying on the fact that a large number of senders would not trouble to demand back their deposit. *Paynter*, 1 Cr. A. R. 253; 25 T. L. R. 191, 1908.

Remoteness] See *Gardner*, above. Defendant was charged with obtaining the prize in a swimming race by false pretences. He obtained his entry-ticket by representing himself to be a member of a certain club, and by a forged letter from the secretary thereof (for which he was ultimately convicted); on the faith of this he was allowed twenty seconds' start and won the prize. It was held that the obtaining the prize was too remotely connected with the false pretence. *Larner*, 14 Cox C. C. 497, 1880; but see *Button*, below. A professional runner, by representing himself to be an amateur and assuming a false name, competed in a race exclusively for amateurs and was allowed a start, and won the race. He was convicted of *attempting* to obtain the prize by false pretences. *Dickenson* (*cor.* Lindley J.; reported, *Times*, 1879, July 25th, and 10th ed. of this work, p. 502). This was followed —and *Larner* disapproved—in *Button*, 1900, 2 Q. B. 597; 69 L. J. Q. B. 901; 64 J. P. 600; 19 Cox C. C. 568: C. C. R., where the fraud was exactly of the same nature as in the last two cases (but defendant had not asked for the prize): it was distinctly held that the attempt here was not too remote from the false pretence: it follows, therefore, that the actual obtaining cannot be. It would seem, however, that in all such cases the question of remoteness is for the jury.

Chattel not yet in existence] See *Martin*, L. R. 1 C. C. R. 56; 36 L. J. M. C. 20; 10 Cox C. C. 383, 1867 (a van ordered), where it was held that it is not necessary that the goods obtained should be in existence at the time the pretence is made, provided the subsequent delivery of the chattel is induced by the false pretence. See also *Welman* and *Fryer*, 1912, and *Continuing Pretence*, below. *Martin* was followed in *Moreton*, 23 Cox C. C. 560; 109 L.T. 417; 8 Cr. A. R. 214, 1913, where it was held that *how long* a false pretence *continues* to operate, is for the jury, and *Gardner*, above, was explained—'there was no continuing false pretence.'

Aiders, &c.] See *Misdemeanours* under that title. Where several persons are acting together, see *Young*, 1789. Even where they are not all present, if they have assisted and concurred in the fraud, they are guilty of false pretences. *Moland*, 2 Moo. C. C. 276, 1843.

Obtaining may be another crime] See s. 44 (3), (4) of the Larceny A. 1916, above, and generally for *any* felony thus disclosed, 14-5 V. 100, 12.

Where goods were obtained by a forgery, the indictment must be for the forgery, and could not be for the obtaining by false pretences. *Evans,* 5 C. & P. 553, 1833; *Anderson,* 2 Moo. & R. 469, 1843; cf. *Inder,* 1 Den. C. C. 325; 2 C. & K. 635, 1848. It must be remembered that the C. C. A. has large powers to correct any merely technical flaw or misdirection as *e.g.* in *Buckland,* below, where, perhaps, the fraud proved was not strictly a false pretence in law; or *Dargue.*

2. *The Nature of the Pretence.*

Existing and future facts: promises] The false pretence laid must be of some bygone or existing fact. See *Welman.* It is not expressly laid down there that the false pretence must not be of some future event or a mere dishonest promise, but it may well be implied, for that view was long held. Indeed, Dr. Kenny says: 'A statement purely affecting the future will not suffice. For all future events are obviously matters of conjecture upon which every person must exercise his own judgment' (Outlines, ch. 15); but, after pointing out that a promise to pay for goods only founds a civil remedy, and citing *Lee,* below, he goes on, 'This distinction between present and future is, however, now being undermined by the principle that representations which do not expressly mention anything but the future may nevertheless imply a representation about the present; viz. a representation that the existing state of affairs is such that in the ordinary course of events, the future occurrence mentioned will take place.' So Stephen J. as noted above. After citing *Giles,* below, and *Murphy,* 1876, below, Dr. Kenny remarks that in drawing a cheque, 'a document which on the face of it is only a command of a future act,' there is implied a 'statement' that such a state of things exists at present that the cheque *will* be honoured.

The 'principle' here alluded to was materially advanced by some remarks (which, however, were distinctly *obiter*) of Wills J. in *Gordon,* 1889, below, viz. 'I find it difficult to see why an allegation as to the present existence of a state of mind *may* not be under some circumstances as much an allegation of an existing fact as an allegation with respect to anything else. . . . But I am very sensible that in such an inquiry there must always be a danger of confounding intention with a representation or a promise as to something future.' With which Dr. Kenny compares the dictum of L. Bowen, 'the state of a man's mind is just as much a fact as the state of his digestion,' *Edgington* v. *Fitzmaurice,* 29 Ch. D. 483, 1885, and adds, 'But if such expressions of intention are to be recognised as sufficient pretences, it will be hard indeed to distinguish between them and mere promises which (as we have seen) are not sufficient to constitute an indictable pretence.'

Where four men came to the prosecutor representing that they had betted that a certain man would run ten miles within one hour, and that they should probably win, the court were of opinion that the false pretences were within 30 G. 2, 24, rpd.: *Young,* 1789, where the pretence laid was that of having actually made a bet (and not, as the headnotes states, of some future fact).

So also a promise to pay for goods on delivery is not a false pretence of an existing fact. *Goodhall,* R. & R. 461, 1821, under 30 G. 2, 24, above; cf. *Dale,* 1836.

Where defendant was charged with pretending that he would tell

the prosecutor where his horses were, and so obtaining a sovereign, it was held that this was not a false pretence of an existing fact, and he ought to have been indicted for falsely pretending that he knew where they were. *Douglas,* 1 Moo. C. C. 462, 1836.

Where the false pretence was that defendant had got to and would pay his rent with the borrowed money, it was held that this was not of an existing fact. *Lee,* L. & C. 309; 9 Cox C. C. 304, 1863.

Where defendant falsely pretended to H. P., who kept Madame T.'s accounts, that she was to give 10*s.* to one Clark, as Madame T. was going to allow Clark 10*s.* a week, it was held by a majority that it did not with sufficient certainty appear from the averments that there was any false pretence, *i.e.* of an existing fact. *Henshaw,* L. & C. 444; 33 L. J. M. C. 132; 9 Cox C. C. 472, 1864.

Where defendant pretended that she had the power to bring A.'s runaway husband 'over hedges and ditches,' it was held that this was not a mere promise, but was a false pretence within the statute. *Giles,* L. & C. 502; 34 L. J. M. C. 50; 10 Cox C. C. 44, 1865; cf. *Jessop,* below. Defendant obtained money by representing that a new directory which W. & Co. were getting up was about to be published, whereas in fact there was no such firm, and no such directory; it was held that this was a misrepresentation of an existing fact, though he asserted that he intended to bring out a directory under that name. *Speed,* 15 Cox C. C. 24, 1882: C. C. R.; *Taylor,* 1883.

Promises] A promise to do something in the future, if it implies that everything is in order thereto at the moment, may support an indictment. Defendant collected subscriptions for a directory, naming an approximate date of publication; the direction, 'Did he *bonâ fide* at the time he was collecting the money intend to bring the book out?' was approved: *Bancroft,* 3 Cr. A. R. 16; 26 T. L. R. 10, 1909; in *Buckland,* 4 Cr. A. R. 28, 1910, L. Alverstone C.J. said: '*Bancroft* was not in a position to do what he had promised.'

Existing business] But where 'the indictment alleged several false pretences which required technical proof of a false pretence of an existing fact, not one of which was proved, but omitted an allegation of pretending to carry on an existing business, which was proved, c. q.: *C. R. Barker,* 5 Cr. A. R. 283, 1910. The issue frequently is whether a genuine business is carrying on. The mere fact that a man has not in his possession goods which he advertises for sale does not disprove such a state of things: *Jakeman,* 24 Cox C. C. 153; 10 Cr. A. R. 38; 110 L. T. 832, 1914; *R. Sagar,* 1914, 3 K. B. 1112; 84 L. J. K. B. 303; 112 L. T. 135; 79 J. P. 32; 10 Cr. A. R. 279: both c. q. See *Crab,* 1868. Where the allegation is of such a pretence no specific statement is required that money was sent, &c. on the faith of a business existing: *Rosenson.*

Function of the jury] It is a question for the jury, whether the words, &c. used by the defendant fairly conveyed what is charged as the false pretence. 'It is extremely essential that the judges should in all these cases be able clearly to point out and define what is the false pretence which will be sufficient in fact to support the indictment,' *per* Pollock C.B. (L. J.). *Cooper,* 2 Q. B. D. 510; 46 L. J. M. C. 219; 36 L. T. N. S. 671; 13 Cox C. C. 617, 1877: C. C. R.; *Randell,* 16 Cox C. C. 335; 52 J. P. 359, 1887: C. C. R. (calling one-

self 'Rev.' in an advertisement is a statement that one is a minister of religion). See *King*, 1897.

In *Powell*, 54 L. J. M. C. 26; 15 Cox C. C. 568; 49 J. P. 183, 1884: C. C. R., defendant, who was agent to an insurance company and whose business it was to collect the annual premiums from the insured, collected from one V. in 1883 the annual premium then due. He did not account for this sum, but appropriated it and notified to the company that V. had failed to renew his policy, which was thereupon treated as lapsed. On April 7, 1884, he called on V. for his next annual premium. V. requested him to call later. He came again on the 21st April, and received from V. part of the premium. It was for obtaining this amount that he was indicted, by falsely pretending to V. that his policy was then in full force, that the current year's premium thereon was then due and payable, and that he was then authorised to receive the same. On the 21st April the days of grace for the premium had expired. V. was aware of this, but the defendant told him that the payment would be 'effectual.' Three judges held that the conviction was right, as defendant's conduct on April 7 and 21 amounted to a representation that the policy was alive and he had authority to say so; but two were of a contrary opinion; they held that the company was bound by the receipt of their agent in 1883, and consequently that the policy did not then lapse, and the defendant made no false pretence in representing it to be in full force.

Falsely pretending that the defendant was prepared to pay the prosecutors 100*l.* which meant that he had the money ready for them, on their signing a promissory note, by which means the prosecutors were induced to make a promissory note (and only got 60*l.*), is a false pretence of an existing fact, and *not* of a future event or a statement of his intention. *Gordon*, 23 Q. B. D. 354; 58 L. J. M. C. 117; 60 L. T. 872; 16 Cox C. C. 662; 53 J. P. 807, 1889: C. C. R.; indictable now under 63-4 V. 51, 4.

Conduct] Very often defendant has made a series of false statements, some of which are false pretences of existing facts, and some promises or exaggerations. *Jennison,* below.

Defendant had paid his addresses to a single woman, and she had consented to marry him, she being ignorant that he was already married (as was proved); after promising to marry him she changed her mind, and told him so, whereupon he threatened her with an action; she, believing that he could and would carry his threat into effect, and in order to induce him to refrain from doing so, paid him 100*l.*, on a written stipulation (produced) that, in consideration of such payment, he would forgo such proceedings. On cross-examination she said that, but for the threat, she would not have paid; and that she was induced by such threat to pay; and she added that, had she known that he was a married man, she would not have paid. L. Denman C.J. left it to the jury to say, whether the money was, in fact, obtained by the false pretence that he was single; the verdict was 'Guilty.' After conference with Maule J., L. Denman said they were both clearly of opinion that there was evidence to go to the jury that the money was obtained by the false pretence that defendant was single, and in a position to marry the prosecutrix; and that Maule J. was further of opinion that there was also evidence of the money having been obtained by his false pretence, that he was entitled

to maintain an action; and that such latter false pretence was sufficient within the A. *Copeland* or *Martin,* C. & M. 516, 1842.

In *Johnston,* 2 Moo. C. C. 255, 1842, defendant pretended to H. that he intended to marry her on a day mentioned, that he had purchased clothes for the wedding, and that he wanted a sum to pay for them, whereby he obtained that sum from her; the banns were regularly published in church with his sanction, and after their publication he met her at a shop by appointment, where he bought the clothes with the money she had given him. Rolfe B. doubted, and the judges held the conviction wrong.

Where defendant had falsely represented to prosecutrix that he was a single man, that he would go to Liverpool to furnish a house with her money, and that he would return and marry her, it was held that the statement of his being an unmarried man was a false pretence of an existing fact, and 'was essential, for without it he would not have obtained the money . . . although it is united with two promises, neither of which alone would have supported the conviction,' and that the conviction was right. *Jennison,* L. & C. 157; 31 L. J. M. C. 147; 9 Cox C. C. 158, 1862.

Defendant falsely told prosecutrix that she kept a shop at N., and promised her that if she lent her—as she did—half a sovereign she should go home with her until she got a situation, and that the money would be there repaid; defendant immediately ran away. The jury found that prosecutrix parted with the money under the belief that she kept a shop at N., and that the former would get her money back. It was held that defendant was rightly convicted. *Fry,* D. & B. C. C. 449; 27 L. J. M. C. 68; 7 Cox C. C. 394, 1858. So when defendant pretended that he had bought some skins and had paid ten shillings on them, and wanted 4*l.* 10*s.* to enable him to fetch them away; all which was false, but prosecutrix, believing it to be true, lent him the money, which he kept, this was held to be obtaining money by false pretences. *West,* 27 L. J. M. C. 227; D. & B. C. C. 575; 8 Cox C. C. 12, 1858, following *Fry.*

Truth and falsehood mixed] If defendant makes several statements which are true, and which influence the mind of the prosecutor, or if his mind is influenced by other circumstances, yet if the former makes one false statement which materially affects the latter's mind, that is sufficient to support a conviction. Defendant induced a brickmaker, after inspecting his ground, to make a contract to take it, he having specifically asserted that he had made good bricks, produced, out of it—which was false. The jury found that the buyer was not 'solely' influenced by the pretences, but 'they turned the balance, so to speak, in his mind.' *English,* 12 Cox C. C. 171, 1872. Defendant made some true statements and one false one, which made prosecutor jump to a wrong conclusion and give him goods; held that the averments were 'divisible.' *Lince, ib.* 451; 25 L. T. 570, 1873: C. C. R. See also *Hewgill,* D. & P. C. C. 315; 2 Com. Law Rep. 600; 18 Jur. 158, 1854.

Tacit pretences—conduct] In *Douglass,* 1808, defendant said nothing, but presented a printed ticket of charge; L. Ellenborough took him 'to have uttered every word' thereon: 7 C. & P. 785 *n.* Cf. the false label cases under *Quality,* below.

Where a person at Oxford, who was not a member of the university, went to a shop dressed as one, and stated that he was one, and obtained

goods; this was held a sufficient false pretence to satisfy the statute, even though 'nothing had passed in words. It clearly is so by analogy to the cases in which offering in payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretence without any words being used.' *Barnard,* 7 C. & P. 784, 1837. Cf. *Gardner,* 1856.

Defendant, on entering the service of a railway company, signed a book of rules, a copy of which was given to him; one of the rules was 'no servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing.' On leaving, he knowingly delivered up, as part of his uniform, a great coat belonging to a fellow servant, and so obtained his wages. It was held that he was properly convicted of obtaining by false pretences. *Bull,* 13 Cox C. C. 608; 36 L. T. 376, 1877: C. C. R.

Assent to a false representation may amount to a false pretence: *Grosvenor,* 24 Cox C. C. 468; 111 L. T. 1116; 10 Cr. A. R. 235, 1914.

Conduct—worthless cheques, notes, &c.] See above, *Existing Facts.* Defendant was indicted for unlawfully pretending that he was the person named in a money order, and for obtaining the amount thereof. He had gone to the post-office, and inquired for letters for John *Story,* and, by mistake, a letter for John *Storer,* containing the order, was delivered to him. He then presented the order to A. B., who desired him to write his name on it, which he did in his real name, John *Story,* and received the money. The terms of the letter clearly explained that the order could not have been intended for him, and he at first denied that he had ever received the money, but afterwards admitted it. Chambre, J. left it to the jury to find against him, if they were satisfied that he had, by his conduct, fraudulently assumed a character which did not belong to him, although he made no false assertions. The jury found him guilty. The judges held the conviction right, being of opinion, 1st, that his writing *his own name* on the order, did not amount to a forgery; and 2ndly, that by presenting the order for payment, and signing it at the post-office, he was guilty of obtaining money by a false pretence (within the A.). *Story,* R. & R. 81, 1805. See *Fraeth, ib.* 127, 1807.

If a person with intent to defraud gives a cheque, which he knows will not be paid, on a banker with whom he keeps no account, this is a false pretence. *Jackson,* 3 Camp. 370, 1813. See *Garratt,* below. So where defendant was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, whereby he obtained a watch and chain, a majority of the judges held the conviction right. *Parker,* 7 C. & P. 825; 2 Moo. C. C. 1, 1837. So where defendant, who formerly had an account at a bank, drew cheques on it and thereby obtained goods, but he knew that the account was virtually closed, and that his cheques would not be paid, it was held that there was evidence of the false pretence that the cheques were good, and that he was rightly convicted. *Hazelton,* L. R. 2 C. C. R. 134; 44 L. J. M. C. 11; 13 Cox C. C. 1, 1874; and see also *Dowey,* 37 L. J. M. C. 52; 11 Cox C. C. 115, 1868: C. C. R. (note of bank bankrupt forty years before to defendant's knowledge), so *Jarman,* below. Where defendant was indicted for obtaining, &c. by sending half bank-notes, and requesting goods to the value of the entire notes to be sent to her, and it was proved that she

had sent the other halves to other persons with similar requests, it was held by seven judges that she was rightly convicted, for, apart from her implied promise to send the other halves, she represented 'by a sort of silent statement' that she had them to send. *Murphy,* 13 Cox C. C. 298; Ir. Rep. 10 C. L. 508, 1876: C. C. R.

Fraudulently offering a 'flash note' in payment, under a false pretence that it is a Bank of England note, was within the A.: *Coulson,* 1 Den. C. C. 592; 19 L. J. M. C. 182; 4 Cox C. C. 227, 1850; or the note of a bank which has stopped payment. *Jarman,* 14 Cox C. C. 111; 38 L. T. 460, 1878: C. C. R. See *Dowey,* above. Cf. *Flint,* below.

Defendant had dealt largely, and in an assumed name, in foreign bonds which had been stolen seven years before. It was held that there was evidence of false representation by conduct: *Re Pinter,* 17 Cox C. C. 497; 66 L. T. 324, 1891: Q. B.

Trade name] If assumed with intent to defraud, may make an indictable pretence: *Whitmore,* 10 Cr. A. R. 204, 1914.

Pretences in accounts] Prosecutors were clothiers, and defendant employed as shearman and superintendent had to keep an account of the persons employed, and the amount of their wages, &c. At the end of each week he was supplied with money to pay the different shearmen by a clerk, who advanced to him such sums as, according to a written note delivered to him by the defendant, were enough. The latter was not authorised to draw money generally *on account,* but merely for the sums actually earned by the shearmen; and the clerk was not authorised to pay any sums, except such as were in that note. Defendant delivered to the clerk a note in this—the common—form: '9 Sept. 1796, 44*l.* 11*s.* 0*d.*' In a book in his handwriting, which it was his business to keep, were the names of several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed, so as to make out the sum of 44*l.* 11*s.* 0*d.* On conviction, the judges all agreed, that *if the false pretence created the credit,* the case was within the A. They considered that the defendant would not have obtained the credit but for the false account he had delivered in; and, therefore, that he was properly convicted. *Witchell,* 2 East P. C. 830, 1798.

Falsely pretending that a certain quantity of work has been done would be within the statute, but a mere overcharge for work would not. Some counts alleged that defendant 'unlawfully, knowingly, and designedly,' did falsely pretend that he having executed certain work, there was a certain sum of money due to him for that work, by means of which said false pretence he did then unlawfully obtain, &c., with intent thereby then to defraud; in other counts, the false pretences were stated to be that he did falsely pretend that the money was due and owing. The defendant worked for prosecutors as a journeyman, and the quantities of the work done by him during each week were entered. The prices were placed in a column opposite to each quantity of work, and were added up on behalf of prosecutors at the end of each week; and the totals were entered by them in the same book, and the amount was paid by them to him on the production by him of the book. After these weekly totals had been thus entered, the defendant had altered them into larger amounts, and then had procured payments of those larger amounts, which he then erased, restoring the figures of the

original totals. After verdict of guilty, it was objected that the indictment did not disclose any false pretence within the A. Parke B.: 'An indictment for false pretences must disclose a false pretence of an existing fact. In this case there is merely a fraudulent claim in respect of *quantum meruit* of the prisoner's work and labour; and the indictment would be supported by evidence that the prisoner made a false estimate of the value of his work. I do not think that is an indictable offence. . . . The false pretence consists of nothing more than what might be mere matter of opinion': c. q. *Oates,* D. & P. 459; 24 L. J. M. C. 123; 6 Cox C. C. 540, 1855, criticised by Mr. Greaves, 2 Russ. Cri. 1568 *t.*

In *Eagleton,* who was found guilty of attempting to obtain, &c., Parke B. said, 'This is not the case of the sale of goods by a false pretence of their weight; it is an attempt to obtain money by the false and fraudulent representation of an antecedent fact, viz. that a greater number of pounds of bread had been delivered than had been actually delivered, and that representation made with a view of obtaining as many sums of twopence as the number of pounds falsely pretended to have been furnished amount to. In this respect the case exactly resembles that of *Witchell* [above], where the prisoner obtained money by the false pretence that certain workmen . . . had earned more than they really had, and there since are cases of similar convictions where the prisoner falsely stated the quantity of work which he had done according to which he was to be paid; we therefore think that the indictment would be maintainable if the money had been obtained.'

Continuing pretence] This point is much the same as *Remoteness,* above. By means of a false wage-sheet a foreman obtained a cheque from his master. It was informally drawn, and payment was refused by the bank. He consequently returned it to his master, who tore it up, and gave another for the same amount, which defendant cashed, appropriating the difference between that sum and what was really due. It was held that the false pretence was a continuing one, and that the second cheque was obtained thereby equally with the first. *Greathead,* 14 Cox C. C. 108; 38 L. T. 691, 1878: C. C. R. See *Martin,* 1867.

Contract—false statement—'puffing'] See *Inducement by Contract,* above. 1. *Quality.*—In *Kenrick,* 1843, one of the false pretences was that certain horses were quiet to ride and drive. L. Denman said: 'A general question seems here to be raised, whether, if money be obtained through the medium of a contract between the defendant and the party defrauded, the charge of false pretences can be maintained. Questions approaching this have been raised in the criminal courts. With some plausibility the thing obtained through the false pretence may be said to be the contract, and not the money which is paid in fulfilment of it, and which the party is probably by its terms liable to repay.' . . . The execution of a contract between the same parties does not secure from punishment the obtaining money in conformity with that contract . . . it is clear that the liability to an action cannot of itself furnish any answer to an indictment for fraud. After referring to *Adamson,* 2 Moo. C. C. 286; 1 C. & K. 192, 1843, he concluded: 'We think that in this case the two ingredients of the offence of obtaining money under false pretences were proved by the evidence. The pretences were false; and the money was obtained by their means.' Defendant kept a cheese stall, and sold to W. B. a quantity of cheeses at the rate of 6½*d.* per lb. At the time he offered

the cheese for sale, he bored two of them with an iron scoop, and produced a piece which prosecutor tasted. The cheese, however, which he so tasted, had not in fact been extracted from the cheese from which it was pretended, but was of another and superior kind, which defendant had privily inserted into the top of the scoop. Prosecutor would not have bought the cheese unless he had believed that the sample had been extracted from it, but when it was delivered he retained it. It was of a very inferior kind. The defence was that this was a sale and an indictment would not lie for mere 'puffing.' Ten judges held the conviction right, on the authority of *Kenrick; Abbott,* 1 Den. C. C. 273; 2 C. & K. 630; 2 Cox C. C. 430, 1847, below. See also *Goss,* Bell C. C. 208; 29 L. J. M. C. 86; 6 Jur. (N. S.) 178; 1 L. T. 337; 8 W. R. 193; 8 Cox C. C. 262, 1860; where the facts were very similar.

Defendant told a pawnbroker that a chain, on which he asked for ten shillings, was silver. The pawnbroker then examined it, and having tested it with an acid, which the chain withstood, lent him ten shillings on it—relying on his own examination and test, and without placing any reliance on the statement of defendant. That and other chains were worth a farthing an ounce, being much less than ten shillings each. The recorder told the jury that, though they could not convict of the full offence, they might convict of *an attempt,* which they did. The judges upheld the conviction, feeling bound by the authority of *Abbott,* Jervis C.J. perhaps, being the only one who approved of that decision, which L. Campbell C.J. (who entirely agreed with *Ball,* C. & M. 249, 1842—very similar facts: guilty of an attempt) disapproved; Parke B. apparently, was very strong against the conviction, but did not give judgment. *Roebuck,* 25 L. J. M. C. 101; D. & B. C. C. 24; 2 Jur. (N. S.) 579; 4 W. R. 514; 7 Cox C. C. 126, 1855. Evidence was admitted apparently without objection that twenty-six chains were found on defendant, and that these were of similar materials. Evidence which was objected to, was also admitted that defendant, a few days after the occasion in question, offered a similar chain to another pawnbroker, under similar circumstances.

Where there was no evidence that in offering a sham ring for sale, defendant had stated that it was of gold: c. q.: *Dunleavey,* 1 Cr. A. R. 240, 1908.

But where defendant induced a pawnbroker—who relied solely on his statements—to advance him money on silver-plated spoons, of which he falsely exaggerated the quality in several respects (using technical trade terms), *e.g.* that they were 'equal to' a well-known line, and they were not worth the money advanced on them, it was held by ten judges (Willes J. dissenting and Bramwell J. doubting) that this was not indictable. *Bryan,* D. & B. C. C. 265; 26 L. J. M. C. 84; 3 Jur. (N. S.) 620; 5 W. R. 598; 7 Cox C. C. 312, 1857; *i.e.* after *Roebuck.* (Mr. Greaves criticised this decision, 2 Russ. Cri. 1547 *f,* 1549 *h.*)

Simplex commendatio] Willes J. based his judgment on the words of rpd. 7-8 G. 4, 29, 53, and the intention of the legislature therein. saying, 'If the matter was a simple commendation of the goods without any specific falsehood as to what they were; if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles which were offered for the purpose of pledge or sale, and knew what they were, I apprehend it would easily have been disposed of by the jury, who were to pass an opinion upon the subject, acting as persons of common sense and knowledge of

the world, and abstaining from coming to any [such] conclusion as that praise of that kind should have the effect of making the party resorting to it, guilty of obtaining money by a false pretence. I say nothing on the effect of a simple exaggeration except that it appears to me that it would be a question for the jury, in each case, whether the matter was such ordinary praise of the goods (*dolus bonus*) as that a person ought not to be taken in by it, or whether it was a representation of a specific fact material to the contract, and intended to defraud, and [which] did defraud, and by which the money in question was obtained. . . . It is said that the effect of establishing a rule, such as that for which I contend, would be to interfere with trade; no doubt it would, and I think ought to, prevent trade being carried on in the way in which it is said to be carried on. . . . I am far from wishing to interfere with the rule as to simple commendation or praise of the articles which are sold, on the one hand, or to fair cheapening on the other; those are things persons may expect to meet with in the ordinary and usual course of trade; but I cannot help thinking that people ought to be protected from any such acts, as those I have referred to being resorted to for the purpose and with intent to cheat or defraud purchasers of their money, or tradesmen of their goods. If the result of it would be to multiply prosecutions, that must be because we live in an age in which fraud is multiplied to a very great extent, and amongst others in this form. . . . If there be such a commerce as requires to be protected by the statute being limited in the mode proposed, it ought to be made honest and conform to the law, and not the law bent to the purpose of allowing fraudulent commerce to go on.'

In *Nathan, &c.*, 2 Cr. A. R. 35, 1909, Walton J. said: 'The terms used by appellants were more than 'puffing': in declaring that the horns were rare and from an animal rapidly becoming extinct, they exceeded what is termed 'indefinite praise,' and stated what they knew to be false.'

In *Ardley,* L. R. 1 C. C. R. 301; 40 L. J. M. C. 85; 24 L. T. 193; 19 W. R. 478; 12 Cox C. C. 23, 1871, *Bryan,* above, is distinguished, and it was pointed out that if defendant there had represented the spoons as being *in fact* 'Elkington's' (instead of 'equal to') when he knew they were not, he would have been rightly convicted; in *Ardley,* the jury had found that defendant represented a chain as in fact 15-carat gold when he knew that it was nothing of the sort; held, rightly convicted. Where defendant was indicted for falsely pretending that he was in the tea trade in Leicester, and that he had good tea for sale, and that he did sell 16 packages which he falsely pretended were composed of good tea, and it was proved that he was not in the tea trade in Leicester, and that the mixture he sold was not tea at all, he was held to be rightly convicted. Kelly C.B. said, 'To call tea good when it was not good might be mere commendation, and not the subject of a criminal prosecution.' *Foster,* 2 Q. B. D. 301; 46 L. J. M. C. 128; 36 L. T. 34; 13 Cox C. C. 393, 1877: C. C. R. See also *Garratt,* 10 T. L. R. 167, 1893: C. C. R.

Here may be referred the *false label* cases; see *Smith,* 1858.

Depreciation] 'If a person were to induce an owner to part with his property by falsely representing it as of inferior value, the case would be clearly within the statute, if the representation were made with intent to defraud': Mr. Greaves on *Bryan,* above, 2 Russ. Cri. 1550, note.

Misrepresentation of value] A false representation of the value of a business (on the sale of the goodwill) is not, it seems, obtaining money by false pretences, nor is such a representation when made for the purpose of obtaining a deposit from a proposed assistant in the business. *Williamson,* 11 Cox C. C. 328; 21 L. T. 444, 1869. But where it is not a question of degree, and the fact is there is no business whatever, there is no doubt that there may be a conviction. *Crab,* 18 L. T. 370; 16 W. R. 732; 11 Cox C. C. 85, 1868: C. C. R.

Warranty] A breach may be indictable: *E. A. Sanders,* 1919.

2. *Quantity, &c.*] Defendant having agreed to sell coal at a certain price, delivered a load which he knew to be only 14 cwt., but which he falsely pretended to be 18, stating that it had been weighed at the colliery, and producing a ticket which showed the weight to be 18 cwt. (which he said he had made out himself when the coal was weighed), and received the money for 18 cwt. It was held by twelve judges that he was properly convicted of obtaining by false pretences. *Sherwood,* D. & B. C. C. 251; 26 L. J. M. C. 8; 3 Jur. (N. S.) 547; 5 W. R. 577; 7 Cox C. C. 270, 1857.

The difference on this point between a mere lie and an indictable false pretence is thus stated by Bramwell B.: 'If a man is selling an article, such as a load of coal, for a lump sum, and makes a false statement as to its weight or quantity, for the purpose of inducing the intended purchaser to complete the bargain, that is not a false pretence within the statute. But if he is selling it by quantity, and says there is a greater quantity than there really is, and thereby gets paid for a quantity of coal over and above the quantity delivered, I am quite satisfied he is indictable.' *Ridgway,* 3 F. & F. 838, 1862; '*sed quære* whether the former dictum is not erroneous': *C. S. G*[*reaves*], 2 Russ. Cri. 1545 *w*; and see also *Lee,* L. & C. 418; 33 L. J. M. C. 129; 10 L. T. 348; 12 W. R. 750; 9 Cox C. C. 460, 1864, approving *Sherwood.*

Obvious falsity] Although the pretences are so obviously false that no reasonable person ought to be taken in by them, yet if in fact the property was obtained by means of the false pretences, it is no defence to say that the prosecutor ought not to have been deceived. See Stephen J.'s definition above.

Where the secretary of an Oddfellows' Lodge told two members that each owed to the lodge more than he really did, and obtained (but did not pay over) the larger sums, a conviction was sustained, though the members knew the true facts. Erle J. said, 'It was once thought [see 2 East P. C. 828-9] that the law was only for the protection of the strong and prudent; that notion has ceased to prevail.' L. Campbell: 'If a tradesman, knowing that a customer owes him nothing whatever, says that he owes him 5*l.* and gets the money, I think he comes within the statute.' *Woolley,* 1 Den. C. C. 559; 3 C. & K. 98; 19 L. J. M. C. 165; 4 Cox C. C. 193, 1850, where Alderson B. said: 'Why should we not hold that a mere lie about an existing fact told for a fraudulent purpose should be a false pretence?'

Defendant fraudulently pretended that a genuine 1*l.* Irish bank-note was a 5*l.* note, and thereby obtained the change for 5*l.* It was held that he was properly convicted of obtaining money by false pretences, although the person to whom the note was passed could read, and on the face of it it afforded ample means of detecting the fraud. *Jessop,* D. & B. C. C. 442; 27 L. J. M. C. 70; 4 Jur. (N. S.) 123; 6 W. R. 245; 7 Cox C. C. 399, 1858.

3. *The Property Obtained.*

'*Chattel, money, or valuable security*'] An unstamped cheque which to be of any use to the dishonest obtainer ought to be stamped, was held not to be a valuable security. *Yates,* 1 Moo. C. C. 170; Carr. Suppl. Cr. L. 333, 1827; to the same effect, *Rushworth,* below (Starkie). But see *Watts,* 1850, and cf. under *Written Instruments.* G., a secretary to a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining an order on the treasurer to pay him a sum and charge it to the society. In fact he got the money from the treasurer's daughter, without his authority. It was held that this was a valuable security, viz. 'order, &c., for the payment of money.' *Greenhalgh,* D. & P. C. C. 267; 2 W. R. 171; 6 Cox C. C. 257, 1854. *Gordon,* 1889, was a conviction for inducing to make a promissory note, although it would not be of any value until it had been delivered into the prisoner's hands.

The execution of a valuable security may be fraudulent within s. 32 of the L. A. 1916, though there is a defect in the document which would invalidate it: *L. B. Graham,* 8 Cr. A. R. 149, 1913, where paper stamped as a promissory note for 5*l.* was used as one for 50*l.*, being represented to the promisor as a certificate of marriage.

Dogs] See *Robinson,* 1859.

The fact that something of value is given in exchange for money obtained does not necessarily negative a false pretence: *Bennett, &c.,* 1913; *Hammerson,* 10 Cr. A. R. 121, 1914, 'where money is obtained by pretences that are false, *primâ facie* there is an intent to defraud: this presumption may be displaced.'

Credit in account] See under *Bankrupts.* In *Eagleton,* all that defendant obtained was credit in account between him and prosecutor. The money was not actually due till after his conviction. See also *Witchell,* above. But where a cheque on a closed and overdrawn account was given before goods were taken away this was obtaining goods, not credit, by false pretences. *Cosnett,* 20 Cox C. C. 6; 65 J. P. 472; 84 L. T. 800, 1901: C. C. R.

Bill of sale] given with a representation that furniture is unencumbered, whereas it is encumbered, though not to its full value, may found indictment: *Meakin,* 1869.

Indictment] The false pretences should be clearly laid: *Hamilton v. R.,* 1845; *C. R. Barker,* 1910; *Butcher,* below. A form is provided in the Appendix to the Ind. A. 1915, no. 12. Where the averment was that defendant pretended that he had paid a certain sum into the Bank of England, but the evidence was that the words used were 'the money has been paid at the bank,' L. Ellenborough held that this assertion was very different from the other, and that there must be an acquittal. *Plestow,* 1 Camp. 494, 1808.

Indictment for attempting, by false pretences made to 'B. and others,' to obtain goods, the property of B. and others. B. 'and others' were partners, and the pretences were made to B. alone, with intent to defraud the firm. Jervis C.J. was of opinion that the conviction was right; the averment of the pretences might be viewed in three ways; the words 'B. and others' might either mean B. and the rest of the firm, in which case it would be important to consider whether

a pretence made to one partner alone may be laid as made to the whole firm; or they may mean 'B., and other persons,' not belonging to the firm, in which case he thought averment of a pretence to A., B., and C. would be proved by evidence showing a pretence made to A. only; or—which he thought the correct view—the words 'and others' may be rejected as surplusage. Erle J.: 'I think that the allegation of a pretence to B. and others only admitted proof of a pretence to B. alone. It would perhaps have been different if the pretence had been laid as made to two persons, A. and B. by name; proof of a distinct several pretence to each must then have been regarded.' [The reports of this last sentence are contradictory.] Martin B.: 'I think that the pretence as laid means a pretence to the firm, and was correctly proved.' *Kealey*, 2 Den. C. C. 68; 20 L. J. M. C. 57; T. & M. 405; 5 Cox C. C. 193, 1851: conviction affirmed.

The chief difficulty in framing indictments for obtaining by false pretences arises on the statement of the false pretences themselves. The following are instances in which formal objections have been taken:

Defendant 'did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from the Agricultural Company 22*l.* 10*s.*, with intent thereby to cheat and defraud the company.' It was objected that the money was not laid as the property of any one, and there was no misdemeanour stated of attempting which the prisoner could be convicted, and both objections were upheld. *Marsh*, 1 Den. C. C. 505; 19 L. J. M. C. 12; 3 Cox C. C. 570, 1849. A. 'unlawfully did falsely pretend that a printed paper,' a 'flash note,' was a good promissory note, is sufficient without setting out the paper, for that is only necessary where the court must see if the instrument falls within a particular description, which is not the case in false pretences. *Coulson.*

There must, however, be averments stating to whom the false pretence was made and from whom the money was obtained (or attempted to be). *Sowerby*, 1894, 2 Q. B. 173; 63 L. J. M. C. 136; 17 Cox C. C. 767: C. C. R.: c. q. It is sufficient, however, if it avers that the pretence was made to all subjects of his Majesty (*e.g.* by advertisement). *Silverlock.*

Amendment] A clerical error was made in the name of a child whose funeral money was in question: Kennedy J. amended. *Byers*, 1907. See now s. 5 of Ind. A. 1915.

Inducement] For the *materiality* of any given pretence—although it may be shown that *other* matters, not laid, operated in some measure on the mind of the defrauded person—see *Hewgill, English, Lince*, above. Cf. *Dale*, below.

Where the charge was that defendant falsely pretended he was the servant of *Hardman*, and in fact he did so pretend at first, but subsequently finding that prosecutor confused *Hardman* and *Harding*, pretended that he was the servant of *Harding*, and prosecutor was induced to part with his mare on such second false pretence, it was held that the evidence did not support the indictment. *Bulmer*, L. & C. 476; 33 L. J. M. C. 171; 9 Cox C. C. 492, 1864. It is difficult to see why there was no amendment.

Election] See *G. W. Norman*, 1914.

Defendant was indicted for obtaining a filly by the false pretence that he was a gentleman's servant, and had lived at Brecon, and had

bought twenty horses at Brecon fair. He bought the filly of prosecutor, and made him this statement, which was false, and also told him that he would come down to the Cross Keys and pay him. Prosecutor stated that he parted with his filly, because he believed that he would come to the Cross Keys and pay him, and not because he believed that he was a gentleman's servant, &c. Coleridge J. held that he must be acquitted: *Dale,* 7 C. & P. 352, 1836.

Evidence] Parol evidence is admissible of the false pretences laid though a deed of partnership between the parties, stating that the consideration for parting with the money, was the general partnership (and not the special (invented) transaction on account of which the money passed), be also put in evidence for the prosecution if such deed had been made to effect the fraud. *Adamson,* above; *Phips.* 547, 558. Defendant was indicted for falsely pretending that his wife was dead, with intent to defraud a benefit society. The stewards required a certificate of her death, and he produced to them a false one. Rolfe B. held, that the actual false pretence was that of the wife's death, and not the feigned certificate, which was only evidence of the false pretence. *Dent,* 1 C. & K. 249, 1843, where a book of the rules was admitted in evidence for the prosecution on proof that a copy had been duly given to defendant. Where the false pretences are contained in a letter, and such letter has been proved to be lost, defendant may be convicted on parol evidence of its contents. *Chadwick,* 6 C. & P. 181, 1833; *Rosenson.*

When one pretence alleged was that defendant was a man of means and able in due time to meet a bill, evidence of his banking account showing dishonoured cheques was properly admitted: *Fryer,* 1912.

See further, *Chain of Acts,* below.

Indictment for obtaining two churns by false pretences. A letter written by defendant to prosecutor, in which he stated that the churns did not require a name on them as they were only wanted for home use, was put to prosecutor 'in chief,' and he was asked what opinion he formed on it of the former's position. He replied that he took him to be a dairyman or farmer. It was held that though the inference to be drawn from the letter was for the jury, yet the question was admissible to show what prosecutor understood by it. *King,* 1897.

Falsity—'negativing'] This must be clearly proved. Defendant bought from prosecutor a horse for 12*l.*, and tendered him notes to that amount on the Oundle bank. The prosecutor objected to receive these notes, but was assured that they were good. Defendant was convicted of obtaining the horse on false pretences, viz. by delivering to prosecutor certain papers purporting to be promissory notes, well knowing them to be of no value. The evidence was that these notes had never been presented by prosecutor at Oundle, or at Sir J. Esdaile's in London, where they were made payable. A witness stated, that he recollected a bank at Oundle stopping payment seven years before, but added that he knew nothing but what he saw in the papers, or heard from the people who had bills there. The notes appeared to have been exhibited 'under a commission of bankrupt' against the Oundle Bank; the words importing the memorandum of exhibit had been attempted to be obliterated, but the names of the commissioners remained on each of them. The judges held the conviction wrong, as the evidence did not sufficiently prove that the notes were bad. 'No opinion was given, whether this would have been an indictable fraud,

if the evidence had been sufficient.' *Flint,* R. & R. 460, 1821. Indictment for obtaining money by falsely pretending that a note purporting to be the promissory note of Coleman, Smith, and Morris, was a good and available note of C., S., and M. Defendant gave the note in payment; a witness proved that he had told him that the issuing bank had stopped payment. It was also proved that the bank was shut up, and that C. and M. had become bankrupts; but that Smith had not. Gaselee J. said, that on this evidence there must be an acquittal, because, as the note might ultimately be paid, it could not be said that defendant was guilty of a fraud in passing it away. *Spencer,* 3 C. & P. 420, 1828; and see *Clark,* 1837, Dick. Q. S., 5th ed., by Talfourd, 315; *Evans,* 29 L. J. M. C. 20; Bell C. C. 187; 1 L. T. 108; 8 Cox C. C. 257, 1859; *Walne,* 11 Cox C. C. 647; 23 L. T. 748, 1870: C. C. R. See *per contra*—though the bankruptcy proceedings were not proved, and there was no evidence what dividend (if any) had been paid—*Dowey* and *Hazelton,* above.

An indictment alleged that defendant obtained goods by falsely pretending that 'a person who lived in a large house down the street, and had a daughter married,' had asked him to procure the goods. No person was therein named, or appears to have been named by defendant as the lady in question. A lady was called who answered that description, and denied that she had ever asked him to procure any goods. It was objected that the false pretence was not sufficiently 'negatived' by the evidence, but the court affirmed the conviction. *Burnsides,* Bell C. C. 282; 3 L. T. N. S. 311; 8 Cox C. C. 370; 30 L. J. M. C. 42, 1860. The court probably thought that the jury must have been satisfied that the lady called was from local circumstances sufficiently identified with the person meant by defendant.

Chain of acts] The rule that when a fraud is constructed out of a long series of transactions, all may be given in evidence *on their connection being shown*—as in *Welman, Roebuck*—is now aided by the enlarged power of joinder given by R. 3 of the Ind. A. 1915.

Where there was a fraud by advertisement, and letters were found on defendant directed to the advertised address, 281 letters similarly directed were produced by the post-office, and were admitted against him: *Cooper,* 1 Q. B. D. 19; 13 Cox C. C. 123, 1875: C. C. R., confirmed by a majority in a court of five judges. In *Holt,* Bell C. C. 280; 3 L. T. N. S. 310; 8 Cox C. C. 411; 30 L. J. M. C. 111; 9 W. R. 74, 1860, defendant obtained money by falsely representing to a customer of his employer's that he was authorised—he was, in fact, forbidden—to receive payment of debts. Evidence that he had soon *afterwards* obtained money from another customer by a similar representation was admitted, though objected to, on the ground of its showing defendant's intent when he did *the act* charged. But the C. for C. C. R. quashed the conviction on the ground that the evidence was inadmissible. Perhaps the ground on which this decision proceeded was this: that the only shape in which the evidence was admissible, if at all, was for the purpose of showing that he knew he did not possess the authority which he represented himself to have; and it may have been thought that for this purpose the evidence was not relevant, because, if any *bonâ fide* mistake existed upon this point, it would operate in one case as well as another, so that mere repetition of the act would not, as in many other cases, add anything to the evidence of guilt; though it might seem that this is rather an objection to the weight of the evidence than to its admissibility.

The question is fully discussed under *Similar Acts,* where several instances of the rule applying to *false pretences*—in which it is most frequently involved—are given. The rule is concisely stated in *E. Simmonds,* 2 Cr. A. R. 303, 1909. Where the gist of the offence is fraud and intent is material, evidence of similar acts, *to show intent, inter alia,* is admissible; but not to show general bad character: *W. Fisher,* 3 Cr. A. R. 176, 1909: c. q. See especially *A. T. Ellis,* 1910. It is clear that the similar act admitted in evidence need not have been charged as an offence: *Wilks,* 10 Cr. A. R. 16, 1914. For *subsequent* similar acts, see *Rhodes,* 1899. When the defence is that later representations were *believed* to be true, evidence of earlier false representations is admissible: *Charlesworth,* 4 Cr. A. R. 167, 1910.

Evidence of a *previous* obtaining of money by similar false pretences is clearly admissible in order to show guilty knowledge. *Francis,* 1874.

Intent] For the presumption and its displacement, see *Hammerson,* above. See s. 40 (1), above. Where the charging part of an indictment did not allege an intent to cheat a certain person or any one, nor that the obtaining was effected 'knowingly, &c.' (although all this abundantly appeared in another part), the judges held the indictment was bad. *Rushworth,* R. & R. 317; on another point, Stark. 396, 1816. Cf. *James,* 1871.

So where a jury found 'guilty of obtaining food and money by false pretences. But whether there was any intent to defraud, the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy,' it was held that this amounted to a verdict of not guilty. *Gray,* 17 Cox C. C. 299, 1891: C. C. R.; *Naylor,* below, distinguished.

The immediate and primary intent must be to cheat, &c. Thus, where defendant received parochial relief, and on the overseer bidding him to go to work, he said he could not, because he had no shoes, on which the overseer supplied him with a pair of shoes, whereas he had two pairs before; the judges held a conviction wrong as the pretence was not within the A., his statement being 'rather a false excuse for not working than a false pretence to obtain goods.' *Wakeling,* R. & R. 504, 1823. A. owed B. a debt, of which B. could not obtain payment. C., a servant of B., went to A.'s wife, in A.'s absence, and got two sacks of malt from her, saying that B. had bought them of A., which he knew to be false, and took the malt to his master, in order to enable him to pay himself; it was held that if C. did not intend to defraud A., but only to put it in his master's power to compel A. to pay him a just debt, he could not, despite the falsehood, be convicted of obtaining by false pretences: *H. Williams,* 7 C. & P. 354, 1836. The only possible explanation of this case is that of Pollock C.B. in *Hamilton,* 1 Cox C. C. 244, 1845, that *Williams* thought he had some right.

Defendant by falsely pretending to be an eminent surgeon induced prosecutor to buy, for 5*s.*, a bottle containing something which he said would cure the eye of a child. Prosecutor received 15*s.* in change for a sovereign. It was held that this was a false pretence. *Bloomfield,* Car. & M. 537, 1842. In *Leonard,* 1 Den. C. C. R. 304, 1848, the first count charged the obtaining a cheque for 14*l.* 1*s.* 2*d.* by false pretences with intent, &c., but the evidence was that defendant only intended to defraud the prosecutor of 7*s.*, as the rest of the money was properly applied; it was held that the first count was proved.

It is no defence to a charge of obtaining by false pretences that at the time of falsely pretending and obtaining, defendant intended (as the jury found) to pay the price when it should be in his power to do so. *Naylor,* L. R. 1 C. C. R. 4; 35 L. J. M. C. 61; 31 L. T. 381; 10 Cox C. C. 421, 1865.

Function of the jury] Appellant took his cart (worth 2*l.*) to T. to be mended; he then borrowed a cart (worth 5*l.*) belonging to T. from a man who was keeping it, representing and perhaps believing that he had T.'s authority. He then attempted to sell it. The conviction for obtaining the cart was upheld. 'The jury had to decide whether, when he obtained it, he did so with intent to defraud. It was not enough for him to intend to deprive the owner of its use, he must have intended to deprive him of it altogether and have meant to sell it': *Crook,* 4 Cr. A. R. 60, 1910.

Ownership of the property] This should be proved as laid, but in a proper case amendment would be allowed. Where the false pretence secured money from a servant paid *on behalf* of his mistress, it was objected, that at the time of payment this was not her money. L. Ellenborough said, that her subsequent repaying it did not make the money paid *her* money at the time. She was not chargeable for more than was actually due (for carriage), and it depended on her whether she should pay the overcharge. The servant, however, afterwards swore that, at the time of this transaction he had in his hands upwards of the whole sum charged belonging to her, which L. Ellenborough considered sufficient to sustain the averment. *Douglass,* 1 Camp. 212, 1808; see *Marsh,* 1849, above.

A., B., and C. entered into partnership for the sale of lamps. It was afterwards agreed that A. should act as agent for the sale on commission, and that his expenses and commission should be paid from the partnership funds before the profits were divided. A. falsely pretended that he had received orders for 100 lamps, whereby he obtained from B. and C. 12*l.* 10*s.*, which would be the amount of his commission. It was held that, inasmuch as his charges were to be payable out of the funds of the partnership, and would thus be a matter of account between him and his partners, his false statement was a misrepresentation respecting a partnership matter: c. q.: *Evans,* 32 L. J. M. C. 38; 9 Cox C. C. 238, 1862: C. C. R., where Pollock C.B. thought that the statute was not intended to apply to those who by fraudulent and knavish statements obtain money in the course of a real commercial transaction. For such a case amounting to larceny or embezzlement, provision is made by s. 40 (4) of the Larceny A. 1916.

Intervention of third party] Indictment for obtaining money from A. The false pretence was made to A., who told defendant to go to his wife for the money. A.'s wife gave the money to defendant, A. not being present. The court confirmed a conviction. *Moseley,* L. & C. 92; 31 L. J. M. C. 24; 5 L. T. 328; 9 Cox C. C. 492, 1861.

Innocent agent] In *Garrett,* D. & P. C. C. 232; 6 Cox C. C. 260; 17 J. P. 774, 1853, L. Campbell said, 'if a man employ a conscious or unconscious agent in this country he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction.' Defendant sent a little boy to get J. B.'s wages. The boy innocently asked for them, and took them to defendant. The indictment charged 1. the obtaining the money from prosecutor by falsely pretending

to him that defendant had authority from J. B. to receive it; 2. obtaining money from prosecutor and the boy by falsely pretending to the boy that he had authority from J. B. to receive it. It was held that both these counts were bad; but Cockburn C.J. thought that a count, charging the obtaining from the prosecutor by falsely pretending to him that the boy had authority from J. B. to receive it, would have been good, because that in fact was the pretence by which the money was got. *Butcher,* 1 Bell C. C. 6; 28 L. J. M. C. 14; 8 Cox C. C. 77, 1858. Cf. *Adams,* 1812.

A joint defendant may be the agent: *Seagrave,* 4 Cr. A. R. 156, 1910.

Aiders, &c.—principals] See *Young,* 1789, and *Moland,* above. See, too, *Kerrigan,* L. & C. 383; 33 L. J. M. C. 71; 9 L. T. 843; 9 Cox C. C. 441, 1864.

Bounty-money] There can be no doubt that obtaining bounty-money fraudulently is within the general law relating to false pretences. See *Jessup,* 25 L. J. M. C. 54; 7 Cox C. C. 70, 1856: C. C. R.

Building societies, &c.] Obtaining the property of building societies or industrial societies by false pretences is punishable on (summary conviction or) indictment by 37-8 V. 42, 1; 56-7 V. 39, 64.

Direction] This must always be precise: *A. W. Smith,* 11 Cr. A. R. 81, 1915. When the pretence alleged was that defendant could take photographs, but the jury were made to consider whether he spoke of good and saleable photographs, c. q. *J. Heath,* 7 Cr. A. R. 247, 1912. So *R. Sagar.* Precision is especially desirable about the *inducement: A. W. Smith,* above; and it is as well to mention it even in the clearest case, though then it is not absolutely essential: *Fryer,* 1912. Many cases are noticed under *Summing Up, e.g. G. Baker,* 1910; *W. Johnson,* 1910, joint defendants.

Documents] See *Evidence,* above, and *Rosenson.*

Venue] It was said before the Larceny A. 1916, 'The rules . . . in larceny cases do not apply to false pretences': 6 Encyc. L. E. art. False Pretences, citing *Stanbury* and *Leech,* below. But that A. has abolished venue, for by s. 39 (1): 'A person charged with any offence against this Act may be proceeded against, indicted, tried and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place; and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence, it shall be deemed to have been committed in that county or place.'

Defendant, residing in the county of M., wrote a begging letter to prosecutor, who resided in the same county, but which letter was posted by an accomplice, in the county of K. Prosecutor, according to the request in the letter, sent a post-office order to defendant at G., in K., which the accomplice having received, he delivered the proceeds to defendant in M. It was held that he was rightly tried in M. *T. S. Jones,* 1 Den. C. C. 551, 1850. By means of altering a draft, defendant cheated a bank in St. Petersburg, the London firm on whom the unaltered draft was drawn discovering the fraud in time. A conviction for attempting to obtain from the London bank was quashed, as even if the forged draft had been honoured he could

not have been convicted; so far from having any interest in the St. Petersburg firm getting the money in London, his interest was that the draft should not be presented. 'For his *own* act in St. Petersburg,' said Maule J., 'he is not responsible in London': *Garrett,* 1853. Defendant wrote and posted in the county of A. a letter containing a false pretence, which the prosecutor received in the borough of B. Prosecutor, in answer, posted a letter in B., containing money, which defendant received in A. It was held that, under 7 G. 4, 64, 12, the trial might be in the borough. *Leech,* 25 L. J. M. C. 77; 1 D. & P. C. C. 642; 7 Cox C. C. 100, 1856. See *Holmes,* 12 Q. B. D. 23; 53 L. J. M. C. 37; 15 Cox C. C. 343, 1883: C. C. R.: letter received in France: draft sent thence to England; *Rogers,* 1877. Where defendant was indicted for obtaining money by sending a false return of fees to the Treasury, posted in Northampton, where he swore the necessary affidavit, and received at Westminster, on which a minute was drawn up directing the money to be paid, and it was paid at Westminster, it was held that the venue was rightly laid in Northamptonshire. *Cooke,* 1 F. & F. 64, 1858.

Where defendant obtained sheep by false pretences in Middlesex, and a few days afterwards removed them into Essex, where he was apprehended, c. q. as Essex Q. S. had no jurisdiction to try the offence. *Stanbury,* L. & C. 128; 31 L. J. M. C. 88; 9 Cox C. C. 94, 1862. See *Ellis,* 1899, and *Dawson,* 1888.

T. S. Jones, above, was followed in *Stoddart,* 1909; there defendant's office in Middelburg received money, &c. for entries in a competition, the money prizes in which were sent to the winners from London. 'The false pretence, if made, was to induce the persons to part with money and send it to Middelburg . . . and when the postal orders . . . [of the competitors] were posted . . . within the jurisdiction of the Central Criminal Court for . . . Middelburg the offence was complete': *per* C. C. A.

Restitution] See s. 45 of the Larceny A. 1916.

This offence in respect of obtaining goods or money is 'crime' within 34-5 V. 112, 20, and 8 E. 7, 59.

The offence, but not *an attempt,* is within the Vexatious Ind. A. Triable at Q. S.

FALSE RUMOURS, SPREADING.

See *Trade Offences,* and cf. p. 421.

FALSIFICATION OF ACCOUNTS.

By 38-9 V. 24, 1: 'If any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years . . .'

By s. 3, this Act is to be read as one with 24-5 V. 96.

A rate-collector stated correctly accounts in his book showing 'a balance in hand' due from the overseers, but he could not produce the amount when called upon. Held, that as the words 'in hand' did not make the entry false he could not be indicted under this s. *Williams,* 19 Cox C. C. 239, 1899: C. C. R. There must be, under s. 1, an intent to defraud found by the jury. Where a conviction was obtained by a direction that falsification was criminal even if made merely to conceal repayments of money lent in the business without the employer's knowledge—which was the defence—it was quashed. *Drewett,* 69 J. P. 37; 21 T. L. R. 164, 1904: C. C. R.

Through innocent agent] A collector, accounting in due course for money received, wrote, 'S. on account, 5*l.*,' and gave the memo. in to the entering clerk; he had received more: conviction affirmed. *Butt,* 15 Cox C. C. 564; 49 J. P. 233; 51 L. T. 607, 1884: C. C. R.

An omission under s. 1 may be one not made by defendant himself but due in the ordinary course of book-keeping to his omission to communicate. *Oliphant,* 1905, 2 K. B. 67; 74 L. J. K. B. 591; 94 L. T. 824; 69 J. P. 230; 21 Cox C. C. 192; 21 T. L. R. 416: C. C. R.; but two judges doubted. The account, &c. falsified must be the master's, and in his possession, and not defendant's own. *Palin,* 1906, 1 K. B. 7; 76 L. J. K. B. 15; 69 J. P. 400: C. C. R. In *Oliphant* the omission to furnish accounts was made in Paris, the defective papers being forwarded to England and copied there into a book, but it was held, on the authority of *Munton,* 1 Esp. 62, 1793, that there was jurisdiction to try in London.

See this title under *Forgery,* and *Credit in Account* under *False Pretences.*

Indictment] A form will be found in the Appendix to the Ind. A. 1915, no. 25.

'*Servant*'] This relation depends on the contract in each case: *A. Solomons,* 1909.

Machine an 'account'] The figures on a taximeter may be an 'account.' *Ib.* Defendant signed the sheet made up from such automatic record.

Triable at Q. S.

FALSIFICATION OF DOCUMENTS.

Private Acts—journals, &c.] By 8-9 V. 113, 4: 'If any person shall print any copy of any private Act or of the journals of either house of parliament, which copy shall falsely purport to have been printed by the printers to the crown, or by the printers to either house of parliament [or under the superintendence or authority of her Majesty's stationery office, by 45-6 V. 9, 2, 3], or by any or either of them; or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall, upon conviction, be liable to transportation for seven years.' For the proviso, see under *Documentary Evidence*.

Banks of England and Ireland dividend warrants] 6. 'Whosoever, being a clerk, officer, or servant of, or other person employed or intrusted by the governor and company of the bank of England, or the governor and company of the bank of Ireland, shall knowingly make out or deliver any dividend warrant or warrant for payment of any annuity, interest, or money payable at the bank of England or Ireland for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding seven years.'

Falsification by uttering] See 24-5 V. 98, 28, under *Forgery*, which was originally dealt with in that s. and other ss. under *Forgery and Uttering, &c.* (*In Other Cases*).

For pedigrees, see 22-3 V. 35, 24; for the land register, 38-9 V. 87, 100 (where there may be a fine of 500*l.*); for other registers, see *False Declarations;* for county court process, 51-2 V. 43, 180; for the statutes, ordinances, &c. of British possessions, &c., 7 E. 7, 16, 1 (2); for company books, &c., *Companies;* for certified legal copies, 14-5 V. 99, 15.

'Records'] Certifying as true any false copy of or extract from any of the 'records,' &c. in the Public Record Office is made felony by 1-2 V. 94, 19.

Trade union rules] By 34-5 V. 31, the Trade Union A. 1871, s. 18: 'If any person with intent to mislead or defraud gives to any member of a trade union registered under this Act, or to any person intending or applying to become a member of such trade union a copy of any rules or of any alterations or amendments of the same other than those respectively which exist for the time being, on the pretence that the same are the existing rules of such trade union, or that there are no other rules of such trade union, or if any person with the intent aforesaid gives a copy of any rules to any person on the pretence that such rules are the rules of a trade union registered under this Act

which is not so registered, every person so offending shall be deemed guilty of a misdemeanour.'

By s. 19, prov. 2, 'the description of any offence under this Act in the words of' the Act 'shall be sufficient in law.' A definition of Trade Union is given 39-40 V. 22, 16, which may apply to 'a branch,' under 6 E. 7, 47, the Trade Disputes A. 1906, s. 5 (2).

FALSIFICATION OF ENTRIES.

The possible cases are too numerous to mention, but see under *False Declarations* and in Index under the subjects to which the entries relate.

False entries—Public Funds] By 24-5 V. 98, 5: 'Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the bank of England or the governor and company of the bank of Ireland, in which books the accounts of the owners of any stock, annuities or other public funds which now are or hereafter may be transferable at the bank of England or at the bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any such owners in any of the said books, with intent in any of the cases aforesaid to defraud, or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of England or at the bank of Ireland, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud, shall be guilty of felony.' Maximum punishment: penal servitude for life.

FIGHTING.

See Index.

FIREARMS, DISCHARGING IN PUBLIC.

See under *Affray, Assault (on Sovereign)*, and *Smuggling*, and *Salmon*, 1880.

FIRING.

See under *Affray, Arson* and *Shooting*, and pp. 392, 402.

FISH.

TAKING OR DESTROYING.

Common law] See under *Animals,* passages from 3 Inst., and East (and Staundf. 25 *b;* 2 Russ. Cri. 1351 *c*). It was no larceny to take fish 'in a river, or other great water, wherein they are at their natural liberty,' though it was 'out of a trunk or pond,' &c. Hawk. P. C. 1, 33 (pt. 1), 39. 'There is no absolute property in living fish other than oysters, mussels and cockles on certain lands, for fish are wild animals and are not goods and chattels; but there may be a qualified property in them as in other wild animals (*Child* v. *Greenhill* (1639), Cro. Car. 553; *Steer* (1704), 3 Salk. 291 . . .). Unless reclaimed in possession, as in a tank, stew or net, fish are not the subject of larceny at common law, but in other cases they are' so 'by statute': 14 Halsbury, 589.

By 24-5 V. 96, 24: 'Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanour . . . provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; . . . and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.' See *Jones* v. *Davies,* 20 Cox C. C. 184, 1902.

In 7-8 G. 4, 29, 38, rpd., 'adjoining' imported actual contact, and, therefore, ground separated from a house by a narrow walk and paling, wall, or gate was not within the meaning of that word, though it might have been within that of 'belonging.' *Hodges,* M. & M. 341, 1829.

Under this s. the *taking* may mean *catching* and not such a taking as constitutes larceny. 'If fish were inclosed in a net or hooked on a line, it would seem that the case would come within this s. by analogy to' *Glover,* R. & R. 269, 1814, 'although there had been no actual removal by the hands of the prisoner': Mr. Greaves, 2 Russ. Cri. 1351 *d.* 'Fish' includes shell fish: *Caygill* v. *Thwaite,* 33 W. R. 581, 1885; 'water' includes tidal and non-tidal: *Paley* v. *Birch,* 8 B. & S. 336, 1867.

Jurisdiction] Under this s. the jurisdiction of the justices is not ousted because the accused acted under a *bonâ fide* though mistaken notion of a right *which could not by any possibility exist* (*e.g.* of fishing in a non-navigable river), or because there was no *mens rea,* the accused having acted without criminal intent. *Hudson* v. *Macrae,* 4 B. & S. 585, 1863.

A *bonâ fide* claim of right (*e.g.* to fish in a tidal navigable river fished by the public for forty years), involving a real question between

the parties, will oust the jurisdiction of the justices, and if the justices decide that there is no such *bonâ fide* claim, the court will quash a conviction. *Stimpson* and *Peak*, 9 Cox C. C. 356; 4 B. & S. 301, 1863: Q. B.

Fish caught] *in the sea* are reduced into possession of the owner of the smack as soon as they are taken, and a 'skipper' who put into port and fraudulently sold the fish he had taken (outside territorial waters) was rightly convicted of larceny. *Mallison*, 20 Cox C. C. 204, 1902: C. C. R. But taken or killed by trespassers they are not larcenable.

Statutes] By 24-5 V. 96, 25: 'If any person shall at any time be found fishing, against the provisions of this Act, the owner of the ground, water, or fishery where such offender shall be so found, his servant or any person authorised by him, may demand from such offender any rod, line, hook, net, or other implement for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, may seize and take the same from him, for the use of such owner: provided that any person angling, against the provisions of this Act, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, from whom any implement used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling.'

By s. 26: 'Whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever within the limits of any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be deemed guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement; and it shall be sufficient in any indictment to describe either by name or otherwise, the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill; provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument or engine adapted for taking floating fish only.'

By 31-2 V. 45, 51: 'All oysters and mussels being in or on an oyster or mussel bed within the limits of a several oyster and mussel fishery granted by an order under this part of this Act, and all oysters being in or on any private oyster bed which is owned by any person independently of this Act, and is sufficiently marked out or sufficiently known as such, shall be the absolute property of the grantees, or of such owner, as the case may be, and in all courts of law and equity, and elsewhere, and for all purposes, civil or criminal, or other, shall be deemed to be in the actual possession of the grantees and such owner respectively.'

By s. 52: 'All oysters and mussels removed by any person from an oyster or mussel bed within the limits of any such several fishery, and

all oysters removed by any person from any such private oyster bed, and not either sold in market overt or disposed of by or under the authority of the grantees or owner (as the case may be), shall be the absolute property of the grantees and owners respectively, and in all courts of law and equity, and elsewhere, and for all purposes, civil, criminal, or other, the absolute right to the possession thereof shall be deemed to be in the grantees and owners respectively.'

By s. 55: 'When two or more oyster or mussel beds or fisheries belonging to different proprietors are contiguous to each other, and any proceeding by indictment or otherwise is taken against any person for stealing oysters or mussels from any bed formed under an order made in pursuance of this part of this Act, or for stealing oysters from any bed formed independently of this Act, it shall be sufficient in alleging and proving the property and lawful possession of the oysters or mussels stolen, and the place from which they were stolen, to allege and prove that they were the property of, and in the lawful possession of one or other of such proprietors, and were stolen from one or other of such contiguous beds or fisheries.'

Evidence] Proof of a several oyster fishery in a tidal river may be oral: *Downing*, 11 Cox C. C. 580; 23 L. T. 398, 1870: C. C. R.

See further under *Sea and River Banks*.

FIXTURES, OFFENCES RELATING TO.

'FIXTURES are personal chattels annexed to the land, that is, fastened to or connected with it.' *Sweet,* Law Lex.

At common law larceny could only be committed of 'goods personal'—'of chattles real no felony can be committed'—and, therefore, not 'of things that adhere to the freehold, as trees, grass, bushes, hedges, stones, or lead of a house or the like': 1 Hale P. C. 510; East P. C. 587; and this extends not only to things actually attached to the realty, but to things *savouring of* and belonging to the realty, as title deeds. Hale, *ib.;* East, *ib.* 596; *Westbeer; Walker,* 1 Moo. C. C. 155, 1827.

After severance] But this would probably not now be extended, as if these things be 'severed from the freehold, as wood cut, grass in cocks, stones digged out of a quarry, then felony may be committed by stealing of them, for they are personal goods. But if a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time or so come and fetch it away, this hath been held felony, because the act is not continuated, but interpolated, and in that interval the property lodgeth in the right owner as a chattel; and so it was agreed by the court of King's Bench, 9 Car. 1, upon an indictment for stealing the lead of *Westminster Abbey';* nor was there larceny of 'corn standing on the ground, for tho it be a chattel personal . . . yet it savours of the realty while it stands so. Co. P. C. p. 109.' [*I.e.* 3 Inst.] Hale, *ib.:* 'the severance . . . was and in many things is still merely a trespass which depended on a subtilty in the legal notions of our ancestors': 4 Bl. Comm. 232-3.

'If,' says Gibbs C.J., 'a thief severs a copper, and instantly carries it away, it is no felony at common law, if indeed he lets it remain after it is severed any time, then the removal of it becomes a felony, if he comes back and takes it; and so of a tree which has been some time severed.' *Lee* v. *Risdon,* 7 Taunt. 191, 1816. The rule is thus stated by the Criminal Law Commissioners:

'Although a thing be parcel of the realty, or be any annexation to or unsevered produce of the realty, yet if any person sever it from the realty and remove it with an intent to steal it, after an interval which so separates the acts of severance and removal that they cannot be considered as one continued act, the thing taken is a chattel, the subject of theft, notwithstanding such previous connection with the realty.

If any parcel of the realty, or any annexation to or unsevered produce of the realty be severed, otherwise than by one who afterwards removes the same, it is the subject of theft, notwithstanding it be stolen instantly after such severance.' 1st Rep. p. 18, where see their comments on the origin of this rule. It seems, this must be taken to mean, that it is larceny if a thing is severed and the person severing has gone away and 'abandoned and lost property and possession,' and afterwards, when his wrongful possession has ceased, he comes again

and resumes it; but a 'mere cessation of physical possession' by the wrong-doer, does not render a subsequent carrying away larceny: *per* Blackburn J., *Townley*, dealing with Hale, above. When the indictment for stealing lead piping stripped from a house was not under the statute, a conviction was varied: *Cooper, &c.*, 1 Cr. A. R. 88; 24 T. L. R. 867, 1908; see under *Simple Larceny* and *Receiving*, and cf. *O'Brien*, 1882.

Statutes] Proviso (*a*) of 6-7 G. 5, 50, 1 (3) is: 'save as hereinafter expressly provided with respect to fixtures [below], growing things and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof.' By 6-7 G. 5, 50, 8: 'Every person who (1)—Steals, or with intent to steal rips, cuts, severs, or breaks (a) any glass or woodwork belonging to any building; or (b) any metal, or utensil or fixture fixed in or to any building; or (c) anything made of metal fixed in any land being private property, or as a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground . . . shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny.' See *Hickman*, Lea. 318; East P. C. 593, 1784; *Wortley*, 1846; and *O'Brien*, 1882; and cf. *Millar*, 1837.

Window-sashes, &c. not permanently fixed but secured temporarily are not fixtures within the rule: *Hedges*, 1 Lea. 201, 1779.

Under 4 G. 2, 32, rpd., it was held, that a person who procured possession of a house under a written agreement between him and the landlord, *with an intention* to steal the fixtures belonging to the house, and did steal the lead, was guilty of a felony. *Munday*, 2 Lea. 850; East P. C. 594, 1799; 'unsatisfactorily reported' but followed in *G. H. Richards*, 1911, 1 K. B. 260; 80 L. J. K. B. 174; 22 Cox C. C. 372; 75 J. P. 144; 104 L. T. 48; 6 Cr. A. R. 21, where evidence was properly admitted of similar treatment of other houses, subjects of a separate indictment.

In that A., 'any square, street, or other place dedicated to public use or ornament,' it has been held, includes a churchyard: *Blick;* see also *Reece*, 2 Russ. Cri. 1250, 1828; so with respect to a tombstone in a churchyard, in *Jones*, 2 Russ. Cri. 1258 *g*, 1828.

An indictment for stealing a copper pipe fixed to the dwelling-house of A. and B. was not supported by proof of stealing a pipe fixed to two rooms, of which A. and B. were separate tenants, in the same house. *Finch*, 1 Moo. C. C. 418, 1834.

An unfinished building intended as a cart-shed which was boarded up on all its sides, and had a door with a lock to it, and the frame of a roof ready for thatching with loose gorse thrown on, was held to be a building within 7-8 G. 4, 29, rpd. *Worrall*, 7 C. & P. 516, 1836.

Defendant was indicted for stealing lead affixed to a building. The jury found him guilty of stealing the lead when lying severed, but not of stealing it when fixed. It was held that he could not be found guilty of a simple larceny on such an indictment. *Gooch*, 8 C. & P. 293, 1838.

A copper sun-dial fixed on the top of a wooden post standing in a churchyard is 'metal fixed in land' within the above rpd. s. *Jones*, D. & B. C. C. 555; 27 L. J. M. C. 171; 7 Cox C. C. 498, 1858.

Defendant was indicted for stealing lead 'fixed to . . . a wharf'; the lead formed the gutter of two sheds of brick, timber, and tiles on the wharf; it was held that it was sufficiently alleged and proved that the lead was 'fixed to a building.' *Rice,* Bell C. C. 87; 28 L. J. M. C. 64; 8 Cox C. C. 119, 1859.

It was held that where a trespasser cut growing grass on another's close, and returned three days afterwards and carried it away, he was rightly convicted. *Foley,* 17 Cox C. C. 142; 26 L. R. Ir. 299, 1889: C. C. R.

See further *Tenants, Trees* and *Vegetable Produce.*

Triable at Q. S.

FOOD, SELLING UNWHOLESOME.

See under *Cheating* and *Nuisance.*

By reason of s. 47 (3) of 54-5 V. 76, Public Health (London) A. 1891 (imposing a fine of 50*l.* maximum or imp. w. h. l. for 6 months), there is a right to trial by jury: *e.g. Dennis*, 1894, 2 Q. B. 458; 63 L. J. M. C. 153; 18 Cox C. C. 21; 71 L. T. 436; 58 J. P. 622, where ten judges held against one that the vendor is protected if he warns the buyer that some of the goods (here, walnuts) may be bad: explained in *Grivell* v. *Malpas*, below. Food liable to be seized but in fact given up for condemnation by the retailer without attempting to sell them to the public does not make the wholesale seller liable under s. 47 (3): *Puck & Co., &c.*, 11 L. G. R. 136; 29 T. L. R. 11; 76 J. P. 487, 1912: K. B. D. by *certiorari;* Rowlatt J. directed an acquittal despite *Grivell* v. *Malpas*, which 'is not easy.' Indictment against a limited company: no costs against the sanitary inspector prosecuting.

After a previous conviction under this s. within 12 months the court may also, 'if it thinks fit and finds' that both offences were 'knowingly and wilfully committed,' order 'a notice of the facts to be affixed' to the premises for 21 days (at most) at the defendant's cost: s. 47 (4).

Dairies] The Milk and Dairies A., 4-5 G. 5, 49, is included 'amongst the purposes' of 54-5 V. 76, but not, apparently, for offences: ss. 12 (3), 15. By 38-9 V. 63, 3, the adulteration of food with a view to sale in certain cases is made, after a previous conviction, a misdemeanour punishable by imprisonment with hard labour for six months. See *Firth* v. *Macphail*, 20 Cox C. C. 821, 1905; *Wieland* v. *Butler-Hogan, ib.* 630, 1904; *Grivell* v. *Malpas*, 21 *ib.* 220, 1906: liability to seizure at the moment of sale is enough; *Dennis* turned on the *contract* of sale.

FORCE, CRIMINAL USE OF.

See Index.

FORCIBLE ABDUCTION AND MARRIAGE.

See *Abduction.*

FORCIBLE DETAINER AND ENTRY.

Common law] It seems that entering with such force and violence into lands or tenements, as to exceed a bare trespass, was indictable. *Wilson*, 8 T. R. 357, 1799; Russ. Cri. 441, where 'twelve persons with force and arms and with a strong hand violently entered into a certain mill . . . and expelled the prosecutor'; *per* L. Kenyon C.J. and a very strong court. The two names sufficiently express the difference between the two offences.

Statute] 5 R. 2, st. 1, c. 7 (*or* 8) (1381) is, 'the king defendeth that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law; and in such case not with strong hand nor with multitude of people but only in [peaceable] and easy manner. And if any man from henceforth do to the contrary and thereof be duly convict he shall be punished by imprisonment of his body and thereof ransomed at the king's will' (1 Statutes Revised). 'The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser; but if a trespasser has gained possession the rightful owner cannot use force to put him out, but must appeal to the law for assistance': *per* Fry J., *Beddall* v. *Maitland*, 17 Ch. Div. 188, 1881.

By 15 R. 2, 2 (1391), 'it is accorded and assented that the ordinances and statutes, made and not repealed, of them that make entries with strong hand into lands and tenements or other possessions whatsoever, and them hold with force, and also of those that make insurrections, or great ridings, riots, routs or assemblies in disturbance of the peace or of the common law, or in affray of the people, shall be holden and kept, and fully executed; joined to the same that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine and ransom to the King.' (1 The Statutes Revised.)

This statute was followed by that of 8 Hen. 6, c. 9 (1429), which, after reciting the 15 Ric. 2, c. 2, above, enacts 'for that the said statute doth not extend to entries in tenements in peaceable manner, and after holden with force, nor if the persons which enter with force into lands and tenements be removed and voided before the coming of the said justices or justice as before, nor any pain ordained if the sheriff do not obey the commandments and precepts of the said justices, for to execute the said ordinances, many wrongful and forcible entries be daily made in lands and tenements, by such as have no right, and also divers gifts, feoffments and discontinuances, sometimes made to lords and other puissant persons, and extortioners, within the said counties where they be conversant, to have maintenance, and some-

times to such persons as be unknown to them so put out, to the intent to delay and defraud such rightful possessors of their right and recovery for ever, to the final disherison of divers of the king's faithful liege people, and likely daily to increase, if due remedy be not provided in this behalf . . . from henceforth, where any doth make any forcible entry in lands and tenements, or other possessions, or them hold forcibly after complaint thereof made within the same county where such entry is made, to the justices of peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time shall cause, or one of them shall cause, the said statutes duly to be executed, and that at the cost of the party so grieved.' *Ib.* See *Wilson,* below, 1835.

The statute goes on to direct the justices to re-seize the lands, &c. entered upon, and to put the party out into full possession of the same. 'Mayors, justices or justice of peace [*sic*], sheriffs and bailiffs of cities, towns and boroughs having franchise' may execute this Act.

Q. S.] According to Russ. Cri. 443 *r*, the word 'boroughs' gives borough Q. S. jurisdiction.

But it is also provided, 'that they which keep their possessions with force, in any lands and tenements whereof they or their ancestors, or they whose estate they have in such lands and tenements have continued their possession in the same, by three years or more, be not endamaged by force of this statute.' *Ib.* This proviso is enforced by 31 Eliz. 11, 3 (1588), which declares that no restitution shall be made, if the person indicted has had the occupation or been in quiet possession for the space of three whole years together, next before indictment found, and his estate therein not ended or determined.

In order to extend the remedy for forcible entries upon other estates than those of freehold, it was, by 21 Jac. 1, 15 (1623) enacted: 'that such judges, justices, or justices of the peace as by reason of any Act or Acts of parliament now in force, are authorised and enabled, uppon enquiry, to give restitucion of possession unto tenants of any estate of freehold, of their land or tenements which shalbe entred upon with force, or from them withholden by force, shall by reason of this present Act have the like and the same authoritie and abilitie from henceforth (uppon indictment of such forcible entries, or forcible withholdinge before them duly found), to give like restitucion of possession unto tenants for term of yeares, tenants by copie of court-rolle, guardians by knight's service, tenants by *elegit*, statute-merchant and staple, of lands or tenements by them so holden, which shalbe entered uppon by force, or holden from them by force.' (1 The Statutes Revised.)

On a prosecution under these statutes the prosecutor must prove, 1, the entry or detainer; 2, that it was forcible; 3, the possession on which the entry was made; and 4, that it was made by the defendant.

1. *The entry or detainer*] A forcible entry or detainer 'is committed by violently taking or keeping possession of lands and tenements with menaces, force and arms, and without the authority of law.' 4 Bla. Com. 148. It must 'be accompanied with some circumstances of actual violence or terror, and therefore an entry which hath no other force than such as is implied by law in every trespass whatsoever, is not within these statutes.' Hawk. P. C. 1, 64, 25. The entry may be violent, not only in respect to violence actually done to the person of a man, as by beating him if he refuses to relinquish possession; but also in respect to any other kind of violence in the

entry, as by breaking open the doors of a house, whether any person be within or not, especially if it be a dwelling-house; and perhaps 'by any act of outrage after the entry, as by carrying away the party's goods.' *Ib.* s. 26; see 3 Burr. 1702 (*n*).

But if a person 'who pretends a title to lands, barely go over them, either with or without a great number of attendants armed or unarmed, in his way to the church or market, or for such like purpose, without doing any act which either expressly or impliedly amounts to a claim to such lands,' this is not an entry within the meaning of the statutes. Hawk. *ib.* s. 20. The bare drawing up of a latch or pulling back the bolt of a door is not a forcible entry, as being 'inconsiderable,' according to the better opinion. So 'coming in peaceably, enticing the owner out of possession and afterwards excluding him by shutting the door without other force.' *Ib.* s. 26; Bac. Abr. Forcible Entry (B); Com. Dig. Forc. Entr. (A) 3; Russ. Cri. 448.

Incidental offence] 'But for any independent wrong (such as an assault or an injury to furniture) committed in the course of the forcible entry damages can be recovered even by a person whose possession was wrongful, for the statute [5 Rich. 2] makes a possession obtained by force unlawful even when it is so obtained by the rightful owner': *per* Fry J., *Beddall* v. *Maitland*, above. The assault or injury mentioned may be indictable.

2. *The force and violence*] Compare 1, above. 'Wherever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession . . . just cause to fear that he will do them some bodily hurt if they will not give way to him, his entry is esteemed forcible, whether he cause such terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance.' Hawk. *ib.* s. 27. But it seems that no entry is to be judged 'forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage, which is not personal.' *Ib.* s. 28. A single person may commit the offence. *Ib.* s. 29.

It is not necessary that there should be any one assaulted to constitute a forcible entry; for, if persons take or keep possession of either house or land, with such numbers and show of force as are calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient in point of law to constitute a forcible entry, or detainer: *per* Abbott C.J., *Milner* v. *Maclean*, 2 C. & P. 18, 1825. Especially a dwelling-house, which has a special sanctity: *per* Ryder C.J., *Bathurst*, Sayer, 225, 1755; Russ. Cri. 447. Forcible entry is not proved by evidence of a mere trespass, but there must be proof of such force, or at least such show of force as is calculated to prevent any resistance: *per* L. Tenterden C.J., *Smyth*, 1832.

Detainer] 'The same circumstances of violence or terror which will make an entry forcible will make a detainer forcible also;' therefore, 'whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former

possessor if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt is made to re-enter; and it hath been said that he also shall come under the like construction, who places men at a distance from the house, in order to assault any one who shall attempt to make an entry into it . . . but . . . barely refusing to go out of a house, and continuing therein in despite of another,' is not a forcible detainer. Hawk. *ib.* s. 30. So where a lessee at the end of his term, keeps arms in his house to prevent the entry of the lessor, or a lessee at will retains possession with force, after the determination of the will: these are forcible detainers. Com. Dig. Forc. Entry (B. 1).

The st. 15 R. 2 only gave a remedy in cases of forcible *detainer* where there had been a previous forcible *entry;* but the st. 8 H. 6, 9, gives a remedy for forcible detainer even after a *peaceable* entry, if unlawful. *Oakley,* 4 B. & Ad. 307, 1832. But it does not hence follow that the 8 H. 6 does not apply to the case of a tenant at will, or for years, holding over after the will is determined, or the term expired; because the continuance in possession afterwards may amount, in judgment of law, to a new entry: *per* Parke J., *ib.*, citing Hawk. above, s. 34. But 'if he merely refuses to go out of a house and continues therein in despite of another,' it is not this offence. Hawk. s. 30.

A conviction for a forcible detainer is bad, if it only states that the prosecutor complained to the justices of an entry and unlawful expulsion and forcible detainer, and that they personally came and found the defendant forcibly detaining the premises, whereupon they convict him, &c. For the justices cannot know by their view without evidence that the detainer was unlawful, or that there had been an unlawful entry. *Semble,* that the conviction ought to show that the defendant was summoned, or had otherwise an opportunity to defend himself. Held, also, that the court was bound to award a re-restitution, as a consequence of quashing the conviction without enquiring into the legal or equitable claims of the respective parties. *Jones,* 1 Str. 474, 1722; *Wilson,* 3 A. & E. 817, 1835; *Attwood* v. *Joliffe,* 3 New Sess. Cas. 116, 1848; 'although the conviction be quashed for a merely technical error and the lease of the dispossessed person has expired during the litigation': Russ. Cri. 454. Of course, the offence may become a riot.

3. *The possession*] 'It hath been holden for a general rule, that one may be indicted for a forcible entry into any such incorporeal hereditaments, for which a writ of entry will lie either by the common law, as for rent, or by statute, as for tythes, &c.; but I do not find any good authority that such an indictment will lie for a common or office.' So no violence 'offered to another in respect of a way or such like easement which is no possession,' will make a forcible entry. Hawk. *ib.* s. 31. Nor can a person be convicted under 15 R. 2 of a detainer of any tenements into which he had not made a precedent forcible entry. *Ib.* There may be forcible entry into ecclesiastical possessions, as churches, vicarage houses, &c.: Russ. Cri. 446.

There seems now to be no doubt that a person may be guilty of a forcible entry, by violently and with force entering into that to which he has a legal title. *Newton* v. *Harland,* 1 M. & G. 644, 1840. See also *Studd,* 1866. In *Newton* v. *Harland* the judges thought that a landlord might be guilty of a forcible entry after the expiration of his tenant's term both at common law and under the statutes; and doubted

whether possession so obtained was legal. See *Davison* v. *Wilson,* 11 Q. B. 890, 1848; *Burling* v. *Read, ib.* 904, 1850, *per* Fry J. in *Beddall* v. *Maitland,* above. But see *Addenda.*

'A joint tenant or tenant in common, may offend . . . either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my et per tout,* so that he cannot in any case be punished for it in an action of trespass, . . . yet the lawfulness of his entry no way excuses the violence.' Hawk. *ib.* s. 33.

Indictment] The indictment must show what estate the expelled person had, for the statute on which it is founded (8 H. 6, 9; 21 J. 1, 15, &c.) varies therewith. *Wannop,* Sayer 142, 1754. In forcible entry on the possession of a lessee for years, it is sufficient to prove that such lessee was *possessed,* although the indictment allege that the premises were his freehold. *Lloyd,* Cald. 415, 1784. 'Proof that the prosecutor holds colourably, as a freeholder or leaseholder, will suffice; the court will not on the trial, enter into the validity of an adverse claim . . . made by the defendant which he ought to assert not by force but by action.' *Williams,* 1828-9, Talf. Dick. Sess., 5th ed. (1841), 377: which see further below.

4. *The defendant*] This offence may be committed by one person as well as by several. Hawk. *ib.* s. 29. All who accompany a man when he makes a forcible entry will be adjudged to enter with him, whether they actually come on the lands or not. *Ib.* s. 22. So also with those who, having an estate in land by a defeasible title, continue with force in possession, after a claim made by one who has a right of entry. *Ib.* s. 23. But where several come in company with one who has a right to enter, and one of the company makes a forcible entry, that is not a forcible entry in the others. 3 Bac. Abr. Forcible Entry (B). And a person who 'barely agrees to a forcible entry made to his use, without his knowledge or privity,' is not within the statutes, 'because he no way concurred in or promoted the force.' Hawk. *ib.* s. 24.

An infant or feme covert may be guilty of a forcible entry, for actual violence done by them in person; but not for violence done by others at their command, for such command is void. A feme covert, it is said, may be imprisoned for such offence, though not an infant, 'because he shall not be subject to corporal punishment by force of the general words of any statute where he is not expressly named.' *Ib.* s. 35. A feme covert may be guilty of a forcible entry into her husband's house, *Smyth,* 1832, if there is violence amounting to a breach of the peace: *per* Tenterden C.J.

Award of restitution] The court in which the indictment is found, or the K. B. on the removal thither of the indictment by *certiorari,* has power, on conviction, to award restitution. Hawk. *ib.* ss. 49, 50, 51. Though by the provisoes in the statutes the defendants may set up a possession of three years to stay the award of restitution. *Ib.* s. 53. A *supersedeas* of the award of restitution may be granted, before it is executed, by the same court that made the award. *Ib.* s. 61. And a re-restitution may be awarded by the King's Bench. *Ib.* s. 66. See *Wilson,* 1835, above.

Before conviction it is in the discretion of the judge of assize to award a restitution or not, although a true bill has been found by the grand jury for a forcible entry. For an instance see *Hake,* 4 M. & R.

483, 1827, in a note to *W. Williams, ib.* 471, 1829; 9 B. & Cr. 549: K. B., where the award was after conviction (above). *Harland*, 2 Lew. C. C. 170; 8 Ad. & E. 826; 1 P. & D. 93; Moo. & R. 141; 8 L. J. M. C. 60, 1838, where the facts were the same as in *Newton* v. *Harland*, above.

'An order of restitution made three years after the inquisition was quashed.' *Harris*, 3 Salk. 313, 1699; Russ. Cri. 454.

Incorporeal hereditaments] 'This putting out is alwaies to be understood either of a house (or land) only and not of a rent, common, advowson or of any such other like thing wherein an actuall entry cannot bee made': *Lamb.* Eirenarcha, I. 4, p. 153 (1609), cited Russ. Cri. 452. Such an indictment for an easement—'passage or way'—was quashed. *Holmes*, 1 Mod. R. 73, 1671.

FORCIBLE DETENTION OF PERSONS.

See *False Imprisonment.*

FOREIGN ENLISTMENT.

Foreign State, Armed Invasion of.

By 33-4 V. 90, Foreign Enlistment A. 1870, 2: 'This Act shall extend to all the dominions of her Majesty, including the adjacent territorial waters.'

By s. 11: 'If any person within the limits of her Majesty's dominions, and without the licence of her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state the following consequences shall ensue: (1) Every person engaged in such preparation or fitting out or assisting therein or employed in any capacity in such expedition shall be guilty of an offence against this Act.

An indictment under this s. alleging that 'within the limits of her Majesty's dominions,' certain offences (*e.g.* preparation of an expedition) were committed, it was held by three judges (trial at bar) to allege sufficiently the A. to have been in operation in that place where (*e.g.*) the alleged illegal preparation took place, without stating how the A. came into force, and further, that if there be an unlawful preparation of an expedition by some person within those dominions, any British subject who assists in such preparation will be guilty of an offence, although he renders assistance from a place outside them (and apparently if he be employed in such expedition *outside* them). *Jameson*, 1896, 2 Q. B. 425; 65 L. J. M. C. 218; 18 Cox C. C. 392; 12 T. L. R. 551; 60 J. P. 662; 75 L. T. 77 (see further under *Indictment*), where L. Russell C.J. lays it down that statutes *primâ facie* apply only to the United Kingdom (see below); where, as here, it is applicable to the crown's dominions it applies to all persons therein, including foreigners, 'and according to its context it may be taken to apply to the Queen's subjects everywhere.'

FORGERY.

A. Common Law.

The offence was punishable as a misdemeanour; not with hard labour, till 4-5 G. 5, 58, 16 (1) made that legal. *Hamilton,* 1901, 1 Q. (or K.) B. 740; 19 Cox C. C. 675; 65 J. P. 265; 70 L. J. K. B. 480; 84 L. T. 333: C. C. R., where defendant, having made a collection for a poor man, had appropriated some of the money; he had not himself written the contributors' names or amounts against them in the collection-book, but had let them do so (which was said not to amount to a *statutory* forgery) and had then altered the entries of the amounts to smaller sums, and in some instances tampered with the names so that they could not be recognised. It was held that forgery to conceal a fraud was not 'a cheat or fraud punishable at common law.' (The reports which state that one judge said Hawk's. definition of common law *forgery* (below) was 'far too wide' are incorrect: see *Hamilton* under *Cheating*. But Yorke A.-G. is reported by Str. in *Ward* (below) to have said so, speaking of P. C. 1, 70, 11, though his argument required that he should call the definition too *narrow;* but Str. is probably in error for his report is much shorter than L. Raymond's, who mentions the citation of Hawk. but nothing of Yorke's reply.)

Coke and Hale (1 P. C. 682) do not deal with the common law.

Hawk. I. 51, 'of forgery,' deals with 'offences against *public credit,*' which, he says, 'are generally committed by means of forgery'; *only* statutes are considered (except, perhaps, in the last s., 76).

I. 70, 1, he says, 'Forgery by the common law seemeth to be an offence in falsely and fraudulently making or altering any matter of record; or any other authentick matter of a publick nature; as a parish register or any other deed or will': 'no other' than 'the abovementioned writings' will, he thinks, do: s. 7; 'whether any third person be actually injured or not': s. 11.

Definition] The offence is (Hawk. I. 51) 'the fraudulent making or alteration of a writing to the prejudice of another man's right'; 4 Bl. Com. 247; defined by East, as 'a false making, a making *malo animo,* of any written instrument for the purpose of fraud and deceit.' P. C. 852, 861. Eyre B. insisted on the instrument purporting *on its face* to be good, &c.: *Jones,* 1785. Forgery consists not in 'making an instrument containing that which is false, . . . but making an instrument which purports to be that which it is not': *per* Blackburn J., in *Ritson,* L. R. 1 C. C. R. 200; 39 L. J. M. C. 10; 11 Cox C. C. 352, 1869, who *ante-dated* a deed conveying property already alienated: under rpd. s. 20 of F. A. 1861. *N.B.*—The making and the intent form the gist of the offence; not the uttering. 'Telling a lie does not become a forgery because it is reduced into writing': *per eundem, In re Windsor,* 34 L. J. M. C. 163; 6 B. & S. 522; 10 Cox C. C. 118, 1865: extradition—where a bank clerk's making false entries in bank-books was held by Q. B. not to be forgery.

The forgery of any document, whether public or private, with intent

to defraud, is punishable as a misdemeanour at common law; for a contrast with statute law, see *Harper,* 1881. And in *Hodgson,* D. & B. C. C. 3; 25 L. J. M. C. 78; 7 Cox C. C. 122, 1856, the court said that whether or not the document which defendant was convicted of forging, a diploma of the College of Surgeons with intent to induce people to believe he was a member, was of a public nature, in order to make out the offence there must have been, at the time of the instrument being forged, an intention to defraud some person. 'The intent must not be a roving intent, but a specific intent,' *per* Jervis C.J.: c. q. The distinction, therefore, in respect of the intent to defraud, which has sometimes been drawn, between the forgery of public and private documents *at common law* seems to be of little importance. If any other inference is to be drawn from the passages in Hawk. P. C. 1, 70, ss. 11 and 1, 8, 9, it must be considered as overruled by this case; or, indeed, by *Ward,* below, as East in his severe criticism of Hawk. 859-60, thought. There the court said: 'The reason why we do not meet with ancient determinations is because personal credit was formerly small and these [private] writings not made use of.' There are indeed many public documents the forgery of which is made punishable *by statute* without any intent: *e.g. Ogden,* below. But these provisions in no way affect the general principle of law just stated; on the other hand, they impliedly recognise it, as, had it been otherwise, they would, many of them, have been unnecessary.

Records] 'Counterfeiting a matter of record is forgery by the common law, for . . . the law gives the highest credit to all records': Hawk. I. 70, 8; Russ. Cri. 1683.

Forgery and cheats compared] It is now clear that forging any document, with a fraudulent intent, and whereby another *may* be prejudiced, is within the rule. Thus, it was held that forging an order for the delivery of goods, though the fraud was not effected, was a misdemeanour at common law. *Ward,* 2 Str. 747; 2 L. Raym. 1461, 1727; cf. *Goate.* And the same was held with regard to a document purporting to be a discharge of a prisoner from a creditor to the sheriff and the gaoler (though the order, if genuine, was a nullity). *Fawcett,* East P. C. 862, 1793.

Ward is considered by East to have settled the rule, that the counterfeiting of *any writing,* with a fraudulent intent, whereby another *may be* prejudiced, is forgery at common law, whether in fact he is or is not. *Ib.* 860; Russ. Cri. 1508. This doctrine was logically applied in *Blake* v. *Allen,* F. Moore, 619, 1600, by the *Star Chamber,* where a man altered, in a bond to himself, 100 *pounds* into 100 *marks,* held, not to be forgery (but a misdemeanour) because the alteration 'is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it': Hawk. I. 70, 4. 'But if he had increased the sum or had diminished it to avoid any collateral prejudice to himself as to be free from any covenant, arbitrament, or like thing, or to prejudice another, this is forgery': Russ. Cri. 1600 *o.*

Forgery at common law must be of some document or writing. See *Closs.* So where defendant had wrappers printed similar to those of one Borwick who labelled his goods 'Borwick's,' and defendant sold in them what he called 'Borwick's Baking Powder,' but without signature and the notification that without such signature no powder was genuine, which appeared on the genuine wrappers; it was held

that this was not forgery (but obtaining by false pretences), though the jury found that the wrappers were intended to defraud. *J. Smith*, D. & B. C. C. 566; 27 L. J. M. C. 225; 8 Cox C. C. 32, 1858. See now 50-1 V. 28.

Uttering] See *Etheridge*, 1901, and this title below. It is not necessary that there should be any 'publication,' *i.e.* uttering, of the forged instrument. East P. C. 855, 951; Russ. Cri. 1599, citing *Elliott*, 1777, where it was admitted that there was no uttering.

It is not forgery fraudulently to procure a person's signature to a document, the contents of which have been altered without his knowledge; *Chadwick*, 2 Moo. & R. 545, 1844—but Stephen, Dig. 326, note 6, art. 385, thinks this decision was wrong and inconsistent; or fraudulently to induce a person to execute an instrument on a misrepresentation of its contents: *per* Rolfe B., *Collins*, *ib.* 461, 1843 (lease and release represented as a requisition to stand for parliament: if the seals were on when the illiterate's mark was obtained, not forgery; otherwise, if they were), a case now specially provided for by s. 32 (2) of the L. A. 1916.

Seals] Counterfeiting the Great Seal was a common law offence: 3 Inst. 15. The counterfeit need not be perfect: East P. C. 86; *Robinson*, 2 Rolle, 50, 1619. Cf. *Imperfect State of Document*, below.

B. Statutes.

The governing Act 'to consolidate, simplify and amend the law relating to forgery and kindred offences' is 3-4 G. 5, 27, the Forgery A. 1913, and is, with the omission of ss. 20 and 22 and Sched., as follows:—

1. *Definition.*—(1) For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine, and in the case of the seals and dies mentioned in this Act the counterfeiting of a seal or die, and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided.

(2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false:—

(*a*) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein;

(*b*) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person;

(*c*) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it.

(3) For the purposes of this Act—

(*a*) It is immaterial in what language a document is expressed or in what place within or without the King's dominions it is expressed to take effect;

(*b*) Forgery of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law;

(*c*) The crossing on any cheque, draft on a banker, post-office money order, postal order, coupon, or other document the crossing of which is authorised or recognised by law, shall be a material part of such cheque, draft, order, coupon, or document.

2. *Documents.*—(1) Forgery of the following documents, if committed with intent to defraud, shall be felony and punishable with penal servitude for life:—

(*a*) Any will, codicil, or other testamentary document, either of a dead or of a living person, or any probate or letters of administration, whether with or without the will annexed;

(*b*) Any deed or bond, or any assignment at law or in equity of any deed or bond, or any attestation of the execution of any deed or bond;

(*c*) Any bank note, or any indorsement on or assignment of any bank note.

(2) Forgery of the following documents, if committed with intent to defraud, shall be felony and punishable with penal servitude for any term not exceeding fourteen years:—

(*a*) Any valuable security or assignment thereof or endorsement thereon, or, where the valuable security is a bill of exchange, any acceptance thereof;

(*b*) Any document of title to lands or any assignment thereof or endorsement thereon;

(*c*) Any document of title to goods or any assignment thereof or endorsement thereon;

(*d*) Any power of attorney or other authority to transfer any share or interest in any stock, annuity, or public fund of the United Kingdom or any part of His Majesty's dominions or of any foreign state or country or to transfer any share or interest in the debt of any public body, company, or society, British or foreign, or in the capital stock of any such company or society, or to receive any dividend or money payable in respect of such share or interest or any attestation of any such power of attorney or other authority;

(*e*) Any entry in any book or register which is evidence of the title of any person to any share or interest hereinbefore mentioned or to any dividend or interest payable in respect thereof;

(*f*) Any policy of insurance or any assignment thereof or endorsement thereon;

(*g*) Any charter-party or any assignment thereof;

(*h*) Any declaration, warrant, order, affidavit, affirmation, certificate, or other document required or authorised to be made by or for the purposes of the Government Annuities Act, 1829, or the Government Annuities Act, 1832, or by the

National Debt Commissioners acting under the authority of the said Acts;

(*i*) Any certificate of the Commissioners of Inland Revenue or any other Commissioners acting in execution of the Income Tax Acts;

(*j*) Any certificate, certificate of valuation, sentence or decree of condemnation or restitution, or any copy of such sentence or decree, or any receipt required by the Slave Trade Acts.

3. *Documents.*—(1) Forgery of the following documents, if committed with intent to defraud or deceive, shall be felony, and punishable with penal servitude for life:—

Any document whatsoever having thereupon or affixed thereto the stamp or impression of the Great Seal of the United Kingdom, His Majesty's Privy Seal, any privy signet of His Majesty, His Majesty's Royal Sign Manual, any of His Majesty's seals appointed by the Twenty-fourth Article of the Union between England and Scotland to be kept, used, and continued in Scotland, the Great Seal of Ireland or the Privy Seal of Ireland.

(2) Forgery of the following documents, if committed with intent to defraud or deceive, shall be felony, and punishable with penal servitude for any term not exceeding fourteen years:—

(*a*) Any register or record of births, baptisms, namings, dedications, marriages, deaths, burials, or cremations, which now is, or hereafter may be, by law authorised or required to be kept in the United Kingdom, relating to any birth, baptism, naming, dedication, marriage, death, burial, or cremation, or any part of any such register, or any certified copy of any such register, or of any part thereof;

(*b*) Any copy of any register of baptisms, marriages, burials, or cremations, directed or required by law to be transmitted to any registrar or other officer;

(*c*) Any register of the birth, baptism, death, burial, or cremation of any person to be appointed a nominee under the provisions of the Government Annuities Act, 1829, or any copy or certificate of any such register, or the name of any witness to any such certificate;

(*d*) Any certified copy of a record purporting to be signed by an assistant keeper of the Public Records in England;

(*e*) Any wrapper or label provided by or under the authority of the Commissioners of Inland Revenue or the Commissioners of Customs and Excise.

(3) Forgery of the following documents, if committed with intent to defraud or deceive, shall be felony, and punishable with penal servitude for any term not exceeding seven years:—

(*a*) Any official document whatsoever of or belonging to any court of justice, or made or issued by any judge, magistrate, officer, or clerk of any such court;

(*b*) Any register or book kept under the provisions of any law in or under the authority of any court of justice;

(*c*) Any certificate, office copy, or certified copy of any such document, register, or book or of any part thereof.

(*d*) Any document which any magistrate or any master or registrar in lunacy is authorised or required by law to make or issue;

(*e*) Any document which any person authorised to administer an

oath under the Commissioners for Oaths Act, 1889, is authorised or required by law to make or issue;

(*f*) Any document made or issued by an officer of state or law officer of the Crown, or any document upon which, by the law or usage at the time in force, any court of justice or any officer might act;

(*g*) Any document or copy of a document used or intended to be used in evidence in any Court of Record, or any document which is made evidence by law;

(*h*) Any certificate required by any Act for the celebration of marriage;

(*i*) Any licence for the celebration of marriage which may be given by law;

(*j*) Any certificate, declaration, or order under any enactment relating to the registration of births or deaths;

(*k*) Any register book, builder's certificate, surveyor's certificate, certificate of registry, declaration, bill of sale, instrument of mortgage, or certificate of mortgage or sale under Part I. of the Merchant Shipping Act, 1894, or any entry or endorsement required by the said Part of the said Act to be made in or on any of those documents;

(*l*) Any permit, certificate, or similar document made or granted by or under the authority of the Commissioners of Customs and Excise.

4. *Misdemeanours.*—(1) Forgery of any document, which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour and punishable with imprisonment with or without hard labour for any term not exceeding two years.

(2) Forgery of any public document which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud or deceive, shall be a misdemeanour and punishable with imprisonment with or without hard labour for any term not exceeding two years.

5. *Seals and Dies.*—(1) Forgery of the following seals, if committed with intent to defraud or deceive, shall be felony and punishable with penal servitude for life:—

(*a*) The Great Seal of the United Kingdom, His Majesty's Privy Seal, any privy signet of His Majesty, His Majesty's Royal Sign Manual, any of His Majesty's seals appointed by the Twenty-fourth Article of the Union between England and Scotland to be kept, used, and continued in Scotland, the Great Seal of Ireland or the Privy Seal of Ireland;

(*b*) The seal of the Public Record Office in England;

(*c*) The seal of any court of record;

(*d*) The seal of the office of the Registrar-General of Births, Deaths, and Marriages.

(2) Forgery of the following seals, if committed with intent to defraud or deceive, shall be felony, and punishable with penal servitude for any term not exceeding fourteen years:—

(*a*) The seal of any register office relating to births, baptisms, marriages, or deaths;

(*b*) The seal of any burial board or of any local authority performing the duties of a burial board;

(*c*) The seal of or belonging to any office for the registry of deeds or titles to lands.

(3) Forgery of the following seals, if committed with intent to defraud or deceive, shall be felony and punishable with penal servitude for any term not exceeding seven years:—

(*a*) The seal of any court of justice other than a court of record;

(*b*) The seal of the office of any master or registrar in lunacy.

(4) Forgery of the following dies, if committed with intent to defraud or deceive, shall be felony and punishable with penal servitude for any term not exceeding fourteen years:—

(*a*) Any die provided, made, or used by the Commissioners of Inland Revenue or the Commissioners of Customs and Excise;

(*b*) Any die which is or has been required or authorised by law to be used for the marking or stamping of gold or silver plate, or gold or silver wares.

(5) Forgery of the following die, if committed with intent to defraud or deceive, shall be felony and punishable with penal servitude for any term not exceeding seven years:—

Any stamp or die provided, made, or used in pursuance of the Local Stamp Act, 1869.

6. *Uttering.*—(1) Every person who utters any forged document, seal, or die shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof shall be liable to the same punishment as if he himself had forged the document, seal, or die.

(2) A person utters a forged document, seal, or die, who, knowing the same to be forged, and with either of the intents necessary to constitute the offence of forging the said document, seal, or die, uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, tenders in evidence, or puts off the said forged document, seal, or die.

(3) It is immaterial where the document, seal, or die was forged.

7. *Demanding property on forged documents, &c.*—Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, with intent to defraud, demands, receives, or obtains, or causes or procures to be delivered, paid or transferred to any person, or endeavours to receive or obtain or to cause or procure to be delivered, paid or transferred to any person any money, security for money or other property, real or personal:—

(*a*) under, upon, or by virtue of any forged instrument whatsoever, knowing the same to be forged; or

(*b*) under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit.

8. *Possession of forged documents, seals, and dies.*—(1) Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, without lawful authority or excuse, the proof whereof shall lie on the

accused, purchases or receives from any person, or has in his custody or possession, a forged bank note, knowing the same to be forged.

(2) Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, without lawful authority or excuse, the proof whereof shall lie on the accused, and knowing the same to be forged, has in his custody or possession—

(*a*) any forged die required or authorised by law to be used for the marking of gold or silver plate, or of gold or silver wares, or any ware of gold, silver, or base metal bearing the impression of any such forged die;

(*b*) any forged stamp or die as defined by the Stamp Duties Management Act, 1891;

(*c*) any forged wrapper or label provided by or under the authority of the Commissioners of Inland Revenue or the Commissioners of Customs and Excise.

(3) Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding seven years, who, without lawful authority or excuse, the proof whereof shall lie on the accused, and knowing the same to be forged, has in his custody or possession:—

Any forged stamp or die, resembling or intended to resemble either wholly or in part any stamp or die which at any time whatever has been or may be provided, made, or used by or under the direction of the local authority for the purposes of the Local Stamp Act, 1869.

9. *Making, &c. paper or implements for forgery.*—Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding seven years, who, without lawful authority or excuse, the proof whereof shall lie on the accused:—

(*a*) Makes, uses, or knowingly has in his custody or possession any paper intended to resemble and pass as—

(i) Special paper such as is provided and used for making any bank note, Treasury bill, or London county bill;

(ii) Revenue paper;

(*b*) Makes, uses, or knowingly has in his custody or possession, any frame, mould, or instrument for making such paper, or for producing in or on such paper any words, figures, letters, marks, lines, or devices peculiar to and used in or on any such paper;

(*c*) Engraves or in anywise makes upon any plate, wood, stone, or other material, any words, figures, letters, marks, lines, or devices, the print whereof resembles in whole or in part any words, figures, letters, marks, lines, or devices peculiar to and used in or on any bank note, or in or on any document entitling or evidencing the title of any person to any share or interest in any public stock, annuity, fund, or debt of any part of His Majesty's Dominions or of any foreign state, or in any stock, annuity, fund, or debt of any body corporate, company, or society, whether within or without His Majesty's dominions;

(*d*) Uses or knowingly has in his custody or possession any plate, wood, stone, or other material, upon which any such words, figures, letters, marks, lines, or devices have been engraved or in anywise made as aforesaid;

(*e*) Uses or knowingly has in his custody or possession any paper upon which any such words, figures, letters, marks, lines, or devices have been printed or in anywise made as aforesaid.

10. *Possessing certain paper.*—Every person shall be guilty of a misdemeanour and on conviction thereof shall be liable to imprisonment, with or without hard labour, for any term not exceeding two years, who, without lawful authority or excuse the proof whereof shall lie on the accused, purchases, receives, or knowingly has in his custody or possession—

(*a*) Any special paper provided and used for making Treasury bills or London county bills or any Revenue paper before such paper has been duly stamped, signed, and issued for public use:

(*b*) Any die peculiarly used in the manufacture of any such paper.

11. *Accessories, &c.*—Any person who knowingly and wilfully aids, abets, counsels, causes, procures, or commands the commission of an offence punishable under this Act shall be liable to be dealt with, indicted, tried, and punished as a principal offender.

12. *Punishments.*—(1) Where a sentence of penal servitude may be imposed on conviction of an offence against this Act, the court may, instead thereof, impose a sentence of imprisonment, with or without hard labour, for not more than two years.

(2)—(*a*) On conviction of a misdemeanour punishable under this Act, the court, instead of or in addition to any other punishment which may be lawfully imposed, may fine the offender:

(*b*) On conviction of a felony punishable under this Act, the court, in addition to imposing a sentence of penal servitude or imprisonment, may require the offender to enter into his own recognizances, with or without sureties, for keeping the peace and being of good behaviour:

(*c*) On conviction of a misdemeanour punishable under this Act, the court, instead of or in addition to any other punishment which may lawfully be imposed for the offence, may require the offender to enter into his own recognizances, with or without sureties, for keeping the peace and being of good behaviour:

(*d*) No person shall be imprisoned under this section for more than one year for not finding sureties.

13. *Q. S.*—A court of quarter sessions in England shall not have jurisdiction to try an indictment for any offence against this Act or for an offence which, under any enactment for the time being in force, is declared to be forgery or to be punishable as forgery.

14. *Venue.*—(1) A person charged—

(*a*) with an offence against this Act; or

(*b*) with an offence indictable at common law or under any Act for the time being in force consisting in the forging or altering of any matter whatsoever, or in offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered;

may be proceeded against, indicted, tried, and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place; and for all purposes incidental to or consequential on the prosecution, trial, or

punishment of the offence, it shall be deemed to have been committed in that county or place:

Provided that, where the offence charged relates to documents made for the purpose of any Act relating to the suppression of the slave trade, it shall, for the purposes of jurisdiction and trial, be treated as an offence against the Slave Trade Act, 1873.

(2) Nothing in this section shall affect the laws relating to the government of His Majesty's naval or military forces.

15. *Criminal possession.*—Where the having any document, seal, or die in the custody or possession of any person is in this Act expressed to be an offence, a person shall be deemed to have a document, seal or die in his custody or possession if he—

(*a*) has it in his personal custody or possession; or

(*b*) knowingly and wilfully has it in the actual custody or possession of any other person, or in any building, lodging, apartment, field, or other place, whether open or enclosed, and whether occupied by himself or not.

It is immaterial whether the document, matter, or thing is had in such custody, possession, or place for the use of such person or for the use or benefit of another person.

16. *Search warrants.*—(1) If it shall be made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or possession without lawful authority or excuse—

(*a*) any bank note; or

(*b*) any implement for making paper or imitation of the paper used for bank notes; or

(*c*) any material having thereon any words, forms, devices, or characters capable of producing or intended to produce the impression of a bank note; or

(*d*) any forged document, seal, or die; or

(*e*) any machinery, implement, utensil, or material used or intended to be used for the forgery of any document;

the justice may grant a warrant to search for the same; and if the same shall be found on search, it shall be lawful to seize it and carry it before a justice of the county or place in which the warrant was issued, to be by him disposed of according to law.

(2) Every document, seal, or die lawfully seized under such warrant shall be defaced and destroyed or otherwise disposed of—

(*a*) by order of the court before which the offender is tried; or

(*b*) if there be no trial, by order of a justice of the peace; or

(*c*) if it affects the public revenue, by the Commissioners of Inland Revenue or the Commissioners of Customs and Excise, as the case may require; or

(*d*) if it affects any of the companies of Goldsmiths or Guardians referred to in the Gold and Silver Wares Act, 1844, by the said company or guardians.

17. *Indictment.*—(1) In an indictment or information for an offence against this Act with reference to any document, seal, or die, it is sufficient to refer to the document, seal, or die by any name or designation by which it is usually known, or by its purport, without setting out any copy or facsimile of the whole or any part of the document, seal, or die.

Intent] (2) Where an intent to defraud or an intent to deceive is one of the constituent elements of an offence punishable under this Act, or under any other Act relating to forgery or any kindred offence for the time being in force, it shall not be necessary to allege in the indictment or to prove an intent to defraud or deceive any particular person; and it shall be sufficient to prove that the defendant did the act charged with intent to defraud or to deceive, as the case may require.

Co-partners] (3) If any person who is a member of any co-partnership, or is one of two or more beneficial owners of any property, forges any document, matter, or thing with intent to defraud the co-partnership or the other beneficial owners, he is liable to be dealt with, indicted, tried, and punished as if he had not been or was not a member of the co-partnership, nor one of such beneficial owners.

18. *Interpretation.*—(1) In this Act unless the context otherwise requires—

The expression 'bank note' includes any note or bill of exchange of the Bank of England or Bank of Ireland, or of any other person, body corporate, or company carrying on the business of banking in any part of the world, and includes 'bank bill,' 'bank post bill,' 'blank bank note,' 'blank bank bill of exchange,' and 'blank bank post bill':

The expression 'die' includes any plate, type, tool, or implement whatsoever, and also any part of any die plate, type, tool, or implement, and any stamp or impression thereof or any part of such stamp or impression:

The expression 'document of title to goods' includes any bill of lading, India warrant, dock warrant, warehouse keepers certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought or sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by endorsement or by delivery the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to:

The expression 'document of title to lands' includes any deed, map, roll, register, or instrument in writing being or containing evidence of the title or any part of the title to any land or to any interest in or arising out of any land, or any authenticated copy thereof:

The expression 'revenue paper' means any paper provided by the proper authority for the purpose of being used for stamps, licences, permits, Post Office money orders, or postal orders, or for any purpose whatever connected with the public revenue:

The expression 'seal' includes any stamp or impression of a seal or any stamp or impression made or apparently intended to resemble the stamp or impression of a seal, as well as the seal itself:

The expression 'stamp' includes a stamp impressed by means of a die as well as an adhesive stamp:

The expression 'Treasury bill,' includes Exchequer bill, Exchequer bond, Exchequer debenture, and War bond:

The expression 'valuable security' includes any writing entitling or evidencing the title of any person to any share or interest in

any public stock, annuity, fund, or debt of any part of His Majesty's dominions or of any foreign state, or in any stock, annuity, fund, or debt of any body corporate, company, or society, whether within or without His Majesty's dominions, or to any deposit in any bank, and also includes any scrip, debenture, bill, note, warrant, order, or other security for the payment of money, or any accountable receipt, release, or discharge, or any receipt or other instrument evidencing the payment of money, or the delivery of any chattel personal.

(2) References in this Act to any Act in force at the commencement of this Act shall be held to include a reference to that Act as amended, extended, or applied by any other Act.

(3) References in this Act to any Government department shall in relation to any functions performed by that department be held to include references to any other Government department by which the same functions were previously performed.

19. *Savings.*—(1) Where an offence against this Act also by virtue of some other Act subjects the offender to any forfeiture or disqualification, or to any penalty other than penal servitude or imprisonment or fine, the liability of the offender to punishment under this Act shall be in addition to and not in substitution for his liability under such other Act.

(2) Where an offence against this Act is by any other Act, whether passed before or after the commencement of this Act, made punishable on summary conviction, proceedings may be taken either under such other Act or under this Act: Provided that where such an offence was at the commencement of this Act punishable only on summary conviction, it shall remain only so punishable.

21. *Extent.*—This Act shall not extend to Scotland.

Transfers of stock of the (late) Metropolitan Board of Works] That body is now replaced by the London County Council by 51-2 V. 41, 40 (8). Falsification of every kind is punished by (the Council's A.) 2-3 G. 5, cv. 38-40, 48.

Falsification of court documents—uttering] By 24-5 V. 98, 28: 'Whosoever, being the clerk of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, shall utter any false copy or certificate of any record, knowing the same to be false; and whosoever . . . shall deliver or cause to be delivered to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing the same to be false, or shall act or profess to act under any such false process, knowing the same to be false, shall be guilty of felony': maximum punishment, seven years' penal servitude.

In *Etheridge*, 1901, Kennedy J. said, this s. 'seems to me to apply to official documents of a court of competent jurisdiction (whether of record or not) . . .' The other report (65 J. P.) that 'this s. only applies to courts of record' is probably mistaken.

By 7-8 V. 19, 5, much the same provisions as these are made for 'bailiffs of inferior courts' and *any one* uttering false process, &c. of those courts. See a conviction (of a debt-collector) before Mathew J. for falsely purporting to serve a summons of the Yarmouth Court of Record: *Rippier*, 32 L. J. Newspaper, 350, 1901.

By 24-5 V. 98, s. 44: 'On the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged, with an intent to defraud.'

Sentence] By s. 47: 'Whosoever shall . . . be convicted of any offence which shall have been subjected by any Act or Acts to the same pains and penalties as are imposed by the [repealed] Act passed in the fifth year of the reign of Queen Elizabeth, intituled, *An Act against Forgers of False Deeds and Writings,* for any of the offences first enumerated in the said Act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable . . . to be kept in penal servitude for any term not exceeding fourteen years.'

By s. 48: Forgeries (including falsification and personation, &c.) which were capital before 1 W. 4, 66, rpd. except s. 21, *and are not otherwise punishable under this* (1861) *Act,* are made punishable by penal servitude for life (maximum), but the s. is now of small use. See under *Amount of Sentence.*

Some regard must be paid to the effect of the fraud; where the only effect was to make liability to pay 'somewhat earlier,' five years' p. s. was reduced to nine months' imp. w. h. l. *Marck,* 13 Cr. A. R. 116, 1918.

Principals in the second degree and accessories] By s. 49: 'In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable . . . to be imprisoned for any term not exceeding two years with or without hard labour; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanour punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender.'

Money orders] See s. 59 of P. O. A. 1908, under *Post Office.*

Trade marks, &c.] For the Merchandise Marks A. 1887, 50-1 V. 28, 2—extended to customs entries by 54-5 V. 15, s. 2 of which (official prosecutions) is extended to the Board of Agriculture by 57-8 V. 19, 1—see that title. This kind is alone, among forgeries, triable at Q. S. See *False Tokens* under *Cheating.*

For trade *names of commodities,* see *Anderson* v. *Britcher,* 24 Cox C. C. 60, 1913: K. B. D., where selling as 'Demerara sugar' what was not produced there was held not to be an offence within 38-9 V. 63, 6 ('nobody supposes a Brussels carpet necessarily to be made in Brussels').

A master is criminally responsible under s. 2, above, for the act of his shopman, servant, &c., although it be contrary to his orders, unless he can show within that s. that he was not responsible. *Coppen* v. *Moore* (No. 2), 1898, 2 Q. B. 306: six judges.

Forgery and uttering, &c. in other cases] There are innumerable provisions scattered through the statutes relating to forgery, many of them to offences provided for by the Forgery A. 1913, above, and thereby repealed.

It is always usual, when an Act is passed which creates government securities, to provide specifically against the offence of forging such securities.

Hall-marks on plate] For transposing or removing stamps on gold and silver wares or dies therefor, and for uttering the counterfeits, &c., see 7-8 V. 22, 2. See *Spittle.*

For printing or uttering any false copy of a proclamation, order, or regulation issued by the Court, the Privy Council, and other State offices, see s. 4 (1) of 31-2 V. 37, amended, and extended to Ireland and the Board of Agriculture by 45-6 V. 9; 58-9 V. 9; and 62-3 V. 50, 21 (3).

For tampering with non-parochial registers, see (amended) 3-4 V. 92, 8, extended by 21-2 V. 25, 3.

For false affidavits, false petitions, certificates, &c., relating to the navy, see 28-9 V. 124, 6; for forgeries relating to service in the navy, 5-6 W. 4, 24, 3; 7 G. 4, 16, 25, deals with false certificates or representations about pensions, &c. at Chelsea Hospital; s. 38 with false personation of officers and soldiers entitled to pay, &c. 2-3 W. 4, 53, 49, deals with personation relating to prize-money, &c. For forgeries relating to seamen's savings banks, see 57-8 V. 60, 154; for anchors and chain-cables, see 62-3 V. 23, 13-6.

For certificates of former conviction, see 7-8 G. 4, 28, 11; and for any false certificate or declaration under the Births and Deaths Registration A. 37-8 V. 88, see 40 (2). See also *Telegraph,* and for money orders under *Post Office.*

Forgeries of licences, &c., for stage and hackney carriages are provided against by 6-7 V. 86.

Forging, &c. some documents under the Merchant Shipping A., 57-8 V. 60, 66, is made felony thereby: 695 (4); others by ss. 104, 121, 130, 154, 180, 197 (8), 282, 564: *e.g.* altering *M* (moderate) to *G* (good) in a seaman's certificate, but otherwise simply reprinting it: *Wilson,* D. & B. 558; 27 L. J. M. C. 230, 1858. See under *Ships.*

See also the Sea Fisheries A. 1883, 46-7 V. 22, 17 (4), amended by Forgery A. 1913.

Falsification of accounts] See that title. 'It is clear that all falsifications of accounts do not constitute forgery, while it is equally clear that the falsification of accounts may take such a form as to amount to forgery at common law or under the' 1861 A.: *per* L. Russell C.J., *Arton, Re:* Q. B. D.

Disqualification] That noted for *barratry,* which see, by 12 G. 1, 29, 4, also attaches to one convicted of forgery.

N.B.—Many of the following cases being, so to say, the material out of which the F. A. 1913 (and to a less extent that of 1861), has been woven, are in a sense obsolete, but as the latest statute is comparatively recent, it has been thought convenient to preserve them as links between the past and future practice in any doubtful case which may arise.

What is forgery?] The act of forgery consists in the making of a false document or writing: 'in all forgeries, the instrument supposed to be forged must be a false instrument in itself': *Dunn,* 1765. It will make no difference whether an entirely new document be constructed, or whether an old one be altered so as to have a different effect. Thus, in *Blenkinsop,* 1 Den. C. C. 276; 17 L. J. M. C. 62; 2

Cox C. C. 420, 1847, there was a signature on a blank stamped paper (at the usual angle of acceptance) by William Wilkinson, a mechanic employed by defendant at Leeds; another address was put to the name of the acceptor of (what was in form) an accepted bill of exchange while the bill was in course of completion, with the intention of making the acceptance appear to be that of some other existing person; it was held to be forgery by thirteen judges. Alderson B. thought that if a man really named *Thomas Coutts* was to sign, and then 'banker' was added—if the signer were not the banker—that would be forgery. Cf. *Epps,* 4 F. & F. 81, 1864.

It is not necessary that additional credit should have been gained by the forgery, if any person has been thereby intentionally defrauded; *e.g.* where an *unknown* person endorsed a bill in a false name when his own would have been equally accepted. *Taft,* 1 Lea. 172, 1777; East P. C. 954; *Taylor,* East P. C. 960; 1 Lea. 214, 1779, the indorsement in both cases being unnecessary. Cf. *Whiley,* below.

If a person, having the blank acceptance of another, be authorised to write on it a bill of exchange for a limited amount, and he write on it one for a larger, with intent to defraud either the acceptor or any other person, it has been held, by twelve judges, that it is forgery (apparently at common law). *Hart,* 7 C. & P. 652; 1 Moo. C. C. 486, 1836. So of a blank cheque: *Bateman,* 1845.

In *Griffiths,* D. & B. C. C. 548; 27 L. J. M. C. 205; 7 Cox C. C. 501, 1858, defendant was a station-master, and it was his duty to pay B. for collecting *and* delivering parcels for the company, who provided him with a form in which to enter the different sums. After a time he paid B. for collecting *only,* but put in items for *both* delivering and collecting, and got a receipt from B.'s servant on the paper (simply 'received for B.'), no sum being mentioned: afterwards he put a receipt stamp under the signature and wrote on it the amount of *both* charges. It was held that he was rightly convicted of forgery (of 'a receipt for money': 2 Russ. Cri. 1602 *w*).

Where a customer of a bank altered his own handwriting on a paid cheque, returned to him, so as to make it appear to be forged, and on returning it as forged, got credit for the amount, it was held not to be forgery, but an obtaining by false pretences. *Brittain* v. *Bank of London,* 3 F. & F. 465, 1863: 'very unsatisfactorily reported. It does not shew in what the alteration consisted, &c.': 2 Russ. Cri. 1606 *n*.

Uttering] In *Autey,* D. & B. C. C. 294; 26 L. J. M. C. 190; 17 Cox C. C. 329, 1857, defendant was convicted for *uttering* a dividend warrant of a railway company bearing (as he knew) a forged indorsement. The instrument was regularly drawn and signed by the secretary in favour of one J. L., and it was stated on it that the name of J. L. must be indorsed upon the back, and it was proved that without such indorsement the bankers would not pay the dividend even to J. L. himself. The indorsement was forged, and as that forgery 'amounted to a forgery of the entire document' it was held that defendant was rightly convicted.

A correct *copy* of a genuine deed, if uttered with intent to defraud, may be a forgery: *F. C. Davis, &c.,* 1909, where the defence was that the originals were lost.

No change of name] It is essential to forgery that the document should contain a false statement. But this may be done by a person barely signing his own name to a document. Thus, where a bill of

exchange payable to H. D. or order came to the hands of another H. D., who fraudulently indorsed it, this was held to be forgery. *Mead* v. *Young*, 4 T. R. 28, 1790; and cf. *Story*, 1805, and *Blenkinsop*. The indorsement of the bill amounted in fact to a statement that the indorser was *that* H. D. to whom the bill was payable. If a person uses his own name, but attaches a false description to it, it will be the same as if he used a fictitious name. See below. So where a son, whose name and description were identical with those of his father (deceased), executed mortgages of the latter's property, passing it off as his own—whether he personated his father or not in doing so—he was guilty of forgery: *per* Jessel M.R., Cotton and Lindley L.JJ., the latter on the authority of *Ritson*, above: *In re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611, 1882.

The use of forged receipts to prove a good and genuine claim may be evidence of the intent to defraud: *Hopley*, 11 Cr. A. R. 248, 1915.

Change of name—known existing persons] Sometimes the only falsehood charged is the use of a name to which defendant is not entitled. If the name be that of a known existing person, which is the commonest species of forgery, there is no difficulty.

Non-existing] But it was at one time doubted whether, if the name were a fictitious one and of a non-existing person, it was still forgery. But that doubt has long been settled. *Lewis*, Foster C. C. 116; East P. C. 957, 1754. See also the judgment 'after very long consideration' in *Lockett*, 1774. And the same rule applies to a signature in the name of a fictitious firm: *Rogers*, 8 C. & P. 629, 1838, where the fictitious 'Nicholson & Co.' may have been signed by an actual Nicholson. If the name be an assumed one, then it will be forgery to draw up a document in that name, if the name were assumed for the express purpose of the fraud. *Conduct* must here be considered.

In *Parkes and Brown*, Lea. 775; East P. C. 963, 1796, where one T. Brown, dated a note at Ringhton, Salop, payable at bankers in London, and got Parkes to sign it in the name of T. Brown, and passed it off as a note of his brother; and it was not proved that he had a brother of that name, but it was that there was no person of that name who resided at Ringhton, or kept an account with those bankers; this was held by the judges to be the uttering of a forgery by *Brown* (but Parkes was discharged on a point of venue). *D. Walker*, 1807, 6 Evans's Collection of Statutes, 93, 3rd ed., 1829, criticises, and is sometimes quoted as an authority against, this; but there defendant, a pauper, unknown to the drawee, had been in the habit of drawing bills (dated Liverpool, though he lived at Manchester) in the same fictitious name, viz. 'D. Walker & Co.,' for some time, and they had been regularly paid, so that Chambre J. thought that there was not sufficient evidence to go to the jury, *i.e.* presumably, of the name having been assumed for the *express purpose* of the forgery—a necessary ingredient in this class of cases. Thus, defendant was charged with forging an acceptance. Prosecutrix had a house to let; he took it, and, to pay for the furniture, &c., wrote the bill in question, which she signed as drawer, and he accepted in the name of Thomas Scott, by which he was going at that time; at various times he had gone by the name of Bontien; but

he called a broker, who stated that he first knew him a little before prosecutrix, and always by the name of Scott, and that he had a nickname of *Bont* and *Bontien* at times; that he had transacted business with him as Scott; that he never knew him by any other name, and that his only knowledge of his having gone by other names was from the newspapers. The judges thought that it did not sufficiently appear that he had not gone by the name of Scott before the time of accepting the bill, or that he had assumed the name for that purpose, and that the conviction was wrong. *Bontien,* R. & R. 260, 1813.

Samuel Whiley was indicted for forging a bill of exchange in the name of *Samuel Milward.* He ordered some goods in that name at Bath, and, a few days afterwards, said he would give a draft on his banker in London, and gave the bill in question. No Samuel Milward kept an account with the London banker. Defendant had always been known by the name of *Whiley;* but a day or so after his first order, a brass plate with the name of 'Milward' was fixed on the door of his house. Prosecutor stated that he took the draft on the credit of defendant, whom he did not know, and who was drawer, payee, and indorser; that he presumed his name was that which he had written, and had no reason to suspect the contrary; and if he had come to him as 'Samuel Whiley' he should have given him equal credit. Defendant stated that in fact *Samuel Milward* was part of his real name, and that he had omitted that of *Whiley* for fear of arrest. The judge left it to the jury to say whether he had assumed the name of 'Milward,' &c., with intent to defraud; a conviction was upheld. *Whiley,* Russ. Cri. 593; R. & R. 90, 1805. Cf. *Taft* and *Taylor,* above.

Where the facts were almost identical with those in *Whiley,* and it was urged that defendant had a right to take any name he pleased, that prosecutrix had never known him by any other than that he signed and that he had not drawn on the banker in the name of a real customer, the judges held the conviction right, and were of opinion that, if the name were assumed for the purpose of the fraud and avoiding detection, it was as much a forgery as if the name assumed were that of any other person of known credit, though the case would have been different if he had habitually used, and become known by another name than his own. *Francis,* R. & R. 209; Russ. Cri. 1622, 1811.

Conduct] Defendant was indicted for forging a bill of exchange, in the name of Thomas White, as drawer. He came to Newnham, where he introduced himself, and resided for a time, and officiated as curate under that name, another Mr. White being really expected there as curate. During his imposture he negotiated the bill in question. Dallas J. told the jury that if they thought he went to Newnham 'in the fictitious character of a clergyman, with a false name, for the sole purpose of getting possession of the curacy, and of the profits, &c.,' they should acquit him, the bill transaction being 'no part of his original plan,' but having 'sprung up incidentally and collaterally'; but if they were satisfied that he went there intending fraudulently to raise money by bills in a false name, and that this bill was made in pursuance of such intent, they should convict him—which they did, expressly on this ground. Eleven judges were of opinion (1) that where proof is given of a defendant's real name, and no proof of any change of name until the time of the fraud committed, 'it throws

it upon the prisoner to show that he had before assumed the false name on other occasions, and for other purposes'; (2) that 'where the prisoner is proved to have assumed a false name, for the purpose of pecuniary fraud connected with the forgery, drawing, accepting, or indorsing in such false or assumed name is forgery.' *Peacock,* R. & R. 278, 1814.

Name assumed for fraud] The result of the cases is that where the fictitious name is assumed for the purposes of the fraud, forgery may be proved, but it is otherwise where the credit is given solely to the person without any regard to the name, as in *Martin,* 5 Q. B. D. 34; 49 L. J. M. C. 11; 14 Cox C. C. 375, 1879: C. C. R., where Robert Martin, in payment for a pony and cart, in the presence of prosecutor, who had long known him, drew a cheque in the name of William Martin, on a bank at which he had then no account, and gave it to prosecutor as his own cheque drawn in his own name. Prosecutor took it *on the credit of* Martin *himself,* not observing the name in which it was signed. It was held, following the resolution in *Dunn,* 1 Lea. C. C. 59, 1765, above, that he was not guilty of forgery but of false pretences. This contradicts *Sheppard,* 1 Lea. 226, 1781: uttering with knowledge of the forgery (and, perhaps, forging), where the facts were very similar; for *Aickles,* 1 Lea. 438, 1787, 'not easily to be distinguished in principle from' *Sheppard,* see Russ. Cri. 1620.

Informality—imperfect state of the document—patent defect] By s. 1 (3) *b* of F. A. 1913, it is not necessary that the document which is forged should be absolutely legally valid for the purpose for which it was intended—which East P. C. 948, understands to mean 'where the false instrument carries on the face of it the semblance of that for which it is counterfeited and is not illegal in its very frame,' citing '*Crooke,* 2 Str. 901, 1741, where the conveyance was ineffectual at law, if genuine, to pass the property.' 'The false instrument . . . must not be obviously an illegal document': 9 Halsb. 713. See under *Bank-notes, Bills,* and '*Orders,*' below. The principle is the same for *Seals,* above (under A.). Thus an indictment at common law for forging a surrender of the lands of J. S., which did not allege that J. S. had any lands, on motion in arrest of judgment was held good, as it is not necessary at common law to show any actual prejudice. *Goate,* 1 L. Raym. 737, 1700; cf. *Ward,* 1727. So the making of a false instrument is forgery, though by statute such instruments ought to be in a certain form, which has not been complied with, unless the statute make the informal instrument *absolutely* void. On an indictment for forging a power of attorney (as a 'deed' within 2 G. 2, 25, rpd., for the receipt of prize-money, the forged form did not strictly comply with that in the statute, now rpd. On a conviction, a majority of the judges were of opinion that the letter of attorney was not a void instrument, but that it might be the subject of indictment; that a payment made under it, to the use of the petty officer, would be good as against him, and that the attorney under it might bring an action for the prize-money, or execute a release. *Lyon,* R. & R. 255, 1813: '*directory* provisions have not the effect of making a deed not in the form prescribed . . . altogether void.' On the same principle, there may be a conviction for forging an unstamped instrument (for which, see Index), though such instrument can have no operation in law. Where there was no drawer's name on a bill at

any time, and the acceptor forged an indorsement, it was held that, as the document was not a bill, he could not be convicted of feloniously forging or uttering an indorsement *on a bill* (but ought to have been indicted for forgery at common law). See *Forms, Bills of Exchange,* below; and *Butterwick* there; *Harper,* 7 Q. B. D. 78; 50 L. J. M. C. 90; 14 Cox C. C. 574, 1881: C. C. R.

Transfer of stock] On an indictment under 33 G. 3, 30, rpd., several points were ruled with regard to forging a transfer of stock. *Gade* was a co-executor of a testator who had bequeathed some consols to H., whom Gade made his own son personate at the bank, and whose name he made him forge, for the purpose of transfer to W. H. had never accepted the stock, as required by law, though it had been transferred into his name. Owing to G.'s son mis-spelling H.'s name, the fraud was unsuccessful, and *Gade* was convicted of forgery. Three objections were taken on his behalf: 1st, there was no acceptance by H. of the transfer, till which time, therefore, the transfer was incomplete, and H. could not possess the stock; 2nd, that till the stock was accepted, H. could not transfer it to any one; 3rd, that the instrument was not witnessed, which, according to the printed forms used by the bank, should have been done. After much argument, the opinion of the twelve judges was delivered by Buller J. who observed, that, to the two first objections, two answers had been given: 1st, that the stock vested by the mere act of transferring it into the name of H., and that if he had died before he accepted it, it would have gone to his executors as part of his personal estate; 2nd, that the nature of the offence would not have been altered, if H. *had not had any stock* standing in his name; for the transfer forged was complete on the face of it, and imported that there was such a description of stock capable of being transferred. Neither the forgery nor the fraud would have been less complete, if H. had really had no stock. On the third objection, the judges all thought that the entry and signatures, as stated in the indictment, were a complete transfer, without the attestation of witnesses, which was no part of the instrument, but only required by the bank for their own protection. *Gade,* East P. C. 874; Lea. 732, 1796. See also *M'Intosh,* 1800.

'*Latent defect*'] The expression is borrowed from Russ. Cri. 1634. Nor will an instrument be less the subject of forgery on account of its not being 'available, by reason of some collateral objection not appearing on the face of it.' Defendant forged an 'order for the payment of money' within 7 G. 2, 22, rpd.; the person whose name was forged was a discharged seaman, who was, in fact, at the date of the order, within seven miles of Portsmouth, where his prize-money would have been payable; the forgery purported to be dated at Petersfield, which is beyond the distance of seven miles within which attestation was required; this, too, was forged, and did not purport to come from the statutory witnesses. This would have invalidated his *genuine* order, by virtue of 32 G. 3, 34, 2, rpd. Moreover, the forgery mentioned no 'sum certain,' but ran, 'all my proportion of prize-money.' The judges, however, held the conviction proper; it was an 'order,' and as it purported, by a false representation, by which the money was obtained, to be in order and outside the statute, there was 'a false making of an order,' *i.e.* forgery. *M'Intosh,* East P. C. 942, 956; Lea. 883, 1800.

In *Snelling,* 1 D. & P. 219; 23 L. J. M. C. 8; 6 Cox C. C. 230, 1853,

following *Carney* and *Pulbrook* (and overruling several older cases: Russ. Cri 174 *n*), 9 Halsb. 723 *q*, the forged document was in the following form:—'Holton, Mar. 31, 1853,—Sirs, pleas to pay the bearis, Mrs. Smart, the sum of eaigth Hundred and 50 4£ ten shillings for me, James Ramsey.' It was held, that, although not addressed to any one, it might be shown, by parol evidence, for whom the document was intended, and this appearing to be the banker with whom J. R. kept an account, the document was an order for the payment of money.

So it is no defence to an indictment for forging, &c., an order of a board of guardians for payments to show that the person who signed the order as chairman—which had to be done (practically) by statute—was not, in fact, chairman on the day he signed, the forgery charged being of *another* signatory's name in the order. *Pike,* 2 Moo. C. C. 70, 1838.

But an 'indictment for forging an order for relief to a discharged prisoner, under' a repealed statute, 'being in many instances ungrammatical and at variance from the Act,' was held bad. *Donnelly,* 1 Moo. C. C. 438, 1835.

Forging a bank-note] 'Where the forgery,' says East, 'consists in counterfeiting any other known instrument [*i.e.* than a bill], it is not necessary that the resemblance should be an exact one: if it be so like as to be calculated to deceive [persons in general, East 950], when ordinary and usual observation is given, it seems to be sufficient. The same rule holds, in cases of counterfeiting the seals, and coining.' P. C. 858. Thus where a bank official stated that *he* should not have been imposed upon by the counterfeits, the difference between those and the true notes being to him so apparent, yet, it appearing that others had been deceived, though the counterfeits were very ill executed, it was held that this was a forgery. *Hoost,* East P. C. 950, 1802. Defendant was indicted for forging a Bank of England note (which he never uttered); the instrument, though it much resembled a real bank-note, was not made of paper bearing the water-mark of the bank; the number also was not filled up, and the word 'pounds' was omitted after the word 'fifty'; but in the margin were the figures £50. It was contended, that on account of these defects, this could not be held a forgery of a bank-note; but the judges held him rightly convicted; for, first, in forgery, there need not be an exact resemblance—it is sufficient that the instrument is *primâ facie* fitted to pass for a true one; secondly, the majority inclined to think that the omission of 'pounds' in the body of the note, had nothing else appeared, would not have exculpated him; but it was matter to be left to the jury, whether the note purported to be for 50*l.*, or any other sum; but all agreed that the 50*l.* in the margin removed all doubt. *Elliot,* East P. C. 951; 1 Lea. 175; 2 B. & P. New Rep. 93 *n.*, 1777. See also *M'Connell,* 1 C. & K. 371; 2 Moo. C. C. 298, 1844, and an illustration of Buller J. at the end of *Gade* (in Lea.), above.

Defendant was convicted for uttering a forged note of a private bank: he had altered a note of the Bedford Bank from 'one' to 'forty pound' (*sic*), but had cut off the signature of the maker, so that the words 'for B. B. and G.' (his firm) only were left, and had made other small obliterations. The judges were clearly of opinion that the conviction was wrong, under the then A. *Pateman,* R. & R. 455, 1821.

Defendant was indicted for having uttered, &c. 'a certain forged paper writing, *purporting* to be a bank-note,' in the following form:—

No. F. 946.

I promise to pay John Wilson, Esq., or bearer, ten pounds.
London, March 4, 1776.

For Self and Company of
my Bank in England.

£Ten.
Entd. *John Jones.*

On the counts charging an intent to defraud the Bank of England he was acquitted, but a special verdict was found, that he intended to defraud the man who gave him ten pounds for the paper, knowing that it was forged, but saying that it was good, and the question argued was, whether this paper purported to be a *bank-note*. The K. B. were of opinion, that the representation which he had made that it was a good note, could not alter the *purport* of it, which is what appears on the face of the instrument itself; for although such *false* representations might make him guilty of a fraud or cheat, they could not make him guilty of felony. *Jones*, Lea. 204; 1 Doug. 300; East P. C. 883, 952, 981, 1779. 'Jones's crime was that of telling a falsehood,' *per* Mansfield C.J., *Collicott*, 4 Taunt. 303, 1812.

Defendant was indicted for uttering a forged 'promissory note.' The instrument was as follows:—

N. 6414.	Blackburn Bank.	30 shillings.

I promise to take this as thirty shillings, on demand, in part for a two pound note, value received.

No. 6414.

Entd. J. C. Blackburn, Sept. 18, 1821.

Thirty shillings.

For Cunliffe, Brooks and Co.

R. Cunliffe.

It was doubted whether this could be called 'a promissory note,' and, further, whether such a genuine original instrument could have any validity, or was not a mere nullity, and the judges held that judgment ought to be arrested. *Burke*, R. & R. 496, 1822, who annotate, 'It is to be observed of' this 'instrument . . . that it was not payable to the bearer on demand; that it was not payable in money, that the maker only promised to take it in payment, and that the requisitions of 17 G. 3, 30 [rpd.] were not complied with.'

Engraving 'part of' a note] In *Keith*, 1 D. & P. C. C. 486; 24 L. J. M. C. 110; 6 Cox C. C. 533, 1855, defendant was convicted of engraving on a plate 'part of a promissory note of a bank. He cut out the centre of . . . a promissory note purporting to be the . . . note' of the B. L. Banking Company, on which the whole of the note was written, and had procured to be engraved on a plate part of the ornamental border of the note, consisting of the royal arms. The question was, whether this amounted to an engraving on a plate 'part of a . . . promissory note, purporting,' &c., within 11 G. 4 and

1 W. 4, 66, 18, rpd. The court held that it did. Parke B. said, 'To see whether an engraving purports to be part of a note you must compare it with the original note. If the forged engraving is clearly intended to imitate any part of a note, whether that part be the obligatory part of the note or not, it is, I think, an offence within the statute. There must be such a portion engraved, that you can say clearly on comparison that it is intended to imitate part or to purport to be part of a note. If a single dot or line only were engraved, there would not be enough to induce one to say, that the engraving purported to be part of a note. But the royal arms of Scotland in the position in which they are found and the Britannia in the margin, appear on comparison without any doubt to purport to be part of the ornaments of a real note': conviction affirmed.

24-5 V. 98, 16, rpd., extended to the engraving in England of the plates of notes of banks trading exclusively in Scotland or the colonies, notwithstanding that s. 55 excepted Scotland from the A. *Brackenridge,* L. R. 1 C. C. R. 133; 37 L. J. M. C. 86; 11 Cox C. C. 96, 1868.

Making a note, &c.] The taking of a 'positive' impression of a note on glass by photography is a 'making' within 24-5 V. 98, 19, rpd., although such impression is evanescent, and cannot be printed or engraved from until it has been converted into a 'negative.' *Rinaldi,* L. & C. 330; 30 L. J. M. C. 28; 9 Cox C. C. 391, 1863.

Deeds] On an indictment for inciting S. R. to forge an administration bond, on administration granted for the effects of J. S., S. R. having executed the bond in the name of E. S. in order to obtain as sister, &c. administration to J. S.'s effects, it was objected that, 22-3 Car. 2, 10 requiring the bond to be given by the person to *whom administration was granted,* and not by the person *who was entitled to administration,* the bond could not be treated as a forgery, but was a good bond within the A., having been given by the person to whom, in fact, administration was granted. The objection was overruled as 'S. R. in the name of E. S., that not being her name at all, executed the bond as if she was really E. S.' *Barber,* Russ. Cri. 1628, 1844.

The forging of a power of attorney to receive a seaman's wages, was held to be the forgery of a deed within 2 G. 2, 25, rpd. *Lewis,* 1754. See *Lyon,* 1813. So a power of attorney to transfer government stock; *Fauntleroy,* 1 Moo. C. C. 52; 2 Bing. 413, 1824; and an indenture of apprenticeship; *Jones,* East P. C. 853, 991; 1 Lea. 366, 1785. See *Lyon,* above. But a letter of orders under the seal of a bishop is not a deed within 24-5 V. 98, 20, rpd. *Morton,* L. R. 2 C. C. R. 22; 42 L. J. M. C. 58; 12 Cox C. C. 456, 1873.

Wills—mark for signature] A will began, 'I, Peter Perry,' and was signed 'John × Perry, his mark.' It was objected on indictment for forging the will of *Peter* Perry that this was not a forgery of the will of Peter Perry as laid in the indictment, but as the prisoners were executed, the judges must have considered the conviction good, though no judgment was given. *Fitzgerald,* 1 Lea. 20; East P. C. 953, 1741. But falsely attesting a voter's mark, *i.e.* purporting to witness his mark when he had not made it, is not forgery (though it might be indictable): *Hartshorn.* A *mark* should be set out in the indictment despite *Smith,* Salk. 342, 1704; East P. C. 976. *Murphy,* 19 St. Tr. 694, 1753, was a case of forgery of a seaman's will to get prize-money: the seaman returned two years after the crime.

It was held that at common law, it makes no difference that the testator whose will is forged is living. *Coogan,* 1 Lea. 449; East P. C. 948, 1787, who, *ib.* 853, says, on Buller J.'s remark that forgery is 'the making a false instrument with intent to deceive,' that in 'deceive' must be included an intent to defraud. So if the will is made in the name of a non-existing person. *Avery,* 1838, under 11 G. 4 & 1 W. 4, 66, 3, rpd.

A probate, unrevoked, is not conclusive proof of the validity of a will. *Buttery,* R. & R. 342, 1818, for it may *afterwards* turn out to be a forgery. *Priestman* v. *Thomas,* 9 P. D. 210, 1884: C. A.

Although the late address of the deceased is wrongly described there may be forgery of 'the will of a dead person,' within s. 2 (1) (*a*) of F. A. 1913: *Kennaway.*

Bills of exchange—form] An instrument cannot be a bill of exchange unless it have a drawer, a drawee, and a payee, and be for a 'sum certain.' 45-6 V. 61, 3, 6, 7, Bills of Exchange A. 1882. (But it still might be a valid security.) Defendant was indicted for forging and uttering. He discounted a bill and indorsed a name not his own on it, there being another already there; but there was no indorsement of the name of the drawers, to whose order it was made payable. It was urged that as there was no indorsement by the payees, nor anything purporting to be such an indorsement, the instrument was not negotiable, and could not, therefore, effect a fraud, but a conviction was approved by the judges, except Bayley J. *Wicks,* R. & R. 149, 1809; cf. *Moffatt,* below.

But where the indictment was for forging an acceptance, and the requisites of statutes, which expressly made bills without the payee's address or the attestation of a witness invalid and not negotiable, had not been complied with, the judges were unanimous that the conviction for the *capital* forgery under 2 G. 2, 25, and 7 G. 2, 22, both rpd., was wrong; at the trial the objection that as it was not stamped it could not be admitted was overruled. *Moffatt,* 1 Lea. 431; East P. C. 954, 1787; cf. *Wicks,* above. This case was distinguished from *Hawkeswood,* below. There cannot be a bill of exchange without a drawer's signature; hence an indictment for forging the acceptance of such 'a bill of exchange' is bad. *Mopsey,* 11 Cox C. C. 143, 1868; cf. *Harper,* 1881.

A document requiring the drawee to pay to *his own* order, but otherwise in proper form, could not formerly be treated as a bill of exchange: *per* Erskine J., *Bartlett,* 2 Moo. & R. 362, 1841; but is now valid expressly by 45-6 V. 61, 5 (1), but 'cannot be enforced until the drawee has endorsed it away': Chalmers on that s. Defendant was indicted for forging an order for the payment of money on 'the treasurers' of the navy. There was no payee named in the order, a blank being left. The judges agreed that the direction to the treasurers instead of 'the commissioners' (the proper body) would not have invalidated the conviction; but they held, the want of a payee did, as it was not an order for the payment of money. *Richards,* R. & R. 193, 1811. They ruled the same way on the same day, with regard to a navy pay bill (of exchange) with the same defect. *Randall,* R. & R. 195, 1811.

No acceptance] An instrument drawn by A. on B., requiring him to pay to the order of C. a certain sum at a certain time 'without

acceptance' is a bill of exchange, as actual acceptance is not necessary to make 'a bill.' *Kinnear,* 2 Moo. & R. 117, 1838.

Unstamped instrument] Defendant was convicted of forging a bill, which, when produced, was found to be unstamped, but the judges held the conviction right, for the holder might by law get it stamped (whereas in *Moffatt,* above—which see—'nothing could have made it good'). *Hawkeswood,* 1 Lea. 257, 1783; *Lee, ib.* 258 *n.* 1784; *Morton, ib.*; East P. C. 955, 1795. In *Teague,* East P. C. 979, 1802; the judges, following those cases, said, 'it had been decided that the Stamp Acts had no relation to the question of forgery; but that, supposing the instrument forged to be such, on the face of it, as would be valid provided it had a proper stamp, the offence was complete.'

If any one write another person's name across a blank stamp, on which, after he is gone, a confederate writes a bill of exchange, this (*semble*) is not a forgery of the acceptance of a bill of exchange. *Cooke,* 1838. Where an innocent person, by defendant's direction, had written the name of an acceptor across a blank bill, on which defendant some time subsequently drew a bill of exchange in his own name and that of another (apparently a firm); Parke B. held that this was not a forgery of an acceptance of a bill of exchange within 1 W. 4, 66, 4, rpd. *Butterwick,* above. But both these would be forgeries at common law.

Forged bill met] The offence is complete on uttering: *Geach* was a conviction, though the bill had been met before prosecution.

Promissory notes] Defendant was convicted of forging a promissory note, in the following form:—

'On demand, we promise to pay to Mesdames S. W. and S. D., stewardesses for the time being, of the Provident Daughters' Society, held at Mr. Pope's, the Hope, Smithfield, or their successors in office, sixty-four pounds with 5 per cent. interest for the same, value received, this 7th day of February, 1815.

For C. F. & Co.,
64*l.* J. F.'

It was moved in arrest of judgment, that this was no promissory note, unsuccessfully, for the judges said that it was not necessary that it should be *negotiable,* and though for some purposes (under the then law) it was not in legal form, yet the 'stewardesses' or their executors could sue upon it, and, therefore, it was capable of being the subject of forgery. *Box,* R. & R. 300; 6 Taunt. 325, 1815; Russ. Cri. 1742, includes this document among those 'held promissory notes within former Acts framed on similar lines' [to those of 2 G. 2, 25, rpd.]. And see *Smith,* 1845.

Partners] In *F. Holden,* 1912, 1 K. B. 483; 81 L. J. K. B. 327; 76 J. P. 143; 22 Cox C. C. 727; 28 T. L. R. 173; 106 L. T. 305; 7 Cr. A. R. 93, a partner, accepting a bill, signed the firm's name, 'H. & F.'—as the jury found—without authority or belief that he had authority and with intent to defraud; he was properly convicted within rpd. s. 24 of the F. A. 1861, as his partner was an 'other person,' and his acting was 'by procuration *or otherwise*' within the s. See now s. 1 (2) of F. A. 1913. 'Without lawful authority or excuse'

in Defence of the Realm Regulations, 45 (e) and 48, was held to apply to an authorised person abusing his authority: *Kupferberg,* 13 Cr. A. R. 166, 1918.

Joint owners] See *Harris,* 1842.

A forged indorsement of *one* of several names of executrixes, payees of a bill, was held to be within 1 W. 4, 66, 3, rpd. *Winterbottom,* 1 Cox C. C. 164; 1 Den. C. C. R. 41; 2 C. & K. 37, 1844.

Advance note] An order to pay defendant or order money, being a month's advance on an intended voyage, 'as per agreement with' the signer, viz. the master (name forged) in the margin of which defendant had written an undertaking to sail in a certain number of hours, is an order, &c., within the 1830 A. *Bamfield,* 1 Moo. C. C. 416, 1834; as this was cited with approval in *Anderson,* 1843, it clearly depends on the *form* being unconditional. So *Howie,* 11 Cox C. C. 320, 1869, which certainly turned on the indictment, which the judge quashed, ordering another to be preferred.

A seaman's advance note, promising to pay, 'provided' the seaman 'shall sail in the said ship, &c.' cannot be described as a promissory note or order for the payment of money, as it is a *conditional* agreement.

Undertakings (by sureties, &c.), &c.] An undertaking to pay a sum which is uncertain and dependent on a contingency and only by way of *indemnity,* is within 1 W. 4, 66, 3, rpd. Thus where it was to pay W. B. 100*l.*, 'or such other sum . . . not exceeding the same, as he may incur . . . by reason . . . of his becoming one of the sureties to' the sheriff of Y. for his officer (the forger), all the judges held a conviction right. *Reed,* 8 C. & P. 623; 2 Moo. 62, 1838. So under a rpd. s. *Joyce,* L. & C. 576, 1865.

A document in the following form:—

'November, 21, 1870,
I. O. U. thirty-five pounds.
35*l.* Arthur Chambers,
George Wickham,'

where Wickham's name was forged, was held to be an 'undertaking for the payment of money' within the same s. *Chambers,* L. R. 1 C. C. R. 341; 12 Cox C. C. 109; 41 L. J. M. C. 15, 1871.

Indorsements] Forging an *indorsement* on an order for the payment of money is not within 1 W. 4, 66, above. *Arscott,* 6 C. & P. 408, 1838. But cf. *Autey,* where it was said, by Maule, at the bar, that *Arscott* was so decided because the indictment disclosed no offence known to the law.

Forging an indorsement on a cheque in order to get the cheque cashed by the credit of the name, is an offence within a rpd. s., even if the cheque is valid without it. *Wardell,* 3 F. & F. 82, 1862.

Order for payment] A paper in the following form, 'Mr. Johnson, Sir, please to pay to James Jackson the sum of 13*l.* by order of Christopher Sadler, Thornton-le-Moor, Brewer—the District Bank. I shall see you on Monday. Yours obliged, Chrs. Sadler,' was held by eleven judges to be an order for the payment of money; Sadler being a customer of the District Bank, whose draft, if genuine,

would have been paid; it was doubtful at the trial whether, at the time of the forgery, he had any effects in the bank. *Carter,* 1 Cox C. C. 170; 1 C. & K. 741, 1844 (in 1 Den. C. C. R. 65, there are some inaccuracies).

State of account] See also *Vivian,* 1 C. & K.719; 1 Den. C. C. R. 35, 1844, where it was held by eight judges that the words 'any instrument for payment under which, if genuine, the payer may recover the amount against the party signing it, may properly be considered a warrant for the payment of money, and it is equally this, whatever be the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed or not.'

Guaranty] *i.e.* a promise to pay, by a *third* person, is within 1 W. 4, 66, 3, rpd. Therefore, where the supposed maker of a forged instrument undertook, in consideration of goods to be sold to R. P., to guarantee to the vendor due payment; this was held to be the forgery of a conditional undertaking for the payment of money. *Stone,* 1 Den. C. C. R. 181; 2 C. & K. 364, 1846; and see *Joyce,* 1865.

Warrants] 'Warrants' and 'orders for payment of money,' 'instruments, which in the commercial world have peculiar denominations,' may be so called if they be, in fact, orders or warrants. Thus a bill of exchange may be described as an order, &c., for every bill of exchange is, in law, an order for the payment of money, but not *vice versâ;* cheques are now bills of exchange. *Lockett,* Lea. 94, 1772. This was an early case of forging a draft by a fictitious customer on a real bank; on it, East says, if the instrument 'purport to be an order which the party has a right to make, although in truth he had no such right, and although no such person existed in fact as the order purports to be made by, it falls within . . . the Act.' This appears to have been always the law. See P. C. 940-4. So a bill of exchange or 'a post bill' or 'draft' may be 'a warrant for the payment of money.' *Willoughby,* 1783, *ib.* 581.

A forged paper purporting to be an authority signed by three officers of a friendly society to receive the money of the club in a bank, was held to be well described in some counts as a *warrant* for the payment of money, nor did the defence that defendants were members of the society and so joint owners avail. *Harris,* 2 Moo. C. C. 267; 1 C. & K. 179, 1842. A post-dated cheque is an order for the payment of money within 1 W. 4, 66, rpd. *Taylor,* 1 C. & K. 213, 1843. And a stolen post-office order form filled up is an order to pay, though no letter of advice has been sent. *Vanderstein, &c.,* 10 Cox C. C. 177, 1865: C. C. R. (Ir.). Cf. *Gilchrist,* C. & M. 224; 2 Moo. C. C. 233, 1841; *Howie,* above.

A receipt for repayment of a deposit in a building society, which in fact the society accepted as an order to pay, was held to be 'a warrant,' 'authority,' or 'request' for payment within a rpd. s. *Kay,* L. R. 1 C. C. R. 257; 39 L. J. M. C. 118; 11 Cox C. C. 529, 1870.

In *Dawson,* 2 Den. C. C. R. 75; 20 L. J. M. C. 102; 5 Cox C. C. 220, 1851, the document was in the following form: 'Mr. Lowe. London. Bought of C. Dawson, English and foreign fruit merchant . . . two bushells of apples, 9*s.* Nov. 9. Sir, I hope you will excuse me sending for such a trifle; but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock,

there will be an action commenced against me, and I am obliged to hunt after every shilling. Yours, &c., F. Dawson.' Lowe was exactly so indebted to one Mrs. *Frances Dawson,* who carried on business in the name of C. Dawson, and the document was forged and uttered to Lowe, as a genuine instrument coming from F. Dawson. The document was held to be both a warrant and an order within 1 W. 4, 66, above. It was admitted that this was a *request* for the delivery of money, now within F. A. 1913, s. 1 (2).

Letter of credit] A forged letter of credit, on receipt of which the addressees having funds of the supposed writer's in their possession, pay them to the bearer, was held by the judges to be 'a warrant' for the payment of money within the A. of 1830. *Raake,* 8 C. & P. 626; 2 Moo. C. C. 66, 1838. A forged paper was in the following form:—"To M. & Co. Pay to my order, two months after date, to Mr. J. S., the sum of 80*l.*, and deduct the same out of my account—80*l.*' It was not signed, but across it was written, 'Accepted, Luke Lade'; and at the back the name and address and description of J. S. M. & Co. were bankers, and Luke Lade one of their customers, but J. S. thus described was not. It was held that this was a warrant for the payment of money; as, if genuine, it would have been a warrant from Luke Lade to the bankers to pay J. S. *Smith,* 1 C. & K. 700; 1 Den. C. C. 79, 1845. See *Advance Notes,* above.

Cheques] Defendant was charged in every count with forging 'a certain warrant *and* order,' &c., *i.e.* a cheque. It was objected that this charged an offence with regard to *two* instruments, but it was held that the instrument was both a warrant and an order; a warrant authorising the banker to pay, and an order on him to do so. *Crowther,* 5 C. & P. 316, 1832; and *Taylor,* 1843.

An indictment describing the forged order as being for the payment of 85*l.* or as 'an acquittance receipt' for that sum is good, though it appears that by the course of business the bankers paid that sum *with interest,* and so a larger sum than the indictment mentioned. *Atkinson,* C. & M. 325, 1841.

Receipts] A scrip receipt, with the blank for the name of the subscriber not filled up, and therefore not purporting to be a receipt of the sum therein mentioned from any person, is not a 'receipt . . . for money' within 2 G. 2, 25, rpd. *Lyon,* East P. C. 933; Lea. 597, 1793.

A turnpike toll-gate ticket, 'denoting the payment of toll,' is a receipt for money. *Fitch,* L. & C. 159, 1862.

The document must be such that, if genuine, it would amount to a receipt. Thus, when the forgery was as follows:—

'Wm. Chinnery, Esq. paid to × *tomson* the som of 8 pounds
feb. 13, 1812,'

and it was uttered with a proper stamp by defendant as a genuine receipt, and taken as such by Mr. Chinnery's housekeeper, Chinnery, in fact, owing Thompson, 7*l.*, the judges by a majority held a conviction wrong, being of opinion that this could not be considered as a receipt within 2 G. 2, 25, above; 'it was an assertion that Chinnery had paid the money, but did not import an acknowledgment thereof' from Thompson: *Harvey,* R. & R. 227, 1812.

The document need not be averred as 'a receipt' if by the evidence it appears to have been one. *Martin,* 7 C. & P. 549, 1836, where it was held by the fifteen judges that the words 'settled—S. Hughes,'

at the foot of a bill, without any averment that they imported a receipt, were sufficient. A servant received from her mistress money to pay the bill of one Sadler. She brought the bill back to her mistress, with the words 'Paid, sadler,' on it. Sadler proved that these words were not written by him or his authority; there was a bare possibility that the money had been paid to his boy. L. Denman C.J. left it to the jury to say whether, in the circumstances, the document was intended by the servant as a receipt for the money, or merely as a memorandum (of her own) of her having paid the bill; guilty, *i.e.* the money was not paid. *Houseman*, 8 C. & P. 180, 1837. So where the charge was forging, &c. 'a receipt,' and the proof was that prisoner had altered 11*l.* to 16*l.* in the following voucher, '6th Jan., 1830, 11*l.* 5*s.* 10*d.* for the high constable, J. H.'; and it was objected, on the authority of *Barton*, 1 Moo. C. C. 141, 1826, under 2 G. 2, 25, rpd., that the indictment was bad for not averring what the words meant, they in themselves being quite ambiguous, Alderson B. held the word 'receipt' sufficient (and pointed out that the lapse of time made no difference to the felonious intent). *Boardman*, 2 Lew. C. C. 181; 2 Moo. & R. 147, 1838.

In *West*, 1 Den. C. C. R. 258, 1847, eight out of twelve judges held that an instrument professing to be a scrip certificate of a railway company was not 'a receipt *and* acquittance' nor a 'receipt' nor an undertaking for the payment of money within 1 W. 4, 66, 3, 10, 26, rpd.: 'It was not a receipt in ordinary parlance, nor made with intent of being such, though it might be used as evidence of a payment of the deposit; but . . . any written paper capable of being so used was not a receipt; as, for instance, a letter written by a landlord to a third person, saying that his tenant had duly paid his rent.' Some thought that 'it was only an undertaking to deliver shares bearing interest, not that the interest should be paid; as an undertaking to deliver a bond for the payment of money with interest would be no undertaking for the payment of money.' See also *Clarke* v. *Newsam*, 1 Exch. R. 131; 16 L. J. Ex. 296, 1847, which the majority followed.

The treasurer of a county, when an order had been made on him for the expenses of a prosecution, used to pay the whole amount to the prosecuting attorney, or his clerk, and to require the signature of every person named in the order to be on the back of it, with the sum to be paid to him. Erle J. held, that such a signature was not a receipt within s. 10, above, but merely an authority to the treasurer to pay. *Cooper*, 2 C. & K. 586, 1847.

But the document need not be signed. In *Inder*, 1848, an unsigned forged paper, 'Received from Mr. Bendon, due to Mr. Warman, 17*s.* —Settelled,' was held to be a forged receipt within (rpd.) 1 W. 4, 66, 10; defendant was Warman's servant and got the money. See *Illidge*, below.

Making a false entry in what purports to be a banker's pass-book with intent to defraud, is a forgery of an accountable receipt (*i.e.* a written acknowledgment of the receipt of money or goods to be accounted for by the receiver: *Wharton*, Law Lex.): *C. Smith*, L. & C. 168; 31 L. J. M. C. 154; 9 Cox C. C. 162, 1862; and *Moody*, L. & C. 173; 31 L. J. M. C. 156; 9 Cox C. C. 166, 1862.

A 'clearance' ticket, issued on the transference of a member from one branch of a benefit society to another, certifying that the

member had paid all dues, is not an 'acquittance' or 'receipt' within a rpd. s. *French,* L. R. 1 C. C. R. 217; 39 L. J. M. C. 58; 11 Cox C. C. 472, 1870; nor is an ordinary railway ticket: *Gooden,* 11 Cox C. C. 672, 1871.

In a forged order for the delivery of goods, 'it does not appear necessary that the particular goods should be specified in the order, provided it be conceived in terms intelligible to the parties themselves to whom such order is addressed.' A forgery was as follows:—'Sir, please to deliver my work to the bearer. Lydia Bell, Fleet Street, London.' Mrs. Bell proved that she had sent several articles of plate to Goldsmith's hall to be marked. The form of the order was usual, but strictly, the several sorts of work, with the weight of the silver, ought to have been mentioned in it. The judges were of opinion that a conviction under rpd. 7 G. 2, 22, was right. *Jones,* East P. C. 941; Lea. 53, 1764; and see *Thomas,* below.

Warrants, &c. for delivery] The law is much the same as that of forging *undertakings, requests, orders,* &c., and the indictment has had much the same history. Defendant was indicted for uttering a forged request, not addressed to any one, for the delivery of goods; he represented himself falsely as the servant of a certain person, and so got the goods: the judges held the conviction right within 1 W. 4, 66, 10, above: *Carney,* 1 Moo. C. C. 351, 1832; *Pulbrook,* 9 C. & P. 37, 1839. No difficulty could arise now in such a case; see also *Rogers,* 9 C. & P. 41, 1839; *Walters,* C. & M. 588, 1842. where by the course of business a signed list became a request for delivery; and *Snelling,* above.

A forged bequest was held to be within s. 10, above, although the person whose name was forged had not any authority over, or interest in the goods, neither did the bequest profess to charge such person, nor to specify goods, the goods being supplied on the credit of defendant. *Thomas,* 7 C. & P. 851; 2 Moo. C. C. 16, 1837.

So a forged paper addressed to a tradesman by a customer: 'Pleas to let bearer, William gof, have spillshoul and grafting tool for me—Edward recketts, &c.' was held to be a forged request for the delivery of goods within s. 10. *James,* 8 C. & P. 292, 1838.

An instrument may be a request, although it be also an undertaking to pay for the goods, *e.g.* 'please send a hat, and I will answer for the money. E. B.' *White,* 9 C. & P. 282, 1840.

An order to taste wine in the London Docks, though invalid for want of one signature, and another on it being forged, has been held to be an order for the delivery of goods within this s. *Illidge,* 1 Den. C. C. R. 404; 18 L. J. M. C. 179; 3 Cox C. C. 552, 1849: cf. *Inder,* above.

Telegrams] Defendant was indicted with obtaining money by means 'of a certain forged instrument, to wit, a forged telegram.' He was a clerk in a post-office, and he sent to a bookmaker a telegram offering a specific bet. The telegram purported to have been handed in *before* the running of the race, and therefore the bookmaker accepted and paid the bet. In reality the telegram was despatched *after* defendant knew that the horse had won. It was held by three judges to two that the telegram was a forged instrument, and the indictment good. *Riley,* 1896, 1 Q. B. 309; 65 L. J. M. C. 74; 18 Cox C. C. 285: C. C. R. Of course, *per* L. Russell C.J., the offence amounted to

forgery at common law as well probably as an obtaining of money by false pretences, and also to a misdemeanour under the Telegraph Acts. Followed in *Howse,* 23 Cox C. C. 135; 76 J. P. 151; 28 T. L. R. 186; 7 Cr. A. R. 104, 1912; a 'cut-out' letter, *i.e.* an addressed envelope duly stamped and post-marked in previous transmission, fraudulently used again is within rpd. s. 38 of F. A. 1861. See *Hutchinson,* 1911, and *Cade,* below. Cf. *Warner,* 1907.

County court process] In *Evans,* D. & B. C. C. 236; 26 L. J. M. C. 92; 7 Cox C. C. 293, 1857, defendant being a creditor of R., sent him a letter, not in any way resembling county court process, but headed with the royal arms, and purporting to be signed by the clerk of the county court, threatening proceedings there. He afterwards told the wife of R. that he had ordered the county court to send the letter, on which she paid the debt. Held that he was rightly convicted under 9-10 V. 95, rpd., with forging county court process. In *Castle,* D. & B. C. C. 363; 7 Cox C. C. 375, 1857, defendant wrote out and sent by post a paper very much resembling a county court notice to a witness to produce books, heading it, '*Castle,* plaintiff. *Charles,* defendant,' probably to defraud Charles. It was held that a conviction under that A. was wrong, inasmuch as the paper did not purport to be a copy of a summons or of any other process. In *Richmond,* 1 Bell C. C. 142; 28 L. J. M. C. 188; 8 Cox C. C. 200, 1859, defendant had obtained a blank printed form for plaintiff's instructions to issue a county court summons, which he filled up with particulars of the names and addresses of himself as plaintiff, and of S. as defendant, and of the nature and amount of the claim. He then, without any authority, signed it with the name of the registrar, and indorsed upon it a notice in his name, that unless the amount claimed was paid by a certain day, an execution warrant would issue against him. This paper he sent to S., with intent to get his (just) debt; it was held that this was a forgery of county court process within that A. (s. 57).

Copies] may be forgeries, *e.g.* when used as secondary evidence and falsified: *Upfold* v. *Leit,* 5 Esp. 100, 1803.

Uttering] See this title, above. It is an offence at common law to utter a forged instrument, the forgery of which is an offence at common law. Defendant was indicted for forging and uttering a testimonial to his character as a schoolmaster, and was found guilty (only) of knowingly uttering the forged document with intent to obtain the place as schoolmaster, and to deceive; conviction affirmed. *Sharman,* D. & P. C. C. 285; 23 L. J. M. C. 51; 6 Cox C. C. 312, 1854.

Statute] S. 6 (1) of the F. A. 1913, puts the utterer of anything forged exactly in the position of the forger; see also 6 (2).

The proof is very similar to that of uttering, &c. counterfeit coin, which see, and *Welch, ib.* 1851.

Where defendant presented a bill for payment with the forged indorsement, 'Received, R. Aikman' (the payee), and on its being objected that the spelling of the name in the bill was 'Aickman,' he altered it into 'Received, for R. Aickman, G. Arscott,' it may be that the presenting the bill *before* the objection was a sufficient uttering. *Arscott,* above; Russ. Cri. 1664.

Evidence] The only evidence of uttering a forged acceptance to a bill was that the bill came enclosed in a letter in defendant's handwriting, and that the day before the bill became due he wrote a letter acknowledging that it was a forgery; it was held not to be necessary to prove either that he posted the letter himself, or commissioned anybody else to do so, but to be a question of fact for the jury. *M'Quin*, 1 Cox C. C. 34, 1843.

'Putting off'] Alderson B., directing an acquittal, said that handing forged instruments to an accomplice or to one knowing the forgery was not 'uttering' within the A. *Heywood*, 2 C. & K. 352, 1847, under 1 W. 4, 66, 20, rpd., where a forged marriage certificate was given by the pretended husband to the pretended wife, to deceive a third person. She was clearly guilty of uttering, but as he was not present he was only an accessory before the fact: Russ. Cri. 1664 *f*. But a different decision had been come to on the words, 'offer or dispose of or put away' [= put off], in rpd. 15 G. 2, 13, 11. Palmer had been in the habit of putting off forged bank of England notes, and had employed the other defendant, Hudson, as an accomplice therein. The latter having offered one in payment, it was suspected and sent to the bank; the same evening Palmer went with her to the person who had stopped it, and said, 'This woman has been here to-day, and offered a two-pound note, which you have stopped, and I must either have the note or the change.' The jury (having acquitted Hudson on a direction that on that indictment they could not find *both* guilty) found Palmer guilty on two counts, (1) for uttering and publishing the note as true to *Hudson* (under another statute); (2) for *disposing of and putting away* the note.

Innocent agent] On the first, 'it seemed to be the general opinion' of the judges that had Hudson been an innocent agent, the evidence would have supported the conviction; but as she was not, there was no need to discuss the point, in view of their decision on the second, by 'a considerable majority,' that the conviction was right. He could not have recovered the note back from Hudson by an action at law; it was out of his legal power, and when it was actually uttered by her, she had effected the purpose for which he had given it her, and it was *disposed of*, and *put away* by him through her means. 'As delivering an instrument to another is a step towards uttering it, it seems most consonant to the intention of the legislature to hold that a delivery to another for a fraudulent purpose is an offence within the words *disposed of* or *put away*.' (In other words, constructive possession was here enough. The minority thought that he was an accessory before the fact.) *Palmer and Hudson*, Lea. 978; 1 Bos. & P. N. R. 96; R. & R. 72, 1804.

This was followed in *Giles*, 1 Moo. C. C. 166, 1827, where the jury found defendant had given the note to one Burr, who being ignorant of its being forged, paid it away. The judges, disagreeing with the jury, thought that Burr knew it was forged; but were of opinion that the conviction was right. Had defendant been charged with *uttering* instead of *disposing* of the note, it seems that (according to the judges), Burr being cognisant of the forgery, he could not have been convicted, as his offence would have been that of accessory before the fact.

Uttering to get credit] The mere showing of a false instrument,

the uttering of which, with intent thereby to gain credit, would be criminal, was not an uttering within 13 G. 3, 79, 2, rpd. Defendant was indicted for uttering and publishing a promissory note. In order to persuade an innkeeper that he was a man of substance, he one day pulled out a pocket-book, and showed him the note in question, and others, all got up to imitate bank of England notes, especially at a little distance, the printing being to a great extent identical. He said he did not like to carry so much property about him, and begged the innkeeper to take charge of them, which he did in a sealed cover. This being opened some time afterwards the notes were found to be forged, as stated. The judges held that this did not amount to an uttering. In order to make it such, 'they seemed to be of opinion that it should be parted with, or tendered, or offered, or used in some way to get money or credit'; *i.e.* 'by means of it,' as explained in *Ion,* below. *Shukard,* R. & R. 200, 1811; Russ. Cri. 1665, 1667: notes by Mr. Greaves.

But if A. exhibit a forged receipt, within 1 W. 4, 66, 10, rpd., to B., the person whom he fraudulently pretends to have signed it, this is an uttering, although A. refused to part with it out of his hand. *Radford,* 1 C. & K. 707; 1 Den. C. C. 59; 1 Cox C. C. 168, 1844: eleven judges: Pollock C.B. said, 'In all these cases reference must be had to the subject. A purse is of no use except it be given. Not so a receipt, or turnpike ticket. A promissory note must be tendered to be taken. Not so a receipt, as the person who has it is to keep it.' In *Ion,* 2 Den. C. C. R. 475; 21 L. J. M. C. 166; 6 Cox C. C. 1, 1852, distinguishing *Shukard,* above, defendant placed a forged receipt for poor-rates in the hands of the prosecutor for inspection only, in order that by representing himself as one who had paid the rates he might—fraudulently, as the jury expressly found—induce him to advance money to G., for whom Ion was to be a surety. This was held, by eight judges, after much argument, to be an uttering, under that s. The true rule is stated in *Ion.* 'A false document is deemed to be uttered when it is parted with or tendered or offered or used in some way to get money or credit upon it or by means of it.'

In *Fitchie,* D. & B. C. C. 175; 26 L. J. M. C. 90; 7 Cox C. C. 257, 1857, a pawnbroker was indicted, under s. 10, above, for uttering a forged 'accountable receipt for goods.' Defendant being called on to produce a pawn-ticket (the subject of proceedings before magistrates), his attorney, in his presence, handed up a forged ticket as the genuine one. The jury found that this was done with defendant's knowledge, and it was held that this was an uttering by him, and of an 'accountable receipt.'

Conditional] 'A conditional uttering of a forged instrument is as much a crime as any other uttering.' Where a person gave a forged acceptance, knowing it to be so, to the manager of a bank with which he kept an (overdrawn) account, saying that he hoped the bill would satisfy the bank as a security for the debt he owed, and the manager replied that that would depend on the result of inquiries respecting the acceptors, *i.e.* the bill was to be placed to his credit or not according to circumstances, Patteson J. held it to be a sufficient uttering. *Cooke,* 1838.

Where an engraving of a forged note was given as a pattern or specimen of skill, but with no intention that that particular note should be put in circulation, Littledale J. held that this was not an uttering. *Harris, &c.,* 7 C. & P. 428, 1836.

Where defendant uttered a forged certificate of ordination, with a forged signature of the registrar, Kennedy J. held that this was not within s. 28 of the F. A. 1861, as the register of ordinations (it was proved) had nothing to do with the 'records' of the consistory or any court, being kept for the registrar's personal convenience, and not under any statutory (or even ecclesiastical) authority (but that it was a common law forgery). *Etheridge,* 19 Cox C. C. 676; 65 J. P. 761, 1901.

Demanding property] In *Hutchinson,* 7 Cr. A. R. 19, 1911, defendant was acquitted of the actual forgery, but convicted under rpd. s. 38 of the F. A. 1861, of participating in the proceeds. It was stated by prosecuting counsel that the view generally taken by criminal practitioners was that there should not be a conviction if defendant, 'not having been in any way concerned in the forgery or uttering, received or even demanded, after he had obtained information that the instrument was in fact forged, a part of the money obtained' thereby. 'It has always been considered that the s. deals with a direct payment made in consequence of the forgery.' These observations would apply to s. 7 of the F. A. 1913. The C. C. A. seemed to agree that *Hutchinson* was an accessory before the fact. See *Howse,* above.

'*Instrument*'] in s. 7 (1913) means the same as in rpd. s. 38 (1861). *W. Cade,* 1914, 2 K. B. 209; 83 L. J. K. B. 796; 78 J. P. 240; 24 Cox C. C. 131; 30 T. L. R. 289; 10 Cr. A. R. 23: forgery of a letter from employee to employer requesting money for the latter's business; the C. C. A. 'must interpret 'instrument' as covering a writing which is not confined to documents of title to lands': *Riley,* 1896, followed.

Intent to defraud] In (*Tylney and*) *Tuff(t)s,* 1 Den. C. C. 321; 3 Cox C. C. 160, 1848, the judges were evenly divided whether defendant could be convicted of forging a will without proof that the forgery (which was proved) was capable of effecting a fraud on *some* one—he having been found guilty (only) on a count 'with intent to defraud a certain person unknown'; he was recommended for a pardon, but this doubt is settled by *Hodgson,* 1856.

But there are *statutory* forgeries where no intent is necessary: *ib.,* and *Ogden,* 6 C. & P. 631, 1834, under 13 G. 3, 52, and 38 G. 3, 69; *Spittle,* 18 T. L. R. 436, 1902, under 7-8 V. 22, 2: hallmarks on plate. And it was said that 'the common law definition of forgery,' *i.e.* an allegation of an intent to defraud 'must be imported into s. 28' of the F. A. 1861, rpd. in respect of forgery—(where no such intent is mentioned)—so far as the word 'forge' is concerned only (and not for other offences in that s.): *per* Quain J., *Powner,* 12 Cox C. C. 235, 1872.

Authority] If A. put the name of B. on a bill, as acceptor, without B.'s authority, expecting to be able to meet it when due, or expecting that B. will overlook it, this is a forgery; but if A. either had authority from B., or, from the course of their dealing, *bonâ fide* believed that he had authority from B., to use his name, it is not forgery. *Forbes,* 1835; *Parish,* 8 C. & P. 94, 1837. And the fact that the person in whose name the bills were accepted had paid or recognised such bills before, would afford fair ground for the belief of such authority exist-

ing. *Beard,* 8 C. & P. 143, 1837. Defendant, a solicitor, being asked for a loan of money by T., got E. to advance the money, on proper security. Defendant handed him a bond, purporting to be signed by T. and D., the brother-in-law of T., whose execution was professed to be witnessed by defendant; and the money was paid to T. Both the signatures were forged by defendant, in his own handwriting. Great intimacy was admitted to have existed between all the parties, and T. and D., though they denied that he had any authority to sign in their names, admitted that, if they had been asked for that purpose, they would themselves have executed it. Channell B. said that (only) if the jury thought he intended to defraud E. when he delivered to him the bond, they should convict, which they did. *Trenfield,* 1 F. & F. 43, 1858. For authority to sign, see Index, and cf. *Wilcox,* 1803.

Extent of authority] So where a clerk received a blank cheque signed with directions to fill in a certain amount, and he filled in a larger amount and appropriated that sum, it was held to be forgery, although he claimed—and, perhaps, justly—the larger amount as due to him for salary. *Wilson,* 1 Den. C. C. 284; 17 L. J. M. C. 82; 2 Cox C. C. 360, 426, 1847.

Conduct] The intent to defraud may be presumed from the general conduct of the defendant; and if the necessary consequence of his acts be to defraud some particular person, the jury may convict, notwithstanding that that person states his belief, on oath, that he did not intend to defraud him. *Sheppard,* R. & R. 169, 1810—parties to a bill all fictitious, but defendant intending to take it up; *Hill,* 8 C. & P. 274; 2 Moo. 30, 1838: the fifteen judges. Despite the F. A. 1861, s. 44, the general intent to defraud, which it is necessary to prove, cannot exist unless the circumstances are such that the natural consequence of defendant's act would be to defraud some one or other. See *Hodgson,* above, under 14-15 V. 100, 8, rpd., which is in similar terms to s. 44.

Nash, 1852, on the other hand, shows that if defendant had an intent by forgery to defraud a *particular* person, it is immaterial whether there was in fact any person capable of being so defrauded. Maule J. put the case of forging a cheque on a bank at which the forger *wrongly* supposed some one to keep an account; in such a case there would be an intent to defraud, although no person could be defrauded. See, too, *Holden and five others,* R. & R. 154; Lea. 1019; 2 Taunt. 334, 1809, where detectives asked the forgers to supply them with the forged notes, in order to entrap them. The conviction was upheld—'the intent is the essence of the crime which exists in the mind, although from circumstances which he is not apprised of, the prosecutor cannot be defrauded by the act of the prisoner.'

See *Snelling* and *Hopley,* 1915, above; *R. Mason,* 1914. For *lost* or *not produced* documents, see on *Hall,* 1872, and *Nisbett,* 1853.

Evidence of uttering] There is no case in which evidence of similar acts is more used than in this (or counterfeit coining), by far the most difficult point sometimes being to ascertain whether defendant acted innocently or with a guilty knowledge. The following cases have been decided.

Defendant was charged with uttering a bank of England note, knowing it to be forged; evidence was offered that he had uttered another note forged in the same manner, by the same hand, and with the

same materials, three months previously, and that two ten pound notes and thirteen one pound notes of the same fabrication, had been found on the files of the bank, on the back of which there was his handwriting, but it did not appear when the company received them. This evidence was admitted, and the majority of the judges were of opinion that it was admissible, subject to observations on the weight of it, which would be more or less considerable, according to the number of the other notes, the distance of the time at which they had been put off, and the situation in life of defendant, so as to make it more or less probable that so many notes should pass through his hands in the course of business. *Ball*, R. & R. 132; 1 Campb. 324, 1807. Defendants were indicted for uttering, in March, bank-notes, knowing them to be forged. To prove their guilty knowledge, evidence was allowed that in February they had uttered, on three occasions, forged bank-notes to three different persons, and that on being asked at each place for their names and places of abode, they gave false names and addresses. L. Ellenborough said, that it was competent for the court to receive evidence of other transactions, though they amounted to distinct offences, and of the demeanour of defendant on other occasions, from which it might be fairly inferred that he was conscious of his guilt whilst he was doing the act charged. On demeanour, he cited *Tattershall*, 1801, to show that the jury might, from a defendant's conduct on one occasion, infer his knowledge on another. Heath J. said, 'The charge in this case puts in proof the *knowledge* of the person, and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances.'

It is not necessary that the other forged notes of which knowledge is proved should be of the same description and denomination as that charged. The point was doubted in *Millard*, R. & R. 245, 1813; but in a series of cases, *Harris, Balls, Warshauer*, or *Moses*, 7 C. & P. 416-31; 1 Moo. C. C. 466-73, 1836, defendants were indicted for forging and uttering a note in the *Polish* language. In support of the *scienter* prosecutor gave evidence of the particulars of a meeting at which one of them agreed with prosecutor, an agent of the Austrian government, to make him 1,000 Austrian notes for fifty florins. This evidence was objected to on that defendant's part, as it was a transaction not relative to *Polish* notes, besides which no Austrian notes were in fact made. Littledale J. however, admitted the evidence, and the judges held the evidence admissible. And *Forster*, 1855, supports the same view; for the same principle would apply equally to indictments for uttering forged instruments and counterfeit coin.

Whether evidence is admissible of uttering other forged instruments *subsequently* to that of the charge seems to some extent doubtful. In one case prosecutors offered to prove the uttering of another forged note five weeks *after* the uttering indicted; but three judges held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shown that the notes were of the *same manufacture*. *Taverner*, Carr. Sup. 195, 1st ed. (1809), in *Smith*, 4 C. & P. 411, 1831. Where in an indictment for knowingly uttering a bill with a forged acceptance, it being proposed, for the purpose of proving the guilty knowledge, to give in evidence other forged bills of exchange *precisely similar*, with the same drawers' and acceptors' names, uttered by defendant about a month after the uttering of the bill indicted, Gaselee J. was disposed to allow the evidence to be received (but it was not offered).

Ib. Cf. *Foster,* above. Defendant was the stamp distributor of the Q. B. D. in Ireland. In the process of stamping, a second sheet placed inadvertently beneath the sheet to be stamped received an impression. These second sheets are called 'blinds.' These he obtained and sold. The defence was that he obtained them innocently, though the person selling them to him might have been fraudulent. To meet this defence evidence was admitted of several documents with similar 'blind' stamps, identified by his mark, and it was held in Ireland (C. C. R.) that they were rightly admitted as evidence of guilty knowledge. *Colclough,* 15 Cox C. C. 92, 1882.

Limits] The limits both of time and circumstances beyond which evidence of uttering other forged instruments would not be permitted, are for the judge to determine; they will probably be wider in forgery and coining than in some other cases, receiving stolen goods, for instance. *Green,* 3 C. & K. 209, 1852; *Salt,* 3 F. & F. 834, 1862, where Williams J. said, 'The judge reposes confidence in counsel that they will not give in evidence what has no tendency to prove guilty knowledge but only to prejudice the prisoner.' See this subject discussed under *Similar Acts.*

The *possession* also of other forged notes is evidence of guilty knowledge. Defendant was indicted for uttering a bill of exchange on Esdaile and Co., knowing it to be forged. It was proved that, when he was apprehended, there were found in his pocket-book three other forged bills, drawn on the same persons. The judges were all of opinion, that these forged bills found on him at his apprehension were evidence of his guilty knowledge. *Hough,* R. & R. 120, 1806. In order, however, to render such evidence admissible, it must, it seems, be first satisfactorily proved that the other notes were forged, and they ought to be produced. *Millard; Cooke,* 8 C. & P. 586, 1838; and see *Forbes,* 7 C. & P. 224, 1835. See, too, *Brown,* 2 F. & F. 559, 1861. 'It would seem that presumptive evidence of forgery, as that the prisoner destroyed the note, ought to be received.' 1 Phill. Ev. 511 *n.*, on *Phillips,* 1829, where note *not* charged was destroyed.

On an indictment for forging and uttering a forged bill, a letter written by defendant, after he was in custody, to a third person saying that such person's name is on *another* bill, and desiring him not to say that the latter is a forgery, is receivable in evidence (as in *Downes,* 1789) to show guilty knowledge, but the jury ought not to consider it as evidence that the other bill is forged, unless such bill is produced, and the forgery of it strictly proved. *Forbes,* 1835. So it was held that evidence of what defendant said respecting other bills of exchange, which are not produced, is not admissible. *Cooke,* 1838. *Cooke* was doubted by Crompton J. in *Brown,* 1861, where it was proposed to put in evidence statements made by defendant with reference to other notes supposed to be forged. There seems to be some doubt what is the mode of proving such other instruments to be forgeries, as the jury cannot be asked to find whether they are or not. See *Moore,* 1 F. & F. 73, 1858.

Falsity of the instrument] If the forgery is of the name of an existing person, it is necessary to disprove the handwriting, and circumstances must be shown from which it may be inferred that defendant, in assuming to use the name, acted fraudulently. But if there be more than one person who might be meant, it is necessary to show,

either directly or by inference, that he did not use the name of any one of these honestly.

Existing person] Thus, where the bill had been sent to one W. Pearce, the payee and indorser, by his intimate friend, D., the drawer; but it never came to his hands, and it was proved to have been uttered by defendant with the indorsement, 'William Pearce,' on it; D. was not called, and the letter of advice from him to P. was held insufficient, and the testimony of Pearce was rejected; for although it might not be *his* handwriting, yet it might be the handwriting of a *William Pearce,* and as he had not been proved to be the intended payee, it might be the handwriting of the William Pearce to whom the bill was made payable: acquitted accordingly. *Sponsonby,* Lea. 332; East P. C. 996, 1784. This decision is doubted by East on the ground of the intimacy and that no evidence of the existence of any other W. Pearce was given, and it may be considered as much shaken by the following case.

Handwriting] Defendant was convicted of forging a promissory note, purporting to be made by one William Holland payable to defendant to order. He had offered it in payment to the prosecutor, who at first refused to take it, upon which defendant said he need not be afraid, for it was drawn by William Holland, who kept the *Bull's Head* at Tipton. He was called, proved that it was not his handwriting, and also that there was no other publican of his name at Tipton, but that there was another *William Holland* living there who, for distinction, was called *Gentleman Holland.* The latter was not called, and it was contended that there was not sufficient evidence of the note having been forged. The judges held, that as defendant had stated that William Holland, of the *Bull's Head,* was the maker (and from being payee of the note he must have known the particulars), it was sufficient for the prosecutor to show that he was not, and that it lay upon defendant to prove that it was the genuine note of another William Holland. *Hampton,* 1 Moo. C. C. 255, 1830.

But who the person is whose name is forged may also be established by the admission of defendant himself. Defendant was charged with forging, &c. a bill of exchange in the name of Andrew Helme, and also with forging an indorsement in the name of John Sowerby, on a bill purporting to be drawn by the same A. Helme. Some letters written by defendant, after his apprehension, to A. Helme, who was his uncle, were produced (as in *Forbes,* above), from which it clearly appeared that the names of the drawer and of Sowerby were forged, and that the latter was the son of a person at Liverpool. A witness proved that defendant offered him the bill with the indorsement upon it, informing him that A. Helme was a gentleman of credit at Liverpool, and the indorser a cheesemonger there who had received the bill in payment for cheeses. Sowerby, the father, was then called, who swore that the indorsement was not his handwriting; that he knew of no other person of the same name at Liverpool, except his son who had been a cheesemonger there, but had now gone to Jamaica, and that he did not believe that the indorsement was in his son's handwriting—which was corroborated by another witness; defendant had known his son. It was objected that Helme, the drawer, was not called to prove which Sowerby the payee was; but the judges held the conviction right. They said, the objection supposed that there was a genuine drawer, who ought to have been called, but to this there were

two answers, 1st, that the drawer's name was forged, which defendant himself had in his own writing acknowledged—'if no real drawer existed, and the objection allowed, it would be to excuse one forgery because another had been committed'; and 2nd, that defendant himself had 'ascertained' who was intended by the John Sowerby, whose indorsement was forged, for he represented him as a cheesemonger at Liverpool (and that he meant Sowerby the son also appeared from one of his letters); moreover, the indorsement was proved not to be in Sowerby's, the son's, handwriting, 'and so evidence of the forgery was complete.' *Downes*, East P. C. 997, 1789.

Fictitious person] If the false assertion on which the charge of forgery is founded be the use of a *fictitious* name, the evidence that will be necessary will depend much on the particularity with which the fictitious person is described. In order to prove that the name 'Samuel Knight, Market-place, Birmingham,' was fictitious, the prosecutor was called, and stated that he went twice to Birmingham and to Nottingham to make inquiries about the acceptor and drawer respectively, and inquired at a bank and at a place where the overseers usually met, without success. The prosecutor was a stranger in both of these towns. It was objected that this evidence was not sufficient, but the judges were of opinion, that there was evidence to go to the jury, though neither the best nor the most usual to prove non-existence, no one from those towns being called; on the other hand, defendant called nobody to prove the existence of the acceptor—which the judge commented on—though he did call two witnesses who knew the drawer and his handwriting: not guilty. *King*, 5 C. & P. 123, 1832. On an indictment for uttering a forged cheque purporting to be drawn by G. Andrewes, it was held sufficient *primâ facie* evidence of the drawer's name being fictitious to call a clerk of the bankers, who stated that no person of that name kept an account with their house. *Backler*, 5 C. & P. 118, 1831; *Brannan*, 6 C. & P. 326, 1834.

Expert evidence] See *Williams*, 1838.

Order not addressed to anyone] See *Snelling*, above.

Indictment] A form for *Forgery* and one for *Uttering* will be found in the Appendix to the Ind. A. 1915, No. 18.

When the nature of the forged instrument—a bill for coals with certain particulars—was not stated, though it was set out in the indictment, judgment was arrested. *Wilcox*, R. & R. 50, 1803: common law forgery. In *Wilcox*, too, the indictment was bad as it did not state what authority the person signing it had to sign it.

The following cases are now only of historic interest. Where a receipt was signed 'C. Ollier,' and the indictment stated it as 'purporting' to be signed by *Christopher* Ollier, the court were inclined to think there was no 'absolute repugnance upon the face of the indictment,' and they reserved the case for the judges, but no opinion was ever given on this point, as there was a conviction on a similar indictment stating the 'tenor' only, 'without any purporting.' *Reeves*, Lea. 808; East P. C. 984 *n.*, 1798; cf. the note to *Williams*, 1850, below, on 'tenor' and 'description.' An indictment charged the forgery of 'Bartw. Browne'; the forgery was in fact 'Bartholomew Browne'; the variance was held fatal even after verdict, and defendant was discharged. *Taylor*, Annual Register, 1800, March 30.

A fictitious signature should be described as *purporting* to be that of the real person. Thus, where the instrument was described as 'a certain bill of exchange . . . signed by *Henry Hutchinson* . . . which bill is as follows,' &c., and the signature to the bill, 'Henry Hutchinson,' was a forgery, it was objected that that averment, which was a substantial allegation, was disproved, and so the judges held, after conviction. *Carter*, East P. C. 985, 1800.

A bank post bill could not be described as a *bill of exchange*, but was sufficiently described as a *bank* bill of exchange. *Birkett*, R. & R. 251, 1813.

Where an indictment charged that defendant 'did forge a certain promissory note for the payment of 50*l*.,' without stating it to be of that or any value; Patteson J. said that the court must take judicial notice of what a promissory note is, and held the description sufficient. *James*, 7 C. & P. 553, 1836. It was held that an instrument payable to the order of A., and directed 'Messrs. P. & Co., bankers,' but without drawee or acceptor (called in other counts a promissory note, an order for payment of money and a warrant for payment), may be described as a bill of exchange; *Smith*, 2 Moo. C. C. 295, 1843; cf. *Hawkes*, *ib.* 60, 1838; that 'a deed purporting to be a lease of certain premises,' is a sufficient description without setting it out verbatim; *Davies*, 2 Moo. C. C. 177, 1840; as is 'a request for the delivery of goods'; *Robson*, 2 Moo. C. C. 182, 1840; that the instrument may be described as a deed, without setting it out or averring that it is one which may be the subject of larceny; *Collins*, 1843—the three last cases being under 2-3 W. 4, 123, 3, rpd., by which a description good in larceny was good in forgery; that a count charging that defendant 'did forge a writing as a certificate of W. N. with intent, &c.,' was good at common law. *Toshack*, 1 Den. C. C. 492, 1849.

If an instrument is set out in full and described by several designations in the indictment, the description of its legal character would appear to be surplusage. *Williams*, 1850; see the reporter's (Den.) note. But if there is only one designation, and that is wrong (*e.g.* promissory note for bill of exchange) though the instrument is set out, the indictment is bad; *Hunter*, R. & R. 511, 1823; but, perhaps, this is not reconcilable with *Williams*. It will be no variance, if the instrument described as a 'forged' instrument, was originally a genuine one, but has been fraudulently *altered* by defendant; for every alteration of a true instrument for a fraudulent purpose makes it, when altered, a forgery of the whole instrument. *Teague; Dawson*, 1 Stra. 19; East P. C. 978, 1717. In practice, however, forgeries of this kind are stated, in one count, at least, as alterations; see *e.g.*, East P. C. 986.

Gilling leaves it doubtful whether an indictment for forgery of a cheque is proved by the forgery of an endorsement.

Foreign language] See under *Documentary Evidence.*

Principals and accessories] In some forgeries, *e.g.* of bank-notes, there are a series of distinct acts at intervals of time, each of which may be a complete act in itself. Hence the doctrine that presence is necessary to constitute a *principal* applies to each part of the whole, very much as in *Coining;* see *Completion of Crimes* in the Index. Thus where one man impressed the water-marks, the date, line, and number, on forged bank-notes, another the signature, another printed

them, &c., &c., not always in the presence of each other, the judges were of opinion that a conviction was right; that each of the offenders acted in pursuance of the common plan, completed some part, and was a principal. *Bingley and others*, R. & R. 446, 1821. Nor does it make any difference that some were ignorant of the exact part the others were to perform; it is sufficient if they know that the forgery is to be completed by somebody. *Kirkwood* and *Dade*, 1 Moo. C. C. 304, 307, 1831. Most of the intermediate acts in the series are now statutory offences in themselves.

But where three persons were jointly indicted under 1 W. 4, 66, 19, rpd., for feloniously using plates containing impressions of foreign notes, it was held that the jury must select some one particular time after all three had become connected, and must be satisfied, in order to convict them, that at such time they were all either present together at one act of using, or assisted in such one act, as by two using and one watching at the door to prevent the others being disturbed, or the like, 'if one were to find the plate, and one the paper, and one to do the work, I should say it was a joint using'; and that it was not sufficient to show that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them. *Harris, &c.*, 1836; verdict, Not guilty, but acting in concert.

Where three persons were indicted under that s. for feloniously engraving and making two parts of a Russian promissory note, the plates were engraved by an Englishman, who was an innocent agent; two of defendants only were present at the time when the order was given for the engraving of the plates; but they said they were employed to get it done by a third person, and there was some evidence to connect the third defendant with the other two subsequently; it was held that, in order to find all three guilty, the jury must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and all three concurred in the employment of the engraver. *Mazeau, &c.*, 9 C. & P. 676, 1840; the third man was acquitted.

Uttering forged instruments, however, is not a series of acts. See *Soares*. It was held on a charge of uttering forged orders for the payment of money, and obtaining goods from a shop by means of such orders, that the two defendants who remained in a cab outside the shop in which the third uttered the orders, and assisted him in taking away the goods, were properly convicted with him of the uttering, though they were not there to assist in the actual uttering, and could not in fact be seen from the shop. *Vanderstein*. Where a wife, with her husband's knowledge, and by his procurement, but in his absence, uttered a forged order and certificate for prize-money, it was held that the presumption of coercion on the part of the husband did not arise; that she was properly convicted of the uttering as principal, and her husband of procuring, as accessory before the fact. *Sarah and John Morris*, R. & R. 270; Lea. 1096, 1814. So an assent afterwards does not render the party guilty as a principal. 1 Hale P. C. 684; East P. C. 973. 'In forgery it is laid down generally in the books that all are principals; and that whatever would make a man accessary before in felony will make him a principal in forgery. But this must, I think, be understood of forgery at common law, and where it is considered only as a misdemeanour.' East, *ib.*

Venue] S. 14 of the F. A. 1913, above. Defendant was indicted in London for uttering forged medicine stamps. Having an order to supply medicines at Bath, he delivered them in Oxford Street, Middlesex, to a porter, to carry them to the City, to go by the Bath waggon, as they did. It was objected that this was not an *uttering* by him in London; there was a difference of opinion on the subject; the majority (six to five) held the uttering and vending complete in Middlesex. *Collicott*, R. & R. 212; Lea. 1048; 4 Taunt. 300, 1812.

In *Smythies*, 1849, though defendant was not shown to have been in custody till he surrendered just before the trial, and the jury found that there was no evidence of the forgery having been committed within the jurisdiction of the court, the judges held he was triable there.

On an indictment for forging and uttering a cheque, the cheque had been dated abroad and drawn by defendant abroad, and he had caused it to be presented to a banker abroad, through whom it was presented in this country without a stamp; held, that he might be convicted of uttering in this country if he set other persons abroad in motion (see Index, *Innocent Agent*), by whom the cheque was presented here. *Taylor*, 4 F. & F. 511, 1865. See *Parkes*, 1796.

FORTUNE-TELLING.

By 9 G. 2, 5, 4: 'If any person shall . . . pretend to exercise or use any kind of witchcraft, sorcery, inchantment or conjuration or undertake to tell fortunes or pretend from his or her skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattles supposed to have been stolen or lost, may be found . . .' he may be imprisoned for a year (or longer, if he fail to find the sureties which may be ordered in addition). Triable at Q. S. This s. is seldom used.

FRAUD AT COMMON LAW.

For *Fraud,* see *Agents, &c., Cheating,* and *Credit.* In *Ingham,* 1859, a distinction was drawn between 'deceive' and 'defraud.' Though every fraud is not indictable, every conspiracy to defraud is: see *Conspiracy.*

FRAUDULENT CONCEALMENT OF CONVEYANCE, &c.

See *Concealment of Deeds, &c.*

FRAUDULENT CONVERSION.

See *Conversion* under *Agents, &c.*

FRAUDULENT DEBTOR.

See s. 13 of Debtors A. under *Credit, &c.* For 'any other fraud' [than false pretences], see *Carpenter,* 1911.

FREEHOLD, LARCENY OF THINGS SEVERED FROM.

See *Fixtures.* 'Drift and ungathered seaweed cast on the shore,' belonging to an exclusive owner, between high and low water mark is not the subject of larceny: *Clinton,* Ir. R. 4 C. L. 6, 1869: C. C. R.

FRIENDLY SOCIETY'S FUNDS, MISAPPROPRIATION OF.

See under *Embezzlement.*

(Civil) proceedings under s. 35 of the S. J. A. 1879, do not exclude indictment: *Stafford JJ., x. p. Foster,* 1894, 97 L. T. Jo. 123 [or 29 L. J. Newspaper, 325], where a treasurer disobeyed the (civil) order; Cave and Wright JJ. ordered *mandamus* to Q. S. to try bill there found.

FURIOUS DRIVING.

By 24-5 V. 100, 35, replacing 1 G. 4, 4, rpd. except in Scotland, 'Whosoever having the charge of any carriage or vehicle, shall by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanour': maximum punishment, imprisonment for two years with hard labour.

Under 5-6 W. 4, 50, 78, it was held that a person riding a bicycle on a highway, may be summarily convicted of furiously driving a 'carriage.' *Taylor* v. *Goodwin,* 4 Q. B. D. 228; 48 L. J. M. C. 104, 1879. And by 51-2 V. 41, 85, 'bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages within the meaning of the Highway Acts.'

Wanton or furious driving] No definition is required: 'there is no reason why a chauffeur who is driving at less than the statutory maximum speed of twenty miles an hour a car which complies with the statutory regulations about lights should not be found guilty of wanton driving': it is for the jury: *Crowden,* 6 Cr. A. R. 190, 1911. In *Chatterton* v. *Parker,* 24 Cox C. C. 312, 1914: K. B. D., a conviction was sustained, though the driver was asleep: 'a horse may be driven furiously if the driver neglects to restrain it and keep it under proper control': *per* Darling J.

Triable at Q. S.

Evidence] In *Elwes* v. *Hopkins,* 21 Cox C. C. 133, 1906: K. B. D., it was held that evidence of the traffic reasonably to be expected on the highway was admissible.

GAME—OFFENCES CONCERNING.

All offences with regard to game, which are indictable, are statutable offences, not known to the common law. Such animals (which title see) being *ferœ natura,* are not, alive, the subjects of larceny: Russ. Cri. 1331.

The principal enactments are 9 G. 4, 69: Night Poaching A., 7-8 V. 29; and 24-5 V. 96, 17.

Taking, &c. game or rabbits by night—after two convictions] By 9 G. 4, 69. 1: 'if any person shall, by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter, or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, . . . in case such person shall so offend a third time he shall be guilty of a misdemeanour': maximum punishment, seven years' p. s.

Power to apprehend poachers] By s. 2: 'Where any person shall be found upon any land, committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right of free warren or free chase thereon, or for the lord of the manor or reputed manor, wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace;

Assault by weapons] And in case such offender shall assault or offer any violence with any gun, crossbow, firearms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanour': maximum punishment, seven years' p. s.

Limitation of prosecutions] By s. 4: '. . . the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence.'

Proof of previous convictions] By s. 8: 'On every conviction under this Act . . . the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence.'

Three armed persons entering, &c. land by night] By s. 9: 'If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanour': maximum punishment, fourteen years' p. s.

'*Night*'] By s. 12: 'For the purposes of this Act, the night shall be considered, and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.'

'*Game*'] By s. 13: 'For the purposes of this Act, the word 'game' shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards,' exactly as in 1-2 W. 4, 32, 2. In 25-6 V. 114, 1, 'eggs of pheasants and partridges, woodcocks, snipes, rabbits,' and 'eggs of grouse' are added, and *bustards* are excluded.

Taking, &c. hares, &c. in the night] By 24-5 V. 96, 17: 'Whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit, in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanour.'

Destroying game or rabbits on a public road] By 7-8 V. 29, 1: 'all the pains, punishments, and forfeitures imposed by' 9 G. 4, 69, above, 'upon persons by night unlawfully taking or destroying any game or rabbits, in any land, open or inclosed, as therein set forth, shall be applicable to, and imposed upon any person by night, unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path, where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all persons authorised by' 9 G. 4, 69, above, 'to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said Act or this Act; and the said Act and all the powers, provisions, authorities and jurisdictions therein or thereby contained or given, shall be applicable for carrying this Act into execution as if the same had been herein specially set forth.

Tame pheasants] reared by hens and under their control are not 'game' and may be stolen: *Garnham*, 8 Cox C. C. 451, 1861, where the pheasants were kept in coops but could run in and out, and were actually roosting in the trees.

Night poaching after two previous convictions] The previous convictions under 9 G. 4, 69, 1, must be convictions under *that* s. Where there was a conviction on indictment (under s. 1) after two previous convictions, one of which was under s. 9 of that A., the Court for

C. C. R. quashed the conviction, pointing out that the instruments or weapons mentioned in s. 9 are not (as are those in s. 1) for taking game, but for doing violence (though it might be that an offence under s. 9 was the offence under s. 1, aggravated by the presence of an armed party). *Lines*, 1902, 1 K. B. 199; 66 J. P. 24; 20 Cox C. C. 143; cf. *Ball*, 1832. So a previous conviction under s. 2: *McLauchlan*, 75 J. P. 8, 1910, following *Lines*. Ordinary agricultural land is not land used for breeding rabbits (within s. 17, above, under which there was a count) merely because rabbits are tolerated there. See *Garratt*, 1834, below. Under s. 1, Hawkins J. ruled that the opinion of the jury should be taken on the facts of the case before the two previous convictions are proved. *Woodfield*, 16 Cox C. C. 314, 1887.

The taking or killing] Where defendant had been seen to set wires one night, in one of which a rabbit was caught, and as he was about to take it the next morning, was stopped by the keeper, this was held by the judges to be a *taking;* the word *taking* meaning *catching*, and not *taking away*. *Glover*, 1814, under 5 G. 3, 14, 6, rpd.: 'take or kill.'

The (a) entering or (b) being on the land] The words of s. 9, above, are, 'shall unlawfully enter or be' by night. It will not, therefore, be necessary to show that defendants *entered* by night, provided they *be* in the place 'by night,' which the indictment must state. Where one under 57 G. 3, 90, rpd., stated that the defendants on, &c., did by night enter divers closes, and were then and there in the closes armed, for the purpose of destroying game, &c., on error, the judgment was reversed, because there was not a sufficient averment that the defendants were by night in the closes armed, for that purpose, &c., neither branch of the sentence alleging the whole statutory offence. *Davies* v. *R.*, 10 B. & C. 89, 1829; see also *Kendrick and others*, 7 C. & P. 184, 1835, under 9 G. 4, 69, which, it was held, made the *entering* and the *being* distinct offences; *Wilks and another*, *ib.* 811, 1837; *Fletcher* v. *Calthrop*, 6 Q. B. 880, 1848. In perjury an information alleging that the defendant did enter and was on certain land there, called A. close, &c., for the purpose of taking and destroying game contrary to the A., &c., but not saying 'for the purpose of destroying game *there*,' was held to be sufficient to give jurisdiction to the justices before whom the information was laid. *Western*, L. R. 1 C. C. R. 122; 37 L. J. M. C. 81; 11 Cox C. C. 93, 1868.

Consent] It is not necessary to prove positively that defendants were on the land without the permission of the occupier or landlord; the jury may infer that they were there 'unlawfully' and 'not by permission for a day's shooting,' from their being 'found at night armed and knocking down the keepers.' *Wood*, D. & B. 1; 25 L. J. M. C. 96; 7 Cox C. C. 106, 1856. See *Allen*, 1826. If persons go out with the general intent of taking game where they can find it, 'they are in pursuit of game in every field that they pass over,' where game might be expected to be found; they are guilty of unlawful entering, even although they pass through the particular field alleged without attempting to poach: *per* Willes J. in *Higgs and others*, 10 Cox C. C. 527, 1867, where defendants were lost sight of for two hours, and then found three miles off with game in their possession: not guilty. (This was held a 'fresh pursuit.') Cf. *Apprehension*. *Sutton*, 1877, is to the same effect.

Where only one defendant was seen in the place *charged* under s. 9, above (though the others were quite near and rescued him), Patteson J. directed an acquittal. *Dowsell and another*, 6 C. & P. 398, 1834; Russ. Cri. 1344, strongly disapproved by Alderson B. in *Lockett*, 7 C. & P. 300, 1836, and overruled in *Whittaker and others*, 1 Den. C. C. 310; 3 Cox C. C. 50; 2 C. & K. 636; Russ. Cri. 1345 *w*, 1848, where seven to five judges held, that all who were aiding, &c. those who entered the field, were guilty of the same (statutable) misdemeanour, though they themselves were never in the field—they were 'constructively' present; see under *Aiders, &c.*, and *Scotton*, 5 Q. B. 493, 1844. In *Whittaker*, a particular close was alleged in the indictment, but in the subsequent case of *Uezzel and others*, 2 Den. C. C. R. 274; 20 L. J. M. C. 192; 5 Cox C. C. 188, 1851; Campbell C.J. (Den. 275) observed: 'Some confusion seems to have arisen on this matter, from not attending sufficiently to the provisions of the Act of Parliament: it has been treated as though the word *close* occurred in the Act, whereas it only specifies '*any land*'. . . *open or inclosed*'; a practice has consequently prevailed of naming a certain close in the indictment, which is quite needless. It would certainly be requisite to designate *some land*, &c.' In *Uezzel*, therefore, a defendant was held to have been properly convicted, he being one of three, armed with guns, one of whom was in a close (alleged) occupied by C. W., in which were pheasants, and all of whom were found to have been in another adjoining close of C. W., in which there was not any game, passing on their way; one count charged them with being 'in inclosed land occupied by C. W.,' and on this count the judges had no doubt. ('Mr. Greaves thought this decision erroneous': Russ. Cri. 1346 *y*.)

Merely sending a dog to drive the game in a field while his owner stands in the road is not an entry by the owner; *Nickless*, 8 Car. & P. 757, 1839; *Pratt*, D. & P. C. C. 502; 24 L. J. M. C. 133, 1855: Q. B., under 1-2 W. 4, 32, Game A., 30, followed in *Pratt* v. *Martin*, 22 Cox C. C. 442, 1911: K. B. D.; but the soil of the high-road frequently belongs to the owner of the adjoining close, and in that case perhaps the defendants might be convicted though they never left the road. In *Pratt*, where the defendant had been summarily convicted for 'entering and being in the daytime upon land in . . . pursuit of game,' the conviction was upheld by the Q. B. in such circumstances. Where a man standing on his own land shot a grouse on another's, and some hours later went on that land to get the dead bird (which, however, had been removed), the Q. B. D. ordered justices to convict under this s. as the shooting and the entering were sufficiently connected to form one transaction. *Horn* v. *Raine*, 19 Cox C. C. 119, 1898. Cf. *Pickering* v. *Rudd*.

Hares, &c.—the situation, &c. of the land] See *Uezzel*, above. Under 24-5 V. 96, 17, it must be proved that the offence was committed in some warren or ground lawfully used for the breeding of hares or rabbits, *i.e.* in some place which is either a warren, or where rabbits are exclusively kept. *Garratt*, 6 C. & P. 369, 1834, under 7-8 G. 4, 29, 30, rpd., where the place was a rick-yard; cf. *McLauchlan*, above.

The indictment must particularise, in some manner, the place in which the offence was committed; for, the majority of the judges said, being 'substantially a local offence, the defendant was entitled to know to what specific place the evidence was to be directed.' *Ridley*, R. & R. 515, 1823. 'A certain cover in the parish of A.' is too general a description. *Crick*, 5 C. & P. 508, 1832. Otherwise,

'entering, &c. certain land in the occupation of A. B., in the parish of, &c.,' without specifying whether it is inclosed or not. *Andrews*, 2 Moo. & R. 37, 1837, both under s. 9, above. R. 9 of Ind. A. 1915, governs the point.

Where there was a variance between the occupation of the land alleged, and that proved, Lindley J. held that the indictment could, if necessary, be amended *if defendants were not misled thereby*. *Sutton, &c.*, 13 Cox C. C. 648, 1877.

Where an entry was alleged into a particular close, 'with the intent *then and there* to kill' game, it was held that the entry was confined *by the indictment*, under 57 G. 3, 90, rpd., to the close specified, and the intent in respect of that close must be proved. *Barham*, 1 Moo. C. C. 151, 1826; *Capwell*, 5 C. & P. 549, 1833, under s. 9; *Gwiner*, 7 C. & P. 231, 1835. Where defendants were in Shutt Leasowe, a place named in one count, which adjoined Short Wood (which was in another count), and were apparently going into the Wood, Patteson J. said, 'The intent was evidently to kill game in the wood, into which none of the parties ever got for that purpose; it is true that they are charged with being in Shutt Leasowe, but they had no intention of killing game there'; they 'must be acquitted.' *Davis and another*, 8 C. & P. 759, 1839. But see below, and *Higgs*, above.

Time limitation of prosecution] The offence (under s. 9) was committed on the 12th January, 1844, the warrant of commitment was dated the 11th December, 1844, the indictment was preferred on the 1st March, 1845. It was held that the prosecution was commenced 'within twelve calendar months after the commission of the offence within s. 4, above. *Austin*, 1 C. & K. 621, 1845. So where the offence was committed on the 4th December, 1845, the information and warrant were on the 19th Dec.: one prisoner was apprehended on the 5th Sept., 1846, and the other on the 21st Oct., 1846; and the indictment was preferred on the 5th of April, 1847; it was held, on the authority of *Willace*, 1797, East P. C. 186, that the prosecution was commenced in time. *Brooks*, 1 Den. C. C. 217, 1847. Cf. *West*, 1898.

In order to prove that proceedings were commenced within the proper time a warrant (Feb. 5, 1861) for defendant's apprehension was produced, but not the information on which it was founded, nor did the warrant show that it was grounded on an information in writing: the date of the offence was Jan. 26, 1861; indictment preferred, March, 1864: c. q., but the court declined to admit that the indictment was bad on the face of it. *Parker*, L. & C. 459; 33 L. J. M. C. 135; 9 Cox C. C. 475, 1864. In *Casbolt*, 11 Cox C. C. 385, 1869, this defence was held good on motion to arrest judgment, though there had been a plea of guilty (allowed to be withdrawn). The information was assumed to be the commencement of proceedings. '*Quære*, whether the warrant was not evidence that the prosecution was pending at its date': Russ. Cri. 1336 *e*.

In *T. P. O'Connor*, 1913, 1 K. B. 557; 82 L. J. K. B. 335; 23 Cox C. C. 334; 77 J. P. 272; 29 T. L. R. 245; 8 Cr. A. R. 167, the C. C. A. thought that 'proceedings' within 2-3 G. 5, 20, 8, were begun by information; they were 'pending' within that s.

So when a warrant was issued before, but defendant arrested on the day an A. came into force: *W. Brown*, 8 Cr. A. R. 173, 1913.

'*Being armed*'] 57 G. 3, 90, above, did not require each to be armed with a gun or 'other offensive weapon.' 'any one of the party being

armed was sufficient to bring the others within the statute.' *Smith and others,* R. & R. 368, 1818. But it is otherwise where one does not *know* that another is armed. *Southern,* R. & R. 444, 1821: same A. It is not necessary under that A. that the gun should be found on any of them. Defendants were shooting in a wood in the night, and the flash of one gun was seen by a keeper; but before they were seen they abandoned their guns, and were caught 200 yards off creeping away on their knees. Being convicted, the judges held this a being 'found' armed. *Nash,* R. & R. 386, 1819.

'*Constructive arming*'] See also *Goodfellow and others,* 1 C. & K. 724; 1 Den. C. C. R. 81, 1845, where it was held (overruling *Davis,* above, where it had been held that an allegation that A. & B. were armed is not supported by proof, that C. only who was with them, was armed; 'constructive arming' is not sufficient under s. 9) that if one of the party (of three or more) has a gun, all are armed within s. 9 of 9 G. 4, 69. See *Common Purpose,* below.

'*Offensive weapon*'—*intent*] The weapon must be taken out with the intent of being unlawfully used. Indictment, under s. 9, for being out at night for the purpose of taking game armed with a bludgeon: defendant had with him a thick stick, large enough to be called a bludgeon, but he was in the constant habit of using it as a crutch, being lame. Taunton J. ruled, that it was a question for the jury with what intent he took it out: acquittal. *Palmer,* 1 Moo. & Rob. 70, 1831. So *Williams,* 14 Cox C. C. 59, 1878. A walking-stick of ordinary size was ruled (under another A.) to be an offensive weapon. *Johnson,* R. & R. 492, 1822. Indictment, under s. 9, for entering, &c., armed with bludgeons, with intent to destroy game, with a count for a common assault. The only weapons proved to have been used were sticks. One of these was produced, with which one defendant, on being attacked by the gamekeepers, had defended himself, and knocked one down. The stick, however, was a very small one, fairly answering the description of a common walking-stick. Gurney B. said that if a man went out with a common walking-stick, and there were circumstances to show that he intended to use it for purposes of offence, it might, perhaps, be called 'an offensive weapon' within s. 2, above; but if he had it in the ordinary way, and on some unexpected attack or collision was provoked to use it in his own defence, 'it would be carrying the statute somewhat too far to say it was an offensive weapon within' its meaning. Conviction for a common assault only. *Fry,* 2 Moo. & Rob. 42, 1837; *Sutton,* 1877. Large stones are such 'offensive weapons' if the jury are satisfied that the stones are of a description capable of inflicting serious injury if used offensively, and that they were brought and used for that purpose. *Grice,* 7 C. & P. 803, 1837.

Claim of right] See *Hall,* 1828.

Joinder] Where there was one indictment (not under 9 G. 4, 69) for shooting at a gamekeeper, and another indictment, under s. 9 thereof, for night poaching in the *same* transaction, it was held that the prosecution need not elect between the two, the offences being quite distinct, and not being able 'by any possibility (to) merge in' one another. *Handley,* 5 C. & P. 565, 1833.

Apprehension of offenders] Although 9 G. 4, 69, 2, is confined to the offences specified in s. 1, yet offenders under s. 9 may also be

apprehended; for what is punishable under s. 9 is none the less an offence under s. 1, because it is an aggravation of that offence and liable to a more 'heinous punishment.' *W. Ball,* 1 Moo. C. C. 330, 1832; cf. *Lines,* 1901.

A gamekeeper and his assistants warned a party of poachers, including defendant, off his master's grounds, and followed them into the highway, where the poachers rushed on the keeper and his men, and blows ensued on both sides. After the keeper had struck several blows, a shot was fired by one of the poachers, which wounded prosecutor. Defendant was indicted, under rpd. 9 G. 4, 31 (so stated in the first edition of this work, p. 636, and obviously correct, but not in the report), for shooting at prosecutor with intent to kill, to disable, &c. It was urged for the defence that as the keeper had knocked down three of the men before the shot was fired, it would have been manslaughter only if death had ensued; but Bayley B. was of opinion that if the keeper struck, 'not vindictively, or by way of punishment, or for the purpose of offence, but in self-defence only, and to diminish the violence which was illegally brought into operation against him,' it would have been murder; even if the keeper and his men had no right to apprehend, they had full right to follow the party, in order to discover who they were, and that defendant and the rest were not warranted in attempting to prevent them; and that if the keepers had attempted to apprehend them, which they did not, they would have been warranted, by 9 G. 4, 69, 2, in so doing. On a conviction for the intent to do grievous bodily harm to prevent his and their apprehension, the judges were of opinion that the keeper had power to apprehend (see above), and that notwithstanding the blows given by the keeper, it would have been murder had the keeper's man died. *Ib. W. Ball,* above, confirmed *J. Ball, ib.* 333, 1832. A gamekeeper and his assistants rushed on poachers, who ran away, and then ranged themselves in a row. One of the men exclaimed, 'The first man that comes out, I'll be damned if I don't shoot him.' The poachers then ran away again followed by the prosecutor, who cocked and drew his pistol. At length several stopped, and the same defendant put his gun to his shoulder, fired at and wounded prosecutor at five or six yards—the latter also fired; it was objected that it was incumbent on prosecutor, as his authority to apprehend is derived from s. 2, above, creating the offence, to give notice to the poachers by calling on them to surrender (and it was argued that this default would have made the crime manslaughter only); but the judges were all of opinion that the circumstances constituted sufficient notice, and that the conviction was right. *Payne,* 1 Moo. C. C. 378, 1833. The deceased attempted to apprehend defendant who was poaching at night in a wood. He was not the servant either of the owner or of the occupier of the wood, or of the lord of the manor, but only of one who had the permission of the owner to preserve the game there: he was killed by one of defendant's party in the attempt to apprehend him, and it was held to be manslaughter only. *Addis,* 6 C. & P. 388, 1834. Gamekeepers who were out watching in the night heard firing of guns in the preserves of their employer, and they waited in a turnpike road, expecting the poachers to come there, which they did, and an affray ensued between them. Wightman J. held, that if the keepers were there endeavouring to apprehend the poachers they were not justified in so doing. *Meadham,* 2 C. & K. 633, 1848.

Common purpose] In these cases, it will be observed, defendant is

identified with his companions. Eight defendants were charged with shooting J. M., with intent to murder. Each having a gun, was out at night in the grounds of J. M.'s master for the purpose of poaching, and J. M. and others went to apprehend them. The poachers formed into two lines, and, pointing their guns at the keepers, threatened to shoot them. A gun was fired, and J. M. was wounded. Some of the keepers were also severely beaten, but no other shot was fired. It was objected that as there was no common intent to murder, the poacher who fired could alone be convicted; but Vaughan B. said, 'I am of opinion that when this Act . . . [57 G. 3, 90, rpd. by 9 G. 4, 69] empowered certain parties to apprehend persons who were out at night armed for the destruction of game, it gave them the same protection in the execution of that power which the law affords to constables in the execution of their duty. . . . With respect to the . . . point, it is rather a question of fact for the jury; still, on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the gamekeepers, and they are all giving their countenance and assistance to the one of them who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they were doing, the objection would have much weight in it.' *Edmeads and others*, 3 C. & P. 390, 1828. See *Skeet*, 1868. So when two men had been seized by keepers, and, while standing still, called to the third, who, coming up, rescued the two men, and beat the keepers and killed one, Vaughan B. ruled that all the three men were equally guilty, though if the two had acquiesced and remained passive and not called to the other, it would not have been so: not guilty. *Whithorne and others*, 3 C. & P. 394, 1828.

Assault] If a person having only a right of shooting over land empowers keepers to apprehend persons trespassing in search of game, and the latter resist such apprehension with no excess of violence, no assault is committed under 9 G. 4, 69, 2. *Wood*, 1 F. & F. 470, 1859. But if the (*indictable*) offence is committed in the night any person has authority to arrest under 14-15 V. 19, 11—despite the fact that 'night' is different in the two Acts—and where poachers resisted and killed a keeper (not of the owner, &c.), it was murder. *Sanderson and others*, *ib.* 598, 1859.

By the Game A., 1-2 W. 4, 32, 31, a trespasser in search of game may be required to quit the land, and to tell their names and abodes, and, in case of refusal, may be apprehended; even if he is justified in resisting, he must not use *unnecessary* force—which is for the jury to decide. *Long*, 7 C. & P. 314, 1836. Foxes are not game, and, therefore, a person engaged in fox-hunting is not justified in entering the land of another against his will. *Paul* v. *Summerhayes*, 3 Q. B. D. 9; 48 L. J. M. C. 33, 1878.

By 25-6 V. 114, the Poaching Prevention A., 2: 'It shall be lawful for any constable or peace officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any

such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing, and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace. . . .'

It is not necessary to prove from what particular land the game was taken; under s. 2, above, circumstantial evidence is enough to prove poaching (but merely being in the company of poachers is not enough). *Brown, &c.* v. *Turner*, 13 C. B. N. S. 485, 1863: C. P.; *Evans* v. *Botterell*, 33 L. J. M. C. 50, 1863. Under this s. (2) a policeman has no power to apprehend, but only to stop and search.

Evidence] In order to justify a policeman even in doing that, it is necessary to prove the existence of reasonable grounds of suspicion, but for this purpose *general* evidence of habitual poaching cannot be given. *Spencer and another*, 3 F. & F. 854, 857, 1863: the case is doubted by Mr. Greaves, Russ. Cri. 1335 *x*. Therefore, resistance to apprehension in such a case is justifiable, and if one of a party alone uses excessive violence he alone is guilty. It seems, however, it would be sufficient for the policeman to state in chief that he had reasonable grounds, and to leave it to the defendant to inquire into the nature of those grounds. See *Tuberfield*, 1864.

GAMING.

'Gaming is permitted in England, upon every possible subject, except where it is accompanied with circumstances repugnant to morality or public policy, or where, as in certain special cases, it is restrained by positive statutes.' Hawk. P. C. 1, 92, 1. 'Excessive gaming is no longer in itself an offence': Russ. Cri. 1895. Many forms of gaming resolve themselves into *Betting,* and are dealt with under that title. See also *Clubs.*

Statutes] The principal is 8-9 V. 109. By s. 17: 'Every person, who shall by any fraud or unlawful device, or in practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly.'

Tossing with coins was held to be a pastime or exercise (if not a game) within this s. *O'Connor,* 15 Cox C. C. 3, 1881: C. C. R.

Indictment] When the indictment stated that the defendant *won* certain monies from one H. F. B. to (*sic*) a person unknown, but not to whom the money belonged, it was held good, because it followed the words of the statute. *Moss,* D. & B. C. C. 104, 1856.

By s. 2, 'in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law and forbidden' by 33 H. 8, 9, and by all other Acts against unlawful games, &c. The A. also contains provisions for searching gaming-houses.

By 17-18 V. 38, 1, penalties are imposed for obstructing the entry of constables (authorised under 8-9 V. 109, 3 (outside Metropolitan Police District), 6 (Metropolitan Police District), 14 (billiards, &c. in a licensed house)) into suspected gaming-houses.

Evidence] By s. 2: 'Where any constable or officer authorised as aforesaid to enter any house, room, or place, is wilfully prevented

from or obstructed or delayed in entering the same or any part thereof, or where any external or internal door of or means of access to any such house, room, or place so authorised to be entered shall be found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same or any part thereof of any constable or officer authorised as aforesaid, or for giving an alarm in case of such entry, or if any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing, or destroying any instruments of gaming, it shall be evidence until the contrary be made to appear that such house, room, or place is used as a common gaming-house within the meaning of this Act, and of the former Acts relating to gaming, and that the persons found therein were unlawfully playing therein.'

Proceedings against keepers of gaming, bawdy, or 'other' disorderly houses, are facilitated by 25 G. 2, 36, by s. 8 of which, 'any person who shall . . . appear, act, or behave . . . as master or mistress, or as the person having the care, government, or management of any' such house 'shall be deemed . . . to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof.' By s. 10, no indictment shall be removed by *certiorari*, but this does not prevent the *crown* from removing the indictment, there being nothing in the A. to bind the crown. *Davies*, 5 T. R. 626, 1794; but it prevents it in all other cases, whether the prosecution be under ss. 5, 6, or private. *Sanders*, 9 Q. B. 235; 15 L. J. M. C. 158, 1846; ss. 5, 6, 7 apply to summary proceedings: 48-9 V. 69, 13.

Punishment] By 17-18 V. 38, 4: 'Any person being the owner or occupier, or having the use of any house, room, or place, who shall open, keep or use the same for the purpose of unlawful gaming being carried on therein, and any person who being the owner or occupier of any house or room shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room or place, opened, kept or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room or place may . . . in the first instance . . . if to the . . . justices it shall seem fit,' be sentenced to twelve months' imprisonment with hard labour (maximum).

Under this s. there was a conviction for organising 'whist drives' for the play of 'Progressive Whist.' *Morris* v. *Godfrey*, 23 Cox C. C. 40; 76 J. P. 297; 28 T. L. R. 401; 106 L. T. 890, 1912.

By 36-7 V. 38, 3, persons playing or betting at any game or pretended game of chance in the 'street, highway, or other open and public place to which the public have access,' &c., are rogues and vagabonds; it must be some game or pretended game of chance: *Ridgeway* v. *Farndale*, 1892, 2 Q. B. 309; 61 L. J. M. C. 199. A railway carriage in transit on a railway is within this s. *Langrish* v. *Archer*, 52 L. J. M. C. 47; 10 Q. B. D. 44, 1882.

It must be proved not only that the defendant won the money, but that he won it by some 'fraud or unlawful device or ill-practice' *during* the game, and it is not sufficient that fraud was used to *induce*

the prosecutor to play. *Bailey,* 4 Cox C. C. 390, 1850, where defendant feigned drunkenness and lost every game, and he and his confederates lured the prosecutor to play at skittles for money; it was held, however, to be an indictable conspiracy. Followed in *Governor of Brixton Prison, ex parte Stoland,* 1912, 3 K. B. 568; 82 L. J. K. B. 5; 77 J. P. 23; 29 T. L. R. 10: three-card trick. Whether in the play an incident is 'a fraud,' &c., is for the jury: *J. Moore,* 1914.

Gaming-houses] Keeping a common gaming-house for gain, and causing and procuring idle and evil-disposed persons to come there and play (at 'rouge et noir') 'for large and excessive sums of money' —which 'would of itself make any game unlawful' (*per* Abbott C.J.) —is indictable at common law, and perhaps an indictment merely for keeping a common gaming-house—generally or for a nuisance—would be good. *Rogier,* 1 B. & C. 272, 1823; *Mason,* 2 T. R. 581; *Lee,* at 493, 1788; *Taylor,* 1824.

The offence is within 22-3 V. 17.

'*Unlawful*' *games*] Whether a particular game is unlawful is for the judge: *Davies,* 1897; a man casually using his rooms to play even an unlawful game with friends is not unlawfully gaming within 17-8 V. 38, 4.

Dice] By 13 G. 2, 19, passage and other games with dice, except backgammon, are prohibited.

Evidence] See under *Nuisance.*

Trial] by jury under 42-3 V. 49, 17, is often demanded; and whether defendant so demand or not, 'prosecutor may indict under s. 1 [16-7 V. 119] as for a nuisance': Russ. Cri. 1902, citing *Brown,* 1895; so *per* Hawkins J., *Cook,* 13 Q. B. D. at 383, 1884.

GARROTTING.

See under *Assault.*

GOING ARMED.

See *Affray* and *Unlawful Assembly.*

It was held in *Dewhurst and others,* 1 St. Tr. N. S. 529, 1820, on indictment for unlawful assembly and causing people to go armed to a public meeting, that arms must not be carried in such a case 'if they are calculated to create terror.'

Poachers] See under *Game.*

GRIEVOUS BODILY HARM, INFLICTING.

This title is practically a continuation of *Assault.*

Statutes] In numerous instances the words 'grievous bodily harm' occur in statutes: *e.g.* 24-5 V. 100, 11, 18, 20, 23, 128 (the full phrase seems to have been first used in rpd. 43 G. 3, 58); sometimes the words are slightly varied: ss. 26, 35, 'bodily harm'; ss. 29, 30, 'bodily injury'; s. 47, 'actual bodily harm.' These ss. will be found under various titles obviously closely connected with this subject.

'*Bodily harm*'] becomes 'grievous' whenever it seriously interferes with health or even comfort. It is not necessary that its effects should be dangerous nor that they should be permanent': *Kenny,* Outlines C. L. c. 10, following *Ashman,* 1 F. & F. 88, 1858, where a man who shot at a parson while preaching in church was acquitted of 'the intent,' but convicted of 'an aggravated assault,' *i.e.* inflicting grievous bodily harm. Whether or not the harm is grievous is for the jury: *ib.*, see under s. 47. For the physical sense of wound, see *Wounding.*

Defendant was indicted, under 7 W. 4 & 1 V. 85, 2, rpd., for causing 'a bodily injury dangerous to life, with intent to commit murder.' Intending to cause the death of her infant child she exposed it in an open field on a cold wet day, where it was found after some hours nearly dead from congestion of the lungs and heart caused thereby, but was restored. In view of the character of the other offences provided for by that s. (poisoning, stabbing, wounding, &c.) and seeing that there had been no lesion of any of the child's organs, the c. for 'a bodily injury' q. *Gray,* D. & B. C. C. 303; 26 L. J. M. C. 203; 7 Cox C. C. 326, 1857. See 24-5 V. 100, 27.

Halliday was a remarkable extension of s. 20, above. Defendant threatened his wife, with every appearance of intending her violence: she began to get out of the window to avoid him, but was held back by a daughter whom he bade let her go, which she did, and the wife fell out; held that he was rightly convicted of doing her grievous bodily harm and of assaulting her: 54 J. P. 312; 61 L. T. 701; 38 W. R. 255; 6 T. L. R. 109, 1889: C. C. R., where L. Coleridge C.J. said, 'When a man creates in another's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries'; followed in *H. S. Beech,* 23 Cox C. C. 181; 107 L. T. 461; 76 J. P. 287; 7 Cr. A. R. 197, 1912, where the facts were much the same.

Intent—'specific' malice] It is not necessary to prove malice against the individual injured; or that any grievous bodily harm was in fact inflicted, if there was an intent to inflict it on some one, as was held in *Hunt,* 1 Moo. C. C. 93, 1825, apparently under 43 G. 3, 58. Defendant having been apprehended by the owner, in an attempt to break

open his stable in the night, was taken into his house where he threatened him with vengeance and struck at him with a knife which he seized; in so doing he cut a servant, who was assisting his master; the cut was not serious. The jury found that the thrust was made with intent to do grievous bodily harm on anybody on whom it might alight, though the particular cut was not calculated to do so. This case also appears to have resolved (a point doubted in *Akenhead*, Holt N. P. C. 469, 1816, under that A.) that the wound need not be in a vital part. Defendant was indicted under 24-5 V. 100, 18, for wounding with intent to do grievous bodily harm, but the jury found him guilty of unlawful wounding only, under 14-5 V. 19, 5, in which fifteen judges said, 'the term malicious' must be understood, and twelve held (without giving reasons) that malice was sufficiently shown in the following circumstances. He and prosecutor, who had been on good terms, were in separate punts on the water on a light night. Defendant had on different occasions said he would shoot at wild fowl even if somebody was in the way at the time: he fired at twenty-five yards' distance, and at that moment the prosecutor's punt slewed round and he was shot. Defendant then rendered help, and assured him that it was an accident. It was stated in the case that it seemed probable that he only intended to frighten prosecutor, and to deter him from coming to shoot there again. Blackburn J. said: 'I have always thought a man acts maliciously when he wilfully does that which he knows will injure another in person or property.' *Ward*, L. R. 1 C. C. R. 356; 41 L. J. M. C. 69; 26 L. T. 48; 20 W. R. 392; 12 Cox C. C. 123, 1872. Defendant, with the intention of causing terror to persons leaving a theatre, and with the intention of obstructing the exit, put out the gas on a staircase and placed an iron bar across a doorway. In attempting to escape several of the audience were injured by the crush; it was held that he was rightly convicted of unlawfully and maliciously inflicting grievous bodily harm upon two of the crowd. 'He acted,' said L. Coleridge C.J., 'unlawfully and maliciously, not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured.' Stephen J. said: 'If the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse, he did it 'wilfully,' that is, 'maliciously,' within' 24-5 V. 100, 20. *Martin*, 8 Q. B. D. 54; 51 L. J. M. C. 36; 14 Cox C. C. 633, 1881: C. C. R. Where, therefore, defendant, while unlawfully and maliciously aiming a blow at A., accidentally wounded B., he was held to be rightly convicted of unlawfully and maliciously wounding B. *Latimer*, 17 Q. B. D. 359; 55 L. J. M. C. 135, 1886: C. C. R., under s. 20; *Hunt*, 1825. The same construction, with regard to general malice, was put on the rpd. Coventry A., 22-3 C. 2, 1: *Carrol*, 1 Lea. 55; East P. C. 394, 396, 1765.

It is necessary in this subject to bear in mind Dr. Kenny's remark: 'The 'malice' required here is something narrower than that vague general idea of a wicked state of mind which the word usually denotes at common law, as in cases of homicide or in the phrase 'mute of malice.' For in *statutory* wrongs the word 'malice' is presumed to have been employed by the legislature in a precise sense; so as to require a wickedness which consisted of or included an actual intention to do an injury and, moreover, an injury of the same kind as that which in fact was done.' Outlines C. L. c. x. If the doer knew that *another* kind of harm might probably be done, there is enough

statutory malice: *ib.;* this explains the conviction in *Chapin* under the 1861 A.

See further under *Murder.*

General and specific intent] The following points have been decided:—

1. If defendant meant to, and did in fact, inflict grievous bodily harm when he struck, a mistake on his part about the *identity* of the person injured makes no difference, and he may be convicted of wounding that person with intent to murder him. Thus A., desiring to murder C., and supposing B. to be C., shoots at and wounds B., A. may be convicted of wounding B. with intent to murder B. *Smith,* D. & P. 559; 7 Cox C. C. 51, 1855, under a rpd. s. This and other cases appear to be inconsistent with (and if so, the former overrules) *Holt,* 7 C. & P. 518, 1836, which was mentioned to the court in *Smith.* To the same effect: *Stopford,* 11 Cox C. C. 643, 1870, where from the report it would appear that Brett J. thought that some of the cases were not distinguishable from (and ought to have followed) *Smith.* Some of the older cases, indeed, in conflict with these decisions, turned entirely on ss. different to those in the 1861 A. and on the forms of the indictments thereunder.

2. If he had a *general* intention to inflict grievous bodily harm on any one of a group, &c., and in pursuance thereof did inflict grievous bodily harm on A., without any *specific* intention, he may be convicted of wounding A. with intent to do grievous bodily harm to A.

Defendant fired a loaded pistol at a group of boys, of whom A. was one, who had been annoying him, and hit A. Held, that he was rightly convicted of shooting at A. with intent to do A. grievous bodily harm. *Fretwell,* L. & C. 443; 9 Cox C. C. 471, 1864. Cf. *Martin,* 1881, above.

3. If he intends to inflict grievous bodily harm on A., and in endeavouring to wound or poison A. such harm is accidentally inflicted on B., he may be indicted and convicted of wounding B., with intent, &c. *Latimer,* above, distinguishing *Pembliton.*

A constable was employed to guard a copse from which wood had been stolen, and for this purpose carried a loaded gun; from this copse he saw W. come out, carrying wood which he was stealing, and called to him to stop; W., however, running away, the constable having no other means of arresting him, fired and wounded him in the leg. The constable was not aware at the time that W. was (as he in fact was) committing a felony. It was held that a conviction for wounding with intent, &c., was right, on the ground that he was not justified in firing as 'the fact that W. was committing a felony was not known to the prisoner at the time.' *Dadson,* 2 Den. C. C. R. 35; 4 Cox C. C. 358; 20 L. J. M. C. 57, 1850.

Intent to commit another felony] The intent to do grievous bodily harm may be inferred, although defendant had also an intent to commit another felony—in *Cox,* probably rape. The judge held that though not eventually dangerous, the harm may be 'a grievous bodily injury,' and added that the intention might be inferred from the act: conviction upheld: R. & R. 362, 1818, under 43 G. 3, 58, under which, too, a defendant charged with shooting, with intent to do A. B. some grievous bodily harm, was held rightly convicted, when the jury found that his [primary] motive was to prevent his lawful apprehension, but

that, in order to effect that purpose, he had also the intention of doing A. B. the harm, as, if both the intents existed, it was immaterial which was principal and which subordinate (both being specified in the A.). *Gillow,* 1 Moo. C. C. 85, 1825. So if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with intent to do grievous bodily harm. *Bowen,* C. & M. 149, 1841, where, it being uncertain who actually struck the blow, the doctrine of common design was ruled to apply.

Where, defendant, in attempting to commit a robbery, threw down prosecutor, kicked him, and produced blood, Denman C.J. left it to the jury to say, whether his intent was to disable the prosecutor, or to do him some grievous bodily harm, under 9 G. 4, 31, 12, rpd., adding that nothing was more likely to accomplish the robbery which he had in view 'than the disabling which such violence would produce.' *Shadbolt,* 5 C. & P. 504, 1833. Merely striking a blow with the fist, though it break both jaws, is not in itself enough to prove this intent: *Wheeler,* 1 Cox C. C. 106, 1844.

Unnecessary violence] Where a person assaulted, who is entitled to defend himself, *unnecessarily* resorts to the use of a deadly weapon, he may be convicted of wounding with intent to do grievous bodily harm, if such was his intent. *Odgers,* 2 Moo. & R. 479, 1843, where, prosecutor having been the aggressor, assault *only* was found, though defendant had used a scythe.

Unlawful wounding] For the verdict of 'unlawful wounding,' see 14-15 V. 19, 5. Where, however, the indictment merely charged a 'felonious shooting with intent to do grievous bodily harm,' and 'grievous bodily harm,' with the same intent, under 24-5 V. 100, 18, it was held by Bowen J. that it was not competent to the jury to convict of unlawfully wounding, it not being alleged that defendant did 'cut, stab, or wound,' under s. 5, rpd. *Miller, &c.,* below. This point, not having been reserved, does not seem to have been noticed in *Waudby,* 1895, 2 Q. B. 482; 64 L. J. M. C. 251; 18 Cox C. C. 194: C. C. R., where on an indictment against two men, charging one with feloniously shooting *and* feloniously wounding with intent to do grievous bodily harm, and the other with aiding and abetting therein, the jury found the former guilty of the misdemeanour only, and the latter of aiding and abetting him. It was claimed that on that indictment such a verdict against the latter could not be found, but the court held that if the principal be convicted of the misdemeanour under s. 5 of unlawfully wounding, the accessory may be convicted also. Cf. *Hapgood and Wyatt; Miller and others,* 14 Cox C. C. 356, 1879. On an indictment for the misdemeanour of inflicting grievous bodily harm, defendant may be found guilty of a common assault: see s. 47. So where, owing to misdirection, a jury found on indictment under s. 18 *unlawful wounding,* the C. C. A. set this verdict aside, but substituted one in terms of s. 47, under which there was another count, declining to substitute *common assault* or alter sentence: *A. Cameron,* 10 Cr. A. R. 198, 1914. In *Cruse,* 8 C. & P. 541; 2 Moo. C. C. 53, 1838, on an indictment under 7 W. 4 & 1 V. 85, 20, a common assault was found.

See for the form of indictment, No. 5 in Appendix to Indictments A. 1915.

GROSS INDECENCY.

See *Sodomy.*

GUN, OFFENCES BY MEANS OF.

See *Firearms, Shooting, Spring-guns.*

GUNPOWDER—OFFENCES BY MEANS OF.

See *Explosives.*

HABITUAL CRIMINALS.

The phrase seems to occur first in the title of Part 3 of rpd. 32-3 V. 99, and not otherwise in any s. before s. 10 of 8 E. 7, 59, the Prevention of Crime A. 1908, which is:—

'(1) Where a person is convicted on indictment of a crime . . . and subsequently the offender admits that he is or is found by the jury to be a habitual criminal and the court passes a sentence of penal servitude the court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the court may determine, and such detention is hereinafter referred to as preventive detention, and a person on whom such a sentence is passed, shall, whilst undergoing both the sentence of penal servitude and the sentence of preventive detention, be deemed for the purposes of the Forfeiture Act, 1870, and for all other purposes, to be a person convicted of felony.

(2) A person shall not be found to be a habitual criminal unless the jury finds on evidence—

(*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or

(*b*) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

* * * * *

(4) In the proceedings on the indictment the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal and in that case it shall not be necessary to swear the jury again:

Provided that a charge of being a habitual criminal shall not be inserted in an indictment—

(*a*) without the consent of the Director of Public Prosecutions; and

(*b*) unless not less than seven days' notice has been given to the proper officer of the court by which the offender is to be tried and to the offender that it is intended to insert such a charge;

and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

(5) Without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life.'

By (6), 'crime' in this s. means what it does in 34-5 V. 112, 20, that is to say—

any felony,
uttering false or counterfeit coin,
possessing counterfeit gold or silver coin,
obtaining goods or money by false pretences,
conspiracy to defraud,
being armed by night with intent to break or enter, or any other offence under (now) s. 28 of Larceny A. 1916.

Indictment] Though not strictly necessary it is better to aver that prisoner is a habitual criminal: *C. Smith*, 1909.

Trial] must immediately follow that of the primary charge: *Jennings*, 4 Cr. A. R. 120; 74 J. P. 213; 26 T. L. R. 266, 1910. Two persons indicted jointly must not be tried jointly on this allegation: *G. Blake*, 4 Cr. A. R. 275; 74 J. P. 336, 1910; but this is not an absolute rule: *E. Taylor, &c.*, 5 Cr. A. R. 168, 1910; cf. *Chatway*, *ib.* 151. Sentence on the primary charge should not be given till after the trial of *this* charge: *A. Walker*, 5 Cr. A. R. 231; 27 T. L. R. 51, 1910: sentence reduced. See *A. Harding*, 1920 (15 Cr. A. R.).

Jury] may be sworn as in felony *or* misdemeanour: *E. Turner*, 1909.

Age sixteen] There must be some evidence of age 'in all cases where the jury would not be prepared to act on their own view without evidence': *E. Turner*, 1909. As a rule persons under thirty are not indicted as habitual criminals: *J. Saunders*, 7 Cr. A. R. 271, 1912.

Three convictions] Convictions on three separate indictments for similar offences all committed within a few days (and tried at or about the same time) are not, perhaps, within this s.: *Raybould*. The three convictions may be enough evidence 'in a proper case': *Waller*,

1909; *J. Kelly,* 3 Cr. A. R. 248; 74 J. P. 167; 26 T. L. R. 196, 1909. That is especially so 'where the crimes are, so to say, professional, as in coining cases': *per* Darling J., *Baggott,* 4 Cr. A. R. 67; 74 J. P. 213; 26 T. L. R. 266, 1910; shop-breaking is not of this nature. 'Much depends on the nature of the offences; where an offence requires no preparation or deliberation and there was no evidence of a system, probably the three convictions would not, without other evidence, be sufficient. But when they require deliberate and systematic planning and are repeated at the earliest opportunity after release, they may be sufficient material for a jury to consider as evidence of an intention to live by crime alone': *Everitt,* 6 Cr. A. R. 267; 27 T. L. R. 570, 1911.

See *Proof of Previous Conviction* and *Other Grounds,* below.

Consent of the Director of Public Prosecutions] For proof, see under *Documentary Evidence.*

'*Leading persistently,*' *&c.*] This is 'the more important part of the definition': *Raybould.* 'The important thing' is to bring the evidence 'down to date': *E. Turner,* 1909. Such evidence of accused's life *before the last conviction* is not necessarily inadmissible; if, for example, he is 'now doing precisely' what 'he used to do when beyond doubt he was a habitual criminal,' it is admissible; in each case it depends on the facts: *Ib.*

Under this head the *nature* of the previous convictions must be carefully looked at: *Baggott,* above, where c. q. as habitual criminal. The time to be considered is the date of the primary offence: *Baggott.* Substantially the evidence must be brought down to the last arrest: *Brummitt,* 1910; it need not stop at the date of the crime primarily charged: *E. J. Wood,* 12 Cr. A. R. 29, 1916. The *onus* of proof is on the crown; where the direction was that accused must show he was leading an honest life, c. q.: *A. Stewart,* 1910. See *Onus,* below. Where there was no reference at all in the notice to the last interval of freedom, but evidence of crimes was given, c. q.: *J. H. Wilson,* 28 T. L. R. 561; 8 Cr. A. R. 20, 1912.

The jury must be expressly directed to evidence tending to prove honesty of purpose: *G. Sullivan* (ii): c. q. in view of interval of seven weeks. The evidence need not be confined to the last interval of freedom: *J. H. Wilson,* 1912.

Interval of release from prison] Where this was six days, about which there was no evidence, the court refused to interfere: *H. Foster,* 3 Cr. A. R. 173, 1909. But prisoner's conduct during this interval is so important on the question of *persistence* that the jury must be pointedly directed thereon: *J. Kelly,* 1909: c. as habitual criminal q. Where the interval was from Feb. 16th to Oct. 12th and there was no evidence about it except prisoner's statement, but (apparently) though the notice did not specify this period some questions were put about it, the C. C. A., being satisfied that there was no 'miscarriage of justice,' applied the proviso to s. 4 (1) of the C. A. Act: *H. Rowland,* 3 Cr. A. R. 277; 102 L. T. 112, 1909. Mere shortness of interval is no bar to a conviction: *Condon,* 4 Cr. A. R. 109, 1910: six and a half weeks; cf. *Everitt,* 1911, above. 'Where there has been a substantial interval, added to the fact that the prisoner has done work,' the court 'must draw attention to it': *G. Wells,* 5 Cr. A. R. 33, 1910.

In *J. Heard,* 22 Cox C. C. 725; 76 J. P. 232; 28 T. L. R. 154;

7 Cr. A. R. 80, 1911, nine months, though 'a considerable interval' (as is six), did not lead to quashing, because the primary crime showed skill and plan, and there was scant evidence of work done. In *C. Mitchell,* 76 J. P. 423; 23 Cox C. C. 284; 28 T. L. R. 484; 7 Cr. A. R. 283, 1912, the interval was five and a half months, and though 'prisoner's record was as bad as it could possibly be,' there was no evidence against him during *that* time except failure to report to the police: c. q. and primary sentence reduced. Where the interval was thirteen months and a considerable amount of work was done, but the primary charge, horse-stealing, and other facts pointed to a relapse into 'criminal life,' a conviction was upheld: *F. Williams,* 8 Cr. A. R. 49, 1912: cases of 'sudden temptation' do not prove the charge.

Proof of honest occupation] 'To be a habitual criminal it is not necessary that the man should never do anything honest': *W. J. Hadley,* 4 Cr. A. R. 39, 1909; so *Jennings,* 1910. The work may be 'a mere cloak': *Hayden,* 6 Cr. A. R. 214, 1910. In *G. Martin,* 5 Cr. A. R. 31, 1910, the interval was fourteen months and some work was done, but this is not 'conclusive.' Whether the work is an evasion or not is for the jury: *J. Martin,* 7 Cr. A. R. 227, 1912. Cf. *Keane and Watson,* 8 Cr. A. R. 12, 1912: six months' interval. In a two months' interval there was evidence of six weeks' work, but also in that period of association with ex-convicts; conviction upheld: *J. Smith,* 8 Cr. A. R. 150, 1913. An isolated act of theft in the course of regular work is not enough: *Dorrington.* Defendant does not lose the benefit of this plea because it refers to a time when he was evading arrest: *A. Brown,* 78 J. P. 79; 23 Cox C. C. 615; 30 T. L. R. 40; 9 Cr. A. R. 161: c. q. Whether this kind of evidence negatives habitual criminality is a question of fact, not of law: *J. Bennett,* 1913. For inability to work, see *Stockdale.*

Evidence of character and repute] This may include convictions other than and not so strictly proved as the three statutory: *G. Franklin,* 74 J. P. 24; 3 Cr. A. R. 48, 1909, where, after notice, nine convictions were proved only by the production of a register by the police, Alverstone L.C.J. saying that sub-s. 10 (5) was intended to permit this as otherwise the A. would be unworkable. A conviction abroad (France) may be proved: *J. Heard,* above. A witness for the crown has a right, in view of these words, to express an opinion favourable to prisoner: *G. Sullivan* (ii). Summary convictions are admissible under this head: *P. Summers,* 10 Cr. A. R. 11, 1914. So is evidence of warrants issued against accused since his last release, provided there is a direction that guilt is not assumed: *H. Macdonald,* 12 Cr. A. R. 127, 1916. But where notice was given of the issue of one warrant and evidence of others was also given, though prisoner had been acquitted of all the charges, and it was also proved that since his arrest a certain kind of robbery had ceased, c. as habitual criminal q.: *C. Russell,* 12 Cr. A. R. 27, 1917; even if such evidence was 'of character and repute' notice ought to have been given.

Previous conviction as habitual criminal] displaces the requirements of 8 E. 7, 59, 10 (2) (*b*).

Notice] See under *Documentary Evidence.* 'To the offender.' Secondary evidence of the contents may be given without any notice to produce, but there must be proof that a proper statutory notice was

given before the three convictions can be proved: *E. Turner*, 1909. 'To the officer of the court.' This is presumed unless challenged: *Westwood*, 1913. Objections to sufficiency of time must be taken at the trial: *J. Weston*, 3 Cr. A. R. 53, 1909; *E. Jones*, 5 Cr. A. R. 29, 1910. This apparently does not apply to the *substance* of the notice: *J. H. Wilson*, 1912, where there was no objection, but c. q. The notice must be as specific as possible: *E. J. Wood*, 1916. Apparently where it is possible it should cover the evidence of 'character and repute': *C. Russell*, 1917, above.

If a trial is postponed till the next assize the notice is good: *Conduit*, 11 Cr. A. R. 38, 1914. Surplusage does not invalidate a notice: *Webber*, below.

Seven days] clear: *Conduit*. Where there was *one* day's notice of one previous conviction the court applied the proviso to s. 4 (1) of C. A. A. 1907: *E. Jones*, above.

'Other grounds'] The notice need not 'specify' the evidence of 'dishonest life,' but 'the ground on which it is intended to found the charge . . . must be given in a real and substantial form': *E. Turner*, 1909. It need not refer to 'other grounds' if the prosecution only relies on the previous convictions: *Waller*, 1909.

Other convictions may be proved before verdict: *A. Stewart*, 4 Cr. A. R. 175; 74 J. P. 246, 1910: c. q.; *Brummitt*, 4 Cr. A. R. 192, 1910. The evidence of these *other* need not be so strict as of the three (*Stewart* in 4 Cr. A. R. is wrong): *Chatway*, 5 Cr. A. R. 155, 1910; and see *G. Franklin; P. Summers*. This point seems finally so settled by *Westwood*, 77 J. P. 379; 8 Cr. A. R. 273, 1913, where proviso of C. A. A. was applied. If this evidence is given without notice the conviction will be quashed: *F. Fawcett*, 5 Cr. A. R. 91, 115; 74 J. P. 441, 1910, where prisoner was notified that between certain dates he was 'given various opportunities of earning an honest living; nevertheless you returned to your criminal . . . life'; held not to let in evidence that he was an 'associate of thieves': see below. The same evidence when no 'other grounds' were specified led to quashing: *J. Moran*, 5 Cr. A. R. 219, 1910, where the judge read to the jury a list of convictions, none of which was proved: c. as habitual criminal q.: *Culliford*, 6 Cr. A. R. 142; 75 J. P. 232, 1910. *Fawcett* and *Moran* were followed in *Maxfield*, 7 Cr. A. R. 230; 28 T. L. R. 404, 1912, where, without notice, evidence was given of association with a convicted coiner (interval of twenty months and evidence of work done); and in *P. Neilson*, 78 J. P. 158; 23 Cox C. C. 685; 30 T. L. R. 125; 9 Cr. A. R. 218, 1913. Evidence of convictions and charges not included in the notice, especially of those in the last interval of liberty, led to quashing: *G. Fowler*, 77 J. P. 379; 29 T. L. R. 422; 8 Cr. A. R. 240, 1913; such inadmissible evidence is not within the proviso to s. 4 (1) of C. A. A. See, however, *Heron*, 9 Cr. A. R. 29, 1913. A previous conviction as a habitual criminal, if quashed, should not be given in evidence: *G. Sullivan* (ii).

Associating with criminals] See *'Other Grounds,'* above. *P. Summers* is, perhaps, an authority that the names of the alleged associates (and dates and places connected) should be given in reasonable time, and that an adjournment should be granted if accused asks for it to meet the allegations. The notice and the evidence must refer

to the last interval of freedom, and if they do not the conviction will be quashed: *Stockdale,* 11 Cr. A. R. 108, 1915.

Onus] of proof is on the crown; that accused must show that he was leading an honest life is a misdirection: *A. Stewart,* 1910: c. q. So *J. Young,* 78 J. P. 80; 23 Cox C. C. 624; 30 T. L. R. 69; 9 Cr. A. R. 185, 1913. There cannot be a conviction merely because he gives no account of his last interval of liberty: *Webber,* 1913, 1 K. B. 33; 23 Cox C. C. 323; 76 J. P. 471; 8 Cr. A. R. 59, 1912; consequently it is a misdirection to ask the jury to consider whether accused has made up his mind to reform. But the mere fact that he has given no account of his last liberty (five months) does not prevent his conviction: *G. Wilson,* 12 Cr. A. R. 95, 1916.

Evidence for prisoner] The probation officer, if there is one, should be called: *G. Sullivan,* 7 Cr. A. R. 269, 1912: c. q.

Sentence] See *Primary Sentence* under *Term of Sentence.* Sentence on the primary charge should not be pronounced before the trial of the second charge: *E. Turner,* 1909. Where prisoners are young preventive detention should begin as soon as possible: *Taylor, &c.,* 1910: sentences of p. s. reduced to three years'. The usual period of preventive detention is five years: reduced to that from ten in *H. Hamilton,* 9 Cr. A. R. 89, 1913; *Loftus,* 12 Cr. A. R. 238, 1917; but there is no rule of law: *Crowley,* 83 L. J. K. B. 298; 24 Cox C. C. 13; 30 T. L. R. 94; 9 Cr. A. R. 200, 203, 1913, where ten was upheld; *G. Sullivan, ib.* But the maximum should not be imposed except for specific reason: *Beavan,* 12 Cr. A. R. 18, 1916: ten reduced to five. *J. Bennett,* 9 Cr. A. R. 225, 1913, is an instance of no preventive detention being imposed. Cf. *J. Thompson,* 1914.

Where the only evidence of habitual criminality is a previous conviction therefor, it seems that great caution should be exercised: *G. Harris,* 13 Cr. A. R. 190, 1918: c. q. and primary sentence reduced.

HABITUAL DRUNKENNESS.

See *Drunkenness.*

HALL MARKS, FORGERY OF.

See under *Forgery.*

HARES, LARCENY OF.

See under *Animals* and *Game.*

HAY, ARSON OF.

See *Arson*.

HIGH TREASON.

See *Treason*.

HIGHWAYS, NUISANCE, &c. TO.

The great bulk of indictments for nuisance on, in, to or about highways have been against defendants alleged to be liable for repair *ratione tenuræ;* but it is observed in *Short and Mellor's* Crown Office Practice, 2nd ed. (1908), p. 104, *n.* 4: 'the effect of s. 25, sub-s. 2, of the Local Government A. 1894 [56-7 V. 73], is practically to supersede indictments for non-repair of highways by persons liable to repair *ratione tenuræ*, as it empowers the road authority to repair the highway and to recover the cost from the person primarily liable.' So Encyc. Laws Engl., art. Highways (1907): 'In former days* the question of liability *ratione tenuræ* was generally raised and decided on an indictment; now it is more frequently settled by a proceeding under s. 25 (2) of the L. G. A. 1894.' Again, 'The ancient remedy for non-repair of a highway was an indictment of the inhabitants of the parish liable to repair it, and that remedy is still applicable. Modern statutes, however, have provided other and more summary methods of procedure': Local Government, &c., by (Sir R. S. Wright and) *H. Hobhouse*, 4th edn. (1914), p. 69.

It had long been recognised that in this class of cases, though they were in form criminal, they were substantially civil (see, for instance, (L.) *Lindley*, cited p. 246); and on some points accordingly procedure was civil. Thus in *Chorley and another*, 12 Q. B. 575, 1848, after *acquittal*, a rule was made absolute for a new trial on a fresh indictment. So, according to *Glen* on Highways, 2nd edn. (1897), p. 176, 'Pollock C.B., on a doubt being expressed whether an indictment for non-repair could be referred as the proceeding was in form criminal, is reported to have said that the objection was a mere technical distinction, and that in substance and in truth the proceeding was civil: *Wadhurst [Parish of]*, the *Times*, 24th March, 1864.'

See on this case, *Short and Mellor*, as above, at 123; *Blakemore*, 1850, was perhaps not cited in *Wadhurst*.

* When, owing to the limited means of locomotion, the state of the roads was a very grave matter.

Indeed, in *Stephens,* 1866, the crown could not have succeeded had the proceedings been 'strictly criminal,' as Mellor J. pointed out, for there was no *mens rea,* and Field J. spoke of it as 'civil' in *Chisholm* v. *Doulton.*

The Evidence A. 1877, by its language clearly indicates that the legislature regarded such trials as essentially civil—and even more by the provision that the defendant is a *compellable* witness for the prosecution—which would be impossible in a wholly criminal case.

Costs, too, in these cases are to be allowed as in civil proceedings: 8 E. 7, 15, 9 (3).

This theory or view has been greatly promoted by lapse of time and by the exclusion of such cases from the jurisdiction of the Court of Criminal Appeal (by s. 20 (3) of the C. A. A.) and their being assigned to the civil Court of Appeal. Accordingly it has not been thought worth while to deal in a book on *criminal* law with a procedure now practically obsolete.*

Common law nuisances] 'There is no doubt but that all injuries whatever to any highway, as by digging a ditch or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the king's people, are public nuisances at common law. . . . Also it is no excuse for one who layeth such logs . . . that he laid them only here and there, so that the people might have a passage, by windings and turnings through the logs.' Hawk. P. C. I. 76 (pl. 1), 144, 145: the harm must not be too trivial: *Bartholomew* and *Russell,* 1854, below. So erecting a gate across a highway is a nuisance, for it not only interrupts the public in their free and open passage, but it may in time become evidence in favour of the owner of the soil. *Ib.* 75, 9. It is also a nuisance 'to suffer the ditches adjoining to a highway to be foul, by reason whereof it is impaired, or to suffer the boughs of trees growing near the highway to hang over the road in such a manner as thereby to incommode the passage.' *Ib.* 76 (pt. 1), 147; and see 5-6 W. 4, 50, 67; *A.-G.* v. *Waring,* 63 J. P. 789, 1899. Cf. *Walker* v. *Horner,* 1 Q. B. D. 4; 45 L. J. M. C. 4, 1875. 'There can be no doubt that any contracting or narrowing of a public highway is a nuisance; it is frequently, however, difficult to determine how far in breadth a highway extends, as where it runs across a common, or where there is a hedge only on one side of the way, or where, though there are hedges on both sides, the space between them is much larger than what is necessary for the use of the public; in these cases it would be for a jury to determine how far the road extended.' 1 Russ. Cri. 6th edn. 790; *Brownlow* v. *Tomlinson,* 1 M. & Gr. 484, 1840; *Wright,* 1832;

* Probably the spectacle will never be seen in our Courts again like that recorded in the *Inhabs. of Haughton,* 1 E. & B. 503, 1853. In 1787 'came J. H. and T. S., two inhabitants of the said township of Haughton, and on behalf of themselves and the rest of the inhabitants . . . . submitted to' a presentment. So in *Mawbey,* 6 T. R. 620, 1796, 'H. Lee and E. Hammond, two inhabitants of the parish of Windlesham, for themselves and the rest of the inhabitants of the said parish, pleaded Not Guilty to,' an indictment. This system of *representative* defendants was designed to secure the necessary expedition: the individuals were liable to pay 'the whole fine,' contributions to which they might recover at law from others liable: Hawk. P. C. I. 773: Chitty, 3 Cr. L. C. 13 (592): 1825. In *Wilts, Inhabs. of,* 1 Salk. 389; 6 Mod. 307, 1705, Holt C.J. said: 'An attachment may go against the inhabitants of the whole county and catch as many as one can of them.'

London and Birmingham Ry., 1 Railw. C. 317, 1839; *The United Kingdom Electric Telegraph Co.*, 31 L. J. M. C. 166, 1862, whence it seems that, in ordinary cases, where a road runs between fences, not only the part which is maintained as solid road, but the whole space between the fences is to be considered as highway. Now, however, by 27-8 V. 101, 51, any obstruction therein mentioned, which is within fifteen feet of the centre of the highway, may be removed.

Where a waggoner occupied one side of a street, in loading and unloading, for several hours at a time, by night and by day, usually having one waggon at least standing, so that no carriage could pass on that side, this was held to be a nuisance, although there was room for two carriages to pass on the opposite side. *Russell*, 6 East 427, 1805. So excavations made close to a highway are a nuisance. *Barnes* v. *Ward*, 9 C. B. 392, 1850; *Hardcastle* v. *S. Yorkshire Ry.*, 4 H. & N. 67, 1859; *Hounsell* v. *Smyth*, 7 C. B. N. S. 731, 1860; *Hadley* v. *Taylor*, L. R. 1 C. P. 53, 1865. So keeping stage-coaches at a stand in a street plying for passengers is a nuisance. *Cross*, 3 Camp. 226, 1812; *Wilkins* v. *Day*, 12 Q. B. D. 110, 1883; *Attorney-General* v. *Brighton and Hove, &c. Association*, 1900, 1 Ch. 276. So exhibiting effigies at a window, and thereby attracting a crowd. *Carlile*, 6 C. & P. 636, 1834; *Lewis*, Law Times Newspaper, Dec. 17, 1881. Ploughing up a footpath is a nuisance, *Griesly*, 1 Vent. 4, 1669; *Wellbeloved* on Highways, 443, both on the ground of inconvenience to the public, and of injuring the evidence of their title by obliterating the route; but there may be a limited dedication of a footpath subject to the right to plough it up. But where the verdict was that a coffee-stall was 'an obstruction, but that it did not appreciably interfere with the traffic,' the C. for C. C. R. held that this was not the finding of a nuisance: c. q. *Bartholomew*, 1908, 1 K. B. 554; 77 L. J. K. B. 275; 72 J. P. 79; 21 Cox C. C. 556; 24 T. L. R. 238: C. C. R.

Liability for authorising others—servants] Where some defendants were householders, and one defendant was a company (employed by those householders), established to light the streets of a town with gas, and had, without statutory authority, opened a trench in one of the streets to lay down their mains along the middle, and this had been done under contract with the town commissioners for lighting the streets, who exercised their statutory authority to confer on them the right to dig up the soil, &c. for their purposes, and they also had with all necessary consents dug and broken the soil to supply gas to private houses, and it was admitted that they had used reasonable despatch in laying down the pipes and restoring the road, but during the execution of the works the street was impassable, it was held, that inasmuch as the acts of defendants were in no respect done in the necessary or proper use of the highway, they were guilty of a nuisance, and a householder who had employed them was convicted with them. *Longton Gas Company*, 29 L. J. M. C. 118; 8 Cox C. C. 317, 1860: Q. B.; cf. *Ellis* v. *Sheffield Gas Consumers' Company*, 2 E. & B. 767; 18 Jur. 146, 1853. See also *Medley*, 1834, and *Train*, 31 L. J. M. C. 169; 9 Cox C. C. 180, 1862: Q. B.

Rivers, &c.] Where defendant's workmen stacked the refuse of the colliery so as to obstruct a navigable river, it was held that defendant's orders to the contrary and his absence—due to old age—from personal superintendence did not relieve him from liability.

Stephens, L. R. 1 Q. B. 702; 35 L. J. Q. B. 251; 10 Cox C. C. 340, 1866; see Introduction, above, and Appendix, *Agency.*

The obstruction of a navigable river is likewise a public nuisance, as by diverting part of the water, whereby the current is weakened, and made unable to carry vessels of the same burthen as before. Hawk. P. C. 1, 75, 11.

The building of a bridge partly in the bed of a navigable river will be a nuisance if it obstruct the navigation, but not otherwise. *Betts,* 16 Q. B. 1022; 4 Cox C. C. 211, 1850. See also *York and North Midland Ry. Co.* v. *R.* (in error), 7 Railw. Cas. 459, 1852. In *Russell,* 3 E. & B. 942; 23 L. J. M. C. 173, 1854, the jury found that an embankment, 'although a nuisance, was not sufficiently so to render the defendant criminally liable,' on which the judge directed an acquittal, and the Q. B. held, that the jury must be understood as finding that the obstruction in question was so insignificant as not to constitute a nuisance, and refused to disturb the verdict. But if a vessel sink by accident in a navigable river, the owner is not indictable for not removing it. *Watts,* 3 Esp. 675, 1798. Where on an indictment for erecting and continuing piles and planking in a harbour, and thereby obstructing it and rendering it insecure, a special verdict was found, that by these works the harbour was in some extreme cases rendered less secure; it was held, that the defendant was not responsible criminally for consequences 'so slight, uncertain and rare,' and that 'not guilty' must be entered. *Tindall,* 6 A. & E. 143, 1837.

Public benefit] On an indictment for erecting an embankment in a navigable river, viz. the harbour of Cowes, the jury found that the embankment was a 'nuisance,' but was for the public benefit. It was held by the K. B. that this finding amounted to 'guilty,' and that it is no defence that although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port. *Ward,* 4 A. & E. 384, 1836; see *L. Grosvenor,* 2 Stark. 511, 1819; *Morris,* 1 B. & Ad. 441, 1830; *Randall,* Car. & M. 496, 1842; and *Atty.-Gen.* v. *Terry,* L. R. 9 Ch. App. 423; 1873, *per* Jessel M.R. Where the crown has no right to obstruct the whole passage of a navigable river, it has no right to erect a weir to obstruct a part, except subject to the rights of the public, and therefore the weir would become illegal on the rest of the river being so choked that there could be no passage elsewhere. *Williams* v. *Wilcox,* 8 A. & E. 314, 1838. See *The United Kingdom Electric Telegraph Co.; Train,* above; and this title under *Nuisance.*

Statutory authority—railways] By an A. reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest, &c., power was given to a company to make such railway according to a plan, &c. By a subsequent A. the company or persons authorised by them were empowered to use locomotives. The railway was made parallel and adjacent to an ancient highway, at some points within five yards of it. It did not appear whether or not the line could have there been made at a greater distance. The engines frightened the horses on the highway. On an indictment it was held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorising the use of

the engines were *unqualified*. *Pease*, 4 B. & Ad. 30, 1832; *Canadian Pacific Ry. Co.* v. *Roy*, 1902, A. C. 220; 71 L. J. P. C. 51.

But where a railway company are authorised by A. to obstruct roads only on conditions which they have not performed, they may be indicted for a nuisance on the old highway. *Scott*, 3 Q. B. 543, 1842, where Maule J. laid it down that the company were not bound to go to an enormous disproportionate expense to secure absolutely the same convenience as before, if the difference was slight, and left the point to the jury; cf. *Bartholomew, &c.*, above; and see *Rigby*, 14 Q. B. 687, 1850.

So also where water authorities or others interfere lawfully with the highway, they are bound to see that they do not create a nuisance. *White* v. *Hindley*, L. R. 10 Q. B. 219; 44 L. J. Q. B. 114, 1875; *Blackmore* v. *Mile End Old Town*, 9 Q. B. D. 451; 51 L. J. Q. B. 496, 1882; *Thompson* v. *Brighton, Mayor of*, 1894, 1 Q. B. 332; 63 L. J. Q. B. 181; 58 J. P. 297; C. A. Cf. *Longton Gas Co.*, above, and *Hill* v. *Met. As. Manrs.*

Where an A. authorises alterations, they must be made with reasonable care, and a nuisance must not be kept up an unreasonable time; otherwise the contractor is liable to be indicted for obstructing the highway. *Burt*, 11 Cox C. C. 399, 1870.

Numbers walking abreast] If 'roughs and rowdies annoy respectable people' this way they may be indicted for a nuisance: *per* Field J., *Long, &c.*, 52 J. P. 630; 59 L. T. 33, 1888.

Necessity] It not unfrequently becomes a question, whether an obstruction is justifiable by the necessity of the case, as when it occurs in the usual and necessary course of any one's lawful business. A timber-merchant occupied a small yard close to the street, and owing to its smallness he was obliged to deposit logs in the street, and to saw up there. L. Ellenborough said, 'If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway, but this must be done with promptness. So of the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. . . . He is not to eke out the inconvenience of his own premises by taking the public highway into his timber yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business.' *Jones*, 3 Campb. 230, 1812; *Fritz* v. *Hobson*, 14 Ch. D. 542; 49 L. J. Ch. 321, 1880. So although a person who is rebuilding a house is justified in erecting a hoarding in the street, which serves as a protection to the public, yet if it encroach unreasonably on the highway, it is a nuisance: *per* Eyre C.J. in *Bush* v. *Steinman*, 1 Bos. & Pul. 404, 1799; and *per* Cockburn C.J. in *Longton Gas Co.*, above; cf. *Russell*, 1854. Cf. *Hoare* v. *Kearley*, 1 T. L. R. 426, 1885.

HOMICIDE.

Homicides which are felonies are *murder* and *manslaughter*.

Homicides not felonious may be divided into three classes: justifiable, excusable, and by misadventure. See 4 Bl. Comm. 201, under *Murder* (*Malice*).

Justifiable homicide 'must arise from an imperious duty prescribed by law, or be owing to some unavoidable necessity induced by the act of the person killed, without any manner of fault in the party killing.' 1 East P. C. 219; Hawk. P. C. 1, 28, 1, 22. One instance is the killing by a gaoler of a prisoner attempting to escape from lawful custody. East 330; Hawk. *ib.* ss. 11, 13; cf. s. 17.

Homicide is 'only *excusable* where the party killing is not altogether free from blame, but the necessity which renders it excusable may be said to be partly induced by his [deceased's] own act.' East 220; if the blame is of a 'trivial' nature: 1 Russ. Cri. 808. Formerly it was the practice for the jury to find the fact specially, and on certifying the record into chancery, a pardon issued of course, under 6 E. 1, the rpd. statute of Gloucester, c. 9 (1278), and forfeiture was thereby saved. But latterly it was usual for the court to direct the jury to find defendant not guilty. East, *ib.* Self-defence—*se et sua defendendo*—is the commonest excuse under this head.

Self-defence] By 24-5 V. 100, 7, 'No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony.'

Chance-medley] 'The ancient legal notion of homicide by *chance-medley** was when death ensued from a combat between the parties upon a sudden quarrel; but it has since been frequently confounded with misadventure or accident.' *Ib.* 221. Thus in *Chichester*, 1671, the court refused to accept the verdict of *chance-medley*.

'Homicide by *misadventure* is when a man doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. . . . The act upon which the death ensues must be lawful in itself; for if it be *malum in se*, the case will amount to felony, either murder or manslaughter, according to the circumstances. If it be merely *malum prohibitum*, as shooting at game by an unqualified person, that will not vary the degree of the offence. The usual examples under this head are—1st, where death ensues from innocent recreations; 2ndly, from moderate and lawful correction *in foro domestico;* and, 3rdly, from acts lawful or indifferent in themselves, done with proper and ordinary caution.' East P. C. 221, who says that the history of the *verdict* was the same as in excusable homicide. See further on these points, *Manslaughter*.

* This name is understood by the *New English Dictionary* as 'mixed or mingled chance or casualty,' but Maitland, 1 Collected Papers 320, has no doubt that it is a corruption of *chaude mêlée*.

HORSES, LARCENY, &c. OF.

See *Cattle*. See also *Dangerous Animals* in Index.

HOUSES—BREAKING, DEMOLISHING, INJURING, &c.

See *Burglary, Dwelling-house, Riot*.

HUSBAND AND WIFE—CRIMES BY ONE AGAINST THE OTHER.

For crimes of violence, see *Spouses as Witnesses*.

For larceny, see that title. On ss. 12, 16, of 45-6 V. 75 (practically repeated in s. 36 of the Larceny A. 1916), Mr. Eversley (Domestic Relations, 3rd ed., 1906, p. 251 *n.*) says, 'It does not seem necessary to confine criminal proceedings under these sections to simple larceny; but charges involving obtaining money or chattels under false pretences, or larceny by a trick, might well be preferred, for they are all offences concerning property, and seem to be within the mischief of this section.'

The same reasoning, it is submitted, would apply to arson, forgery, and other offences with respect to property.

In *March*, 1828, the judges thought the conviction of a wife, living apart, for arson with intent to injure her husband's property was wrong, because she was 'identified' with him, but there seems no doubt that if a wife burned a husband's house with intent to defraud an insurance office, she could be convicted. So, it is submitted, if she defrauded *others* by forging his name, she could be convicted, but not—apart from statute—if she defrauded him. *March* seems to be the only case on the point.

IDIOTS, OFFENCES AGAINST.

For 'idiot' at common law, see *Incompetency of Witnesses.*
For 'defectives' generally, see Appendix, *Mental Unsoundness.*
For sexual offences against females, see under *Rape.*

ILLEGAL PRACTICES.

See under *Bribery.*

IMPRISONMENT, ILLEGAL.

See *False Imprisonment.*

INCEST.

The Punishment of Incest A. 1908, 8 E. 7, 45, is:—

1.—(1) Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother, shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour: Provided that if, on an indictment for any such offence, it is alleged in the indictment and proved that the female person is under the age of thirteen years, the same punishment may be imposed as may be imposed under section four of the Criminal Law Amendment Act, 1885 (which deals with the defilement of girls under thirteen years of age).

(2) It is immaterial that the carnal knowledge was had with the consent of the female person.

(3) If any male person attempts to commit any such offence as aforesaid, he shall be guilty of a misdemeanour, and upon conviction thereof shall be liable at the discretion of the court to be imprisoned for any time not exceeding two years with or without hard labour.

(4) On the conviction before any court of any male person of an offence under this section, or of an attempt to commit the same, against any female under twenty-one years of age, it shall be in the power of the court to divest the offender of all authority over such female,

and, if the offender is the guardian of such female, to remove the offender from such guardianship, and in any such case to appoint any person or persons to be the guardian or guardians of such female during her minority or any less period:

Provided that the High Court may at any time vary or rescind the order by the appointment of any other person as such guardian, or in any other respect.

2. Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother, or son, as the case may be) shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years.

3. In this Act the expressions 'brother' and 'sister,' respectively, include half-brother and half-sister, and the provisions of this Act shall apply whether the relationship between the person charged with an offence under this Act and the person with whom the offence is alleged to have been committed, is or is not traced through lawful wedlock.

4.—(1) An offence under this Act shall be deemed to be an offence within, and subject to, the provisions of the Vexatious Indictments Act, 1859, and any Act amending the same.

(2) A court of quarter sessions shall not have jurisdiction to enquire of, hear, or determine any indictment for an offence against this Act, or for an attempt to commit any such offence.

(3) If, on the trial of any indictment for rape, the jury are satisfied that the defendant is guilty of an offence under this Act, but are not satisfied that the defendant is guilty of rape, the jury may acquit the defendant of rape and find him guilty of an offence under this Act, and he shall be liable to be punished accordingly.

If, on the trial of any indictment for an offence under this Act, the jury are satisfied that the defendant is guilty of any offence under sections four or five of the Criminal Law Amendment Act, 1885, but are not satisfied that the defendant is guilty of an offence under this Act, the jury may acquit the defendant of an offence under this Act and find him guilty of an offence under sections four or five of the Criminal Law Amendment Act, 1885, and he shall be liable to be punished accordingly.

(4) Section 4 of the Criminal Evidence Act, 1898, shall have effect as if this Act were included in the schedule to that Act.

5. All proceedings under this Act are to be held in camera.

6. No prosecution for any offence under this Act shall be commenced without the sanction of His Majesty's Attorney-General, but this section shall not apply to any prosecution commenced by or on behalf of the Director of Public Prosecutions.

An offence found under s. 4 (3) obviously is not within s. 6.

Evidence of similar acts] The only date alleged being Nov. 9th, an amendment was allowed to March 15th, which made the alleged paternity possible, and the direction to the jury alluded to more than one offence; the conviction was upheld on the ground that there was no miscarriage of justice: *A. Allen*, 4 Cr. A. R. 181, 1910. That such evidence is admissible was finally established in *Ball*, 1910, which

see. The reason of the House of Lords was that the evidence of earlier acts tended to prove that the parties had gratified a mutual passion, and that this was relevant to the charge and to rebut the defence that the relations proved were innocent.

It seems, on principle, that *subsequent* similar acts are equally admissible: *A. E. Stone,* 1910.

Accomplice] If one of the parties consents, he or she becomes an accomplice and must be corroborated: *Stone,* above: c. q. See *Accomplices.* The jury must be directed on this point. Even if the female is not an accomplice there should be a caution on the need of corroboration, if her character is not good: *B. Brown,* 1910: c. q. Cf. *B. Brown,* 1911. Such a caution should be given when the evidence of the witness who may be an accomplice relates to acts not indicted but similar to which the witness is a party: *Bloodworth.* Medical evidence of facts not otherwise accounted for may be corroboration: *W. H. Cooper,* 1914. Mere submission does not make complicity; there must be permission: *Dimes,* below.

Indictment for rape] A verdict under s. 4 (3), above, does not imply that the female is an accomplice: *Dimes,* 7 Cr. A. R. 43; 76 J. P. 47, 1911.

Indecent assault] may be found under s. 4 (3), above, as it may be found under the s. 4 therein mentioned, under which by s. 9 of 48-9 V. 69, indecent assault may be found: *Simmonite,* 1916, 2 K. B. 821; 86 L. J. K. B. 15; 115 L. T. 616; 25 Cox C. C. 544; 12 Cr. A. R. 142.

Sentence] Seven years' p. s. was reduced to three, in view of the state of the home: *Keats,* 9 Cr. A. R. 214, 1913.

INCITING TO CRIME.

To murder] See *P. P. Shephard*, 1919.

In so far as the inciter is an accessory, see *Aiders, &c.*, and *Gregory*, 1867, thereunder. 'The gist of the offence . . . is that the person incited has not committed the crime': 1 Russ. Cri. 203. Thus, to solicit a servant to steal his master's goods is a misdemeanour and as tending to a breach of the peace, is triable at quarter sessions, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. *Higgins*, 2 East 5, 1801, where it was even suggested that in certain cases incitement to commit a felony may be a felony. 'All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community are indictable,' *ib.* 21. So an *endeavour* to provoke another to send a challenge to fight (especially by sending an insulting letter) has been held to be a misdemeanour. *Philipps*, 6 East 464, 1808; see *Challenging*. So to 'incite or even solicit another person to commit a felony or to do any act with intent to induce another person to commit' a felony is a misdemeanour. *Ransford*, 13 Cox C. C. 9, 1874: C. C. R., where the recipient of a letter inciting to sodomy had not even read it: 'On which,' it is observed, 'every person who solicits or attempts to solicit a person to . . . sodomy is guilty of a misdemeanour at common law': 9 Halsbury 541: triable at Q. S. For statute, see *Sodomy*, and *Allen*, 1848, *ib. Williams*, 1844, was clearly an incitement indictable at common law; see *Higgins*, 1801. For 'traps' by officials, &c., see under *Accomplices* and *Bannen*. Defendant, who was editor of a London newspaper written in German, was convicted of publishing an article intending, by approving the recent assassination of the Czar of Russia, to encourage, &c. persons to commit murder, and it was held that the conviction under 24-5 V. 100, 4, and for libel was right although the encouragement was not addressed to any person in particular. *Most*, 7 Q. B. D. 244; 50 L. J. M. C. 113; 14 Cox C. C. 583, 1881: C. C. R. *Antonelli*, 70 J. P. 4, 1905, followed *Most*, where it was held that 'the sovereigns and rulers of Europe' were a sufficiently definite class to support the indictment. Defendant indicted for soliciting and inciting a servant to conspire with him to cheat and defraud his master was rightly convicted where it was proved that he had offered a bribe to the servant to sell the master's goods at less than their proper value. *De Kromme*, 17 Cox C. C. 492; 56 J. P. 682; 66 L. T. 301, 1892: C. C. R. L. Coleridge C.J. compared the point to that in *Kenrick*, 1843.

All *Challenges* (which see) are incitements: 1 Russ. Cri. 440.

Mutiny] See that title.

37 G. 3, 70, 1, is: 'Any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces, by sea or land, from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons, to commit

any act of mutiny, or to make, or endeavour to make, any mutinous assembly, or to commit any traiterous or mutinous practise whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony. . . .' Not triable at Q. S.

The indictment need not specify any particular soldier, &c. tampered with. *Bowman,* 22 Cox C. C. 729; 76 J. P. 721, 1912, where an 'open' letter was published in a paper: the jury must consider whether such a publication is 'addressed' to soldiers.

By s. 2: 'Any offence committed against this Act, whether committed on the high seas or within that part of Great Britain called England, shall and may be prosecuted and tried before any court of oyer and terminer, or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if the said offence had been therein committed.'

By s. 1 of 7 W. 4 & 1 V. 91, which recites 37 G. 3, 70, and other statutes: 'If any person shall, after the commencement of this Act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable . . . to be transported beyond the seas for the term of the natural life of such person. . . .'

Nevertheless, by 29-30 V. 109, Naval Discipline A., 12: 'Every person subject to this Act [see *Mutiny*] who shall endeavour to seduce any other person subject to this Act from his duty or allegiance to her Majesty or endeavour to incite him to commit any act of mutiny shall suffer death or such other punishment as is hereinafter mentioned.' By s. 13, 'every person not otherwise subject to this Act,' *i.e.* civilians, so offending are liable as in s. 12. By s. 14, persons subject to the Act who 'lead or incite any other person to join in any mutinous assembly' are liable as in s. 12. The corresponding enactment for the army is 44-5 V. 58, 7.

Trading with the enemy] Where there was no evidence of intention to obtain a licence within 4-5 G. 5, 87, a conviction for 'inciting' to transgress that A. by business proposals was upheld: *Spencer,* 84 L. J. K. B. 145; 112 L. T. 479; 11 Cr. A. R. 30, 1914.

Official Secrets A. 1911] By s. 4, incitement, &c. to commit an offence against this A. is a felony or a misdemeanour according as that offence is and is liable to the same punishment.

Inciting to a breach of the peace] is not, apparently, indictable, but it is not an essential element of that offence that any individual should be put in fear: *Lansbury* v. *Riley,* 1914, 3 K. B. 229; 23 Cox C. C. 582: K. B. D.

Perjury] See 1-2 G. 5, 6, 7, and *Subornation.*

Post Office offences] See that title.

INCORRIGIBLE ROGUES.

Though not triable on indictment, these cases are appealable by s. 20 (2) of Criminal Appeal A. in respect of sentence (*not* conviction): *W. J. Brown,* 1 Cr. A. R. 85; 72 J. P. 427, 1908. Defendants cannot claim a jury: *T. Evans,* 24 Cox C. C. 138; 83 L. J. K. B. 905; 10 Cr. A. R. 53, 1914. In addition to the imprisonment before sentence, Q. S. may impose a year's imp. w. h. l.

Vagrancy Acts, 1824 *and* 1898] 5 G. 4, 83, 5, 10; 61-2 V. 39, 1 (1), (3).

Whipping may be inflicted on a male. This seems to be an unique instance of one court convicting and another sentencing. The following cases have been decided by the C. C. A.

It is a condition precedent of conviction by Q. S. that the previous conviction as a 'rogue and vagabond' should be expressly recorded; that as an 'idle and disorderly person' is insufficient: *W. Johnson,* 1909, 1 K. B. 439; 78 L. J. K. B. 290; 73 J. P. 135; 25 T. L. R. 229; 2 Cr. A. R. 13. Nor can Q. S. convict of being 'incorrigible' though there are two qualifying convictions: *T. Evans,* 1915. Two offences within the 1898 A. or one within that and one within the 1824 A. justify conviction as an 'incorrigible': *Herion,* 1913, 1 K. B. 284; 82 L. J. K. B. 82; 77 J. P. 96; 23 Cox C. C. 387; 29 T. L. R. 93; 8 Cr. A. R. 99.

Alternative procedure under Cr. L. Am. A. 1912] See *Living on Immoral Earnings.*

See also under *Prison-Breach.*

Sentence] See *E. Edwards,* 1909, and (the same defendant *alias*) *J. O'Brien,* 2 Cr. A. R. 193, 1909. In *G. Lewis,* 4 Cr. A. R. 52, 1910, the maximum term was approved for begging, but in *W. Cooper,* 1910, for the same offence, it was reduced to half. The flogging was remitted in *O. Fidler* (not supporting wife, &c.). The detention before sentence, being with hard labour, must be taken into account. *Gillon.*

Costs] By 8 E. 7, 15, 9 (4), that A. applies as if the offence were indictable.

INDECENCY.

See that title, *Sodomy*, and under *Nuisance*.

INDECENT ASSAULT.

See under *Assault*.

INDECENT PUBLICATION.

See *Obscene, &c.*

INDIA, OFFENCES IN.

Jurisdiction] By s. 127 (1) of 5-6 G. 5, 61 (Government of India A. 1915): 'If any person holding office under the Crown in India commits any offence under this Act, or any offence against any person within his jurisdiction or subject to his authority, the offence may, without prejudice to any other jurisdiction, be inquired of, heard, tried and determined before His Majesty's High Court of Justice and be dealt with as if committed in the county of Middlesex.

(2) Every British subject shall be amenable to all courts of justice in the United Kingdom of competent jurisdiction to try offences committed in India for any offence committed within India and outside British India as if the offence had been committed within British India.' By s. 129, in addition to any other punishment, the offender may 'be adjudged to be incapable of serving the Crown in India in any office, civil or military.'

Misdemeanours] The offences in question by any one holding office under the Crown in India are enumerated in s. 124, viz.: (1) oppression of any British subject; (2) wilful disobedience to the orders of the Secretary of State; (3) breach of trust or duty of his office; (4) trading by certain high officials; (5) 'if he demands, accepts or receives by himself or another in the discharge of his office, any gift, gratuity or reward, pecuniary or otherwise, or any promise of the same, except in accordance with such rules as may be made by the Secretary of State as to the receipt of presents and except in the case of fees paid or payable to barristers, physicians, surgeons and chaplains in the way of their respective professions' . . . 'and if he is convicted of having demanded, accepted or received any such gift, gratuity

or reward, the same or the full value thereof shall be forfeited to the Crown, and the court may order that the gift, gratuity or reward, or any part thereof, be restored to the person who gave it, or be given to the prosecutor or informer, and that the whole or any part of any fine imposed on the offender be paid or given to the prosecutor or informer, as the court may direct.'

By s. 126 (1), another misdemeanour is carrying on 'mediately or immediately any illicit correspondence dangerous to the peace or safety of any part of British India, with any prince, chief, landholder or other person having authority in England, or with the commander, governor or president of any foreign European settlement in India, or any correspondence contrary to the rules and orders of the Secretary of State or of the Governor-General in Council or a Governor in Council.'

For procedure in England, see under *Depositions*.

By s. 125, if any European British subject lends money or any valuable thing directly or indirectly to any prince or chief he commits a misdemeanour within the A.

The same jurisdiction and procedure are provided by 42 G. 3, 85.

INFANTS, OFFENCES AGAINST AND BY.

See Index.

INFECTIOUS DISEASE, NUISANCE FROM.

See *Nuisance*.

INJURY, CRIMINAL.

See *Malicious Injury*.

INTIMIDATION.

See under *Conspiracies in Restraint of Trade* and in Index.

INVITING INFANTS TO BET OR TO BORROW.

See *Betting* and *Borrowing Money*.

JESUITS—OFFENCES BY.

By 10 G. 4, 7 (Roman Catholic Relief A. 1829), 34: 'In case any person shall . . . within any part of this United Kingdom be admitted or become a Jesuit or brother or member of any other such religious order, community or society as aforesaid,' *i.e.* in s. 28, 'of the church of Rome, bound by monastic or religious vows,' not being females (s. 37), he is guilty of a misdemeanour, and on conviction *must* be banished for life from the United Kingdom; there are other penalties against such persons coming into, or after sentence remaining in, the country, &c. (after three months, transportation for life). The Secretary of State, if a Protestant, may grant a licence of sojourn for six months at most. Where a metropolitan magistrate refused on an information by a common informer disclosing a *primâ facie* case under this s. on the ground that there never had been any prosecution under it, and that it and other ss. of the A. were 'practically obsolete,' and that now any prosecution ought to be commenced by the crown, the K. B. D. refused a *mandamus* to him to hear the summons because he had exercised his discretion not 'on improper and extraneous grounds,' and, therefore, the court had no jurisdiction. *Kennedy,* 20 Cox C. C. 230; 86 L. T. 753, 1902. But they held that a common informer could prosecute. No other case is known. It is doubtful whether this offence is triable at Q. S.

JURY, UNDUE INFLUENCE ON.

See *Embracery.*

JUSTICE. INTERFERENCE WITH ADMINISTRATION OF.

See *Perversion, &c.*

KEEPING BETTING AND OTHER HOUSES.

See under *Nuisance.*

KNACKERS, OFFENCES BY.

By 26 G. 3, 71, 8 (rpd. for London), slaughtering horses or cattle 'for any other purposes than butcher's meat,' or flaying them when brought dead, except in a *licensed* place, and certain offences connected therewith, are made felonies, punishable by fine, imprisonment and whipping (or transportation for seven years at most).

By s. 9, hiding, &c. the hides or skins of such animal is a misdemeanour.

LARCENY.

The long history of the English law of larceny may be conveniently found in 3 *Stephen*, Hist. Cr. Law (1883), whence it appears (p. 141) that after the time of Coke and Hale 'the main outline of the' *common law* 'may be considered as having been fixed. . . . Its principles have never been varied down to the present day.' A very large number of statutes or parts of statutes were repeated in 1827 by 7-8 G. 4, 27, beginning with the *Charta Forestae*, 'a charter or statute made in' 1225, and on the same day was passed a consolidating A., 7-8 G. 4, 29, now repealed.

It will be found convenient to have a definition of *Trespass:* 'in its largest and most extensive sense [it] signifies any transgression or offence against the law of nature, society or of the country in which we live; whether it relates to a man's person or his property': 3 Bl. Comm. 208, cited 27 Halsbury 844, who emphasises that it 'is a wrongful act of *commission*' as 'A mere act of omission cannot be a trespass: *Six Carpenters' Case*, 1610' (8 Rep. 146 a). Sir F. Pollock, Torts, 9th ed. p. 9, cites *Entick* v. *Carrington*, 19 St. Tr. 1066 [1765]: 'By the laws of England every invasion of private property be it ever so minute is a trespass: *per cur.*' See below under *Mistake*.

The *word* is not defined, but 'definition' is in the margin of s. 1 of 6-7 G. 5, 50, Larceny A. 1916, which runs: 'For the purposes of this Act—(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof: Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner:

(2)—(i) The expression 'takes' includes obtaining the possession—(*a*) by any trick; (*b*) by intimidation; (*c*) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; (*d*) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps;

(ii) the expression 'carries away' includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached;

(iii) the expression 'owner' includes any part owner or person having possession or control of, or a special property in, anything capable of being stolen.'

(3) Set out under *Animals* and *Fixtures*.

Simple larceny] By s. 2: 'Stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and a felony punishable with penal servitude for any term not exceeding five years, and the offender, if a male under the age of sixteen years, shall be liable to be once privately

whipped in addition to any other punishment to which he may by law be liable.'

'Simple larceny' is opposed by Hale, 1 P. C. 503, to 'larciny accompanied with violence or putting in fear, which is called robbery' (which title see); the former is 'plain theft unaccompanied with any other atrocious circumstance; . . . *mixed* or *compound* larciny . . . also includes in it the aggravation of a taking from one's house or person': 4 Bl. Com. 229; cf. *Thomson*, 1795; see *Venue*, below; robbery is 'open and violent larciny from the person': *ib.* 243; when there is no putting in fear it is 'barely larceny from the person': Hawk. P. C. I. 34 (which see under *Robbery*). 'Simple larceny' seems to occur first in a statute in rpd. 7-8 G. 4, 29, 2; 'the expression . . . has no definite meaning': *Stephen*, 3 Hist. Cr. L. 147 [1883]. This is now not true, but the term in this A. is not happy, for ss. 5, 11 and 16 (*b*) all enact maximum sentences less than s. 2, and s. 5 only deals with a misdemeanour. The expression in the earlier statutes meant the common law offence, but larceny is now a purely statutory offence. The 'stealing' which 'amounts to a felony . . . at common law' in s. 91 (rpd.) of the 1861 A. means 'simple larceny.'

Terms] By the Larceny A., 6-7 G. 5, 50, 46 (1): 'The expression 'document of title to goods' includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought or sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to:

The expression 'document of title to lands' includes any deed, map, roll, register, paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title or any part of the title, to any real estate, or to any interest in or out of any real estate.'

'The expression 'property' includes any description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.'

These expressions are still defined almost identically in the Larceny A. 1861, s. 1.

Property and possession] By far the most authoritative and fullest account of theft in English law is in *Possession in the Common Law*, Part III. by R. S. Wright (afterwards Wright J.), and Parts I. and II. by F. Pollock, cited here as 'W.' and 'P.' respectively. See the introductory remarks under *Embezzlement* and *Obtaining by False Pretences*. The passage in the *former* from W. continues: 'The possession which is violated [in larceny] may be that of a person who has no right of ownership and no right to the possession.' In s. 2, *ib.* he remarks: 'It is necessary to observe that there are numerous cases in the year books and old writers in which the word 'property'

is used to signify possession; and property is attributed alike to the owner, the bailee, and the trespasser, and the owner is said to lose the property by a delivery or taking.' 'The crime [theft] involves a violation of possession; it is an offence against a possessor, and therefore can never be committed by a possessor.' *Pollock and Maitland,* 2 History, Bk. 2, ch. 8, s. 2, p. 496. The former of these learned writers thus applies the principle of possession to larceny: 'Notwithstanding first appearances the common law has a theory of possession, and a highly elaborated one . . . we have to bear in mind that it must be known who is in legal possession of any given subject of property, and who is entitled to possess it, before we can tell what wrongs are capable of being committed, and against whom, by the person having physical control over it or by others. Legal possession does not necessarily coincide either with actual physical control or the present power thereof (the 'detention' of continental terminology), or with the right to possess (constantly called 'property' in our books); and it need not have a rightful origin. The separation of detention, possession in the strict sense, and the right to possess, is both possible and frequent. A. lends a book to B. gratuitously, and not for any fixed time, and B. gives the book to his servant to carry home. Here B.'s servant has physical possession, better named custody or detention, but neither legal possession nor the right to possess. B. has legal and rightful possession, and the right to possess as against every one but A., while A. has not possession, but has a right to possess which he can make absolute at any moment by determining the bailment to B., and which the law regards for many purposes as if it were already absolute. As to an actual legal possession (besides and beyond mere detention) being acquired by wrong, the wrongful change of possession was the very substance of disseisin as to land, and is still the very substance of trespass by taking and carrying away goods (*de bonis asportatis*), and as such it was and is a necessary condition of the offence of larceny at common law.' The Law of Torts, 9th ed., ch. 9, pp. 352-4.

The key to many cases may be found in the remark, *ib.* p. 352, 'the rights of a possessor or one entitled to possess have all but monopolized the very name of property.' Further, it must be specially remembered of

Custody as against wrongdoers] 'against a mere wrongdoer custody is always *primâ facie* evidence of possession': P. p. 59; 'a person physically or apparently in possession is deemed to be in possession until it is shown that another person is in point of law in possession: and the apparent possession is deemed a rightful one as against strangers or wrongdoers': W. 158. How far this is true of a *servant's* custody, see W. p. 139, cited below under *Servants* and *Carriers.*

The property as laid] Many cases turn on this element of the indictment, but with the growing simplicity of pleading culminating in the Indictments A. 1915—see especially R. 6 (1), the only object of which is to *identify* the property (on the assumption that it is somebody's: see *W. White,* 1912)—and with the practically unlimited power of *amendment* now existing the value of those decisions has been reduced to an illustration of the principles of *possession,* and are retained, *e.g. More than One Taking,* below, only for that purpose.

At common law, 'If' one 'has got the goods lawfully into his possession before the intention of depriving the owner of them is formed, there is no larceny': *per* Cave J., *Ashwell.*

The taking] It is convenient to discuss this after *Intent.*

Intent—animus furandi] is thus analysed by W. p. 223:

(i) 'the intention of deprival and appropriation, which seems to be identical in character (though it may differ as to finality) with the actual or implied intention which enters into a civil conversion';

(ii) 'this intention must be wrongful in the sense that there must be a knowledge that the deprival and appropriation will be a deprival of the owner against his will and in the sense that there must not be a real claim of right.'

Lucri causa] This element need not exist, 'except in so far as it may be involved in the other ingredients of the *animus furandi*': *ib.* 'It is conceived that at least in the case of theft against a general owner . . . *lucri causa* is immaterial, and that motive does not form any ingredient of the definition of theft.' *Ib.* p. 228.

Thus in *Cabbage,* R. & R. 292, 1815, defendant undoubtedly took and killed a horse, but he did it clearly to screen a friend, who was in custody for having previously stolen it. Six judges held a conviction for stealing right, because taking *lucri gratia* is not essential to larceny, though some thought the service to the friend was *lucrum* (to the thief); the fraudulent taking with intent wholly to deprive the owner of his property was enough; but five judges thought the conviction wrong. A similar case was *E. Jones,* 1 Den. C. C. 188, 1846, where a servant, after her discharge, applied at the post-office and received her master's letters; she delivered all but one to her master, and that one she destroyed, with a view of suppressing inquiries with reference to her character. This was held by all the judges present but one to be larceny; they did not admit the doctrine of *lucri gratia,* but said the suppression was sufficient *lucrum.*

(i) *Deprival, &c.*] W. proceeds: '1. *The character or quality* ['in many cases hardly to be distinguished' from 2. 'its intended finality']. There need not be any intention physically to deprive the owner of the thing or even to take it for so much as a moment out of his presence or premises. Thus it suffices if a servant remove his master's goods merely from one part of his shop to another, intending to offer them to him for sale [*Hall,* 1848; *Manning,* 1852], or wrongfully put the master's axle into the master's own furnace in order to melt it [*Richards,* 1844; cp. *Webb,* 1835, 1 Moo. 431; *Poole,* 1857]; for it is as effective a deprivation of him to make him pay the value of his own goods or to destroy the character of his axle as to run away with them.

So, on the other hand, there need not be any intention to keep or use the thing even for a moment for the accused's own use, unless in the most technical sense of use. Thus it may suffice if his intention is merely to give the thing away [*White,* 1840, 9 C. & P. 344], or instantly to destroy it [*Cabbage,* above], or even to apply it wrongfully to the master's own use [*Morfit, Privett, Handley,* below], as in the case of a groom giving too much corn to his master's horses. . . . It seems somewhat doubtful whether an intention to exact a reward from an owner as the condition of restoring to him a thing which he has lost is sufficient [*Wynne,* 1786; *Peters,* 1843; *York,* 1848; *Gardner,* 1862]. It would seem that an original intention to keep the thing in all events unless a reward shall be given would

comprise every technical requirement for this part of an *animus furandi*, but that a mere intention to detain it for a greater or less time in the hope of a reward being offered would not be sufficient, especially if there were no proof of an intention to require an exorbitant reward. [Cf. *Watts*, 1844, 1 Cox C. C. 349, where the question was suggested but not decided whether it would be sufficient [to constitute larceny] to obliterate [owner's] marks on wreck [stranded on the shore and appropriated] with intent to obtain salvage under the old law].'

The *permanence* to which W. refers is now provided for in the *Definition*, s. (1), above.

This, like every other intent, is to be inferred from the mode in which the accused deals with the thing. It will, however, be a general presumption that where one takes wrongful possession of the goods of another, his intention is to steal them, and the *onus* will lie upon him to prove the contrary. If a man carries away the goods of another openly ('otherwise than by apparent robbery'), before him or others, this carries with it evidence of being a trespass only. 1 Hale P. C. 509. *Animus furandi* is, however, a question for the jury, and not for the bench, who cannot draw an inference of fact from their finding. *Farnborough.* A servant, taking his master's horse to ride 'about his own occasions' is not guilty of larceny if he returns again. Hale, *ib.* Defendants were charged with stealing two horses: they went in the night to an inn, took a horse and mare from the stable, and rode about thirty-three miles to a place where they left them in the care of ostlers, saying that they should return. They were apprehended on the same day about fourteen miles off. The jury found them guilty, but added that they were of opinion that they merely meant to ride the horses to the place where they left them, and to leave them there; and that they had no intention either of returning them or making any further use of them. The judges, by a large majority, held that, on this finding, it was a trespass only, and not a larceny, but they all agreed that it was a question for the jury, and that, if the jury had found a general verdict of guilty on this evidence, it could not have been questioned. *Philipps*, East P. C. 662, 1801. So where defendant indicted for stealing a horse, two saddles, &c., had got into stables and taken away the horse and other articles altogether, but, when he got some distance, had turned the horse loose, and proceeded on foot with the saddles, &c., Garrow B. left it to the jury to say, whether he had any intention of stealing the *horse;* for, if he intended to steal the other articles, and only used the horse as a mode of carrying off the plunder more conveniently, he would not be guilty of larceny of the horse. *Crump*, 1 C. & P. 658, 1825; not guilty of stealing the horse. On the same principle, where defendant, who was indicted for stealing a straw bonnet, &c., had entered the house where the articles were, through a window which had been left open, and took things which belonged to a girl with whom he had relations, and carried it to a hay-mow of his own (where they met), the jury thought that he wanted to induce the girl to go thither again, but that he did not intend to deprive her of the bonnet, &c., and this was held not to be larceny. *Dickinson*, R. & R. 420, 1820.

It is not necessary that defendant should intend to appropriate the goods to his own benefit; it is sufficient if he intends to deprive the owner of his property in them, and in the words of Parke B. in

Holloway, below, 'to take the entire dominion over' them. So *Cabbage* and *Jones*, 1846.

For servants' intent, see below, *By servants.*

W. proceeds:

2. '*Intended finality of the deprival*] The English law does not follow the rule . . . that an intention of mere misuse or of temporary deprival is sufficient for theft; but it requires an intent of final deprival and appropriation. Thus, if the jury believe that the accused took a horse with the intention of using it for a time and then returning it, they cannot in general find him guilty of theft by that taking; and there seems to be no limit in English law to the length or extent of use or misuse which a man may mean and carry out in such a case without being guilty of theft, so long as he intended to return the thing, except the difficulty of convincing the jury of that intention [*Philipps*, 1801; *Dickinson*, 1820, above]. There are, however, some dicta on which an argument might be founded to the effect that if the accused took the horse for such use or even used it in such a manner as would probably result in its destruction or loss to the owner an intention to cause such destruction or loss might be inferred. And where the purpose to which the thing is intended to be applied is of itself an exercise of complete ownership and will, when effected, put it out of the power of the accused to return the thing except upon the happening of some contingency, as where a person improperly takes plate and pawns it, intending at some future time to redeem and restore it, the conclusion of an intent of final deprival and appropriation can hardly be negatived except by proof of ability or at least of reasonable belief of ability as well as intent to redeem and restore [*Phetheon*, below; *Medland*, 5 Cox C. C. 292, 1854; *Trebilcock*, below]. And where a person took a railway ticket, he might have been convicted of theft, notwithstanding its return* to the company at the end of the journey, for its value was then exhausted [*Beecham*, 5 Cox C. C. 181, 1851].'

Taking and restoring] Where goods are once taken with a felonious intent, the offence cannot be purged by a restoration of them to the owner. Thus, defendant, having robbed the prosecutor of a purse, returned it to him again, saying, 'If you value the purse take it, and give me the contents,' but before the latter could do this the former was apprehended; the offence was held to be complete by the first taking. *Peat*, East P. C. 557, 708; Lea. 228, 1781; see also *Wright*, Russ. Cri. 1182, 1828, cited in *Phetheon*, 9 C. & P. at 554 *n.*, 1840, and other cases under *Deprival*, above.

Nor will an intent 'ultimately' to restore suffice, if defendant has 'usurped the entire dominion': Parke B. in *Holloway*, 1848. See *Refusal to Restore*, below. Thus, where the jury found a man guilty, who had broken open a box of plate entrusted to him and pawned the contents, under rpd. 20-1 V. 54, 4, but recommended him to mercy on the ground that they believed that he intended 'ultimately' to return them, some of the judges doubted whether this was in law any other than a general verdict of guilty, but all thought that the conviction was good. It seems that to acquit, the jury must find he intended to restore *at the time of the taking*. *Trebilcock*, D. & B. 453; 7 Cox

* The learned writer mistakes the *facts*: the ticket was *not* used and defendant was acquitted.

C. C. 408, 1858. Cf. this and *Peat. Medland*, above, was a case of pawning of chattels from lodgings and afterwards restoring: guilty.

W.'s 'general conclusion' is 'that the required intention of deprival and appropriation is an intention to assume the exercise of dominion or general property over the thing, as distinguished from an intention to assume the exercise of such rights as might be exercised by a bailee or servant, or as might be given by the owner to another person without extinguishing his own general property [*e.g.* a right of partial destruction or *abusus*. See above; *Trebilcock; Poole*, 1857; *Hall*, 1848; *Holloway*, 1848]. Nor does there seem to be any considerable danger in adopting such a rule, for if the accused assumed an apparent dominion over the thing, it will be for him to establish an original limitation of the intended dominion against the strong presumption arising from apparent assumption of general dominion.

NOTE.—A question may arise where money has been taken and there is clear proof of an intention to restore it in a short time.

If a shilling is taken and the intention was to restore a different shilling in five minutes, it would seem that the theft is technically complete (cp. *Wells*, 1858); and that if it were otherwise no consistent definition of theft would be possible unless by treating such cases as exceptional.'

(ii) W.'s second element of *animus furandi* was 'wrongfulness of intent.'

1. *Without the consent of the owner*] 'If,' he says, 'the owner did not in fact consent, there is yet no theft if the accused *bonâ fide* believed on reasonable grounds that he did consent; and, on the other hand, if the owner did consent to the change of property, there is no theft, though the accused believed that he did not consent.' '*Invito domino*,' said Bramwell B. in *Middleton*, L. R. 2 C. C. R. 38; 12 Cox C. C. 260, 417; 42 L. J. M. C. 73, 1873, 'does not mean *contrary to or against his will*, but *without* it.' See *No Consent*, below.

2. *Claim of right*] 'It is not easy to determine what claim of right will exclude theft . . . in the case of a poacher taking back wires and a pheasant which had been seized by a keeper, an acquittal was directed [*Hall*, 1828]; and in *Holloway* [1833], a poacher was allowed to be acquitted . . . of stealing a keeper's gun in a scuffle, on the ground that he might have taken it merely in the apprehension of personal danger. East [P. C. 659] says, 'if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal; for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy [Cp. 1 Hale, 508]. . . . It would seem that a mere *bonâ fide* claim of right to the thing itself might not be held to exclude theft if there is no such claim of right to do the act by which it is obtained': W. *ib.*

'This, if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence': *Stephen*, 3 Hist. Cr. L. 124.

'If the owner of the ground' takes a straying horse '*damage feasant*, or the lord seises it as a stray, tho perchance he hath no title so to do, this is not *felleo animo*, and therefore cannot be felony.' 'If A. thinking he hath a title to the horse of B., seiseth it as his own, or supposing that B. holds of him, distrains the horse of B. without cause,

this regularly makes it no felony, but a trespass, because there is a pretense of title; but yet this may be but a trick to colour a felony, the ordinary marks of which are secrecy and denial. 1 Hale P. C. 506, 509.

In *H. Williams,* 1836, 'the defendant believed, however erroneously, that he had some sort of right to do as he did, and this was probably the ground on which the jury acquitted him': *per* Pollock C.B., *Hamilton,* 1 Cox C. C. 247, 1845.

In *J. Clay,* 74 J. P. 55; 3 Cr. A. R. 92, 1909, defendant asserting that part of the purchase price of a horse he had sold was not paid, took it out of the vendee's field; there was no direction on *animus furandi:* c. q. See *Knight,* 1781.

For gleaning, see 2 Russ. Cri. 1190, and *Price,* 4 Burr. 1925. 1766; *Steel* v. *Houghton,* 1 H. Bl. 51, 1788.

The taking, &c.] All the elements in s. 1 (2) (i), above, are discussed—but *not in the order* there. There must be an actual taking possession, and this is what is meant by saying that every larceny includes a trespass, though the trespass is sometimes constructive only. (See below.) Thus, A. owing money to B., defendant said he could settle the debt on A.'s behalf, and taking a stamped receipt from his pocket put it on the table, and then took out some silver. B. then wrote the receipt, and defendant took it up and went out of the room. On being asked for the money he said, 'It is all right'; but never paid it. Held not a larceny of the paper, as B. never had such a possession as would enable him to maintain trespass. *J. Smith,* 2 Den. C. C. 449; 21 L. J. M. C. 111; 5 Cox C. C. 533, 1852: c. q. So where defendant assigned his goods by deed to trustees for the benefit of his creditors, but under the deed remained in possession, and before the trustees had taken possession he removed the goods intending to deprive the creditors, as the jury found the goods were not in his custody as the agent of the trustees, this negatived a bailment: c. q. *Pratt,* 6 Cox C. C. 373; D. & P. C. C. 360, 1854.

Innocent agent] The taking 'need not be by the very hand of the party accused. For if he fraudulently procure another, who is himself innocent of any felonious intent, to take the goods for him, it will be the same as if he had taken them himself . . . as if one procure an infant, within the age of discretion, to steal goods for him . . . and the taking must be charged to be by him': East P. C. 555; see *Trick through innocent third person,* below. A man, pointing to a horse, bade an ostler bring him out and saddle him; when this was done he failed to mount him, and ordered him to be led out of the yard; before he could mount he was charged; held that if he intended to steal this was felony: *Pitman,* 2 C. & P. 424, 1826.

Asportation—severance] See Larceny A. s. 1 (2) ii. 'The least removing of the thing taken from the place where it was before is sufficient . . . though it be not quite carried off'; thus a guest, who took the sheets from his bed with an intent to steal them, and carried them into the hall, and was apprehended before he could get them out of the house, was adjudged guilty of larceny. Hawk. P. C. 1, 33 (pt. 1), 25; 3 Inst. 108: 'the sheets were carried away, being removed . . . to the hall, albeit they were still in the house of the owner'; *Lapier,* East P. C. 555, 557, 708; Lea. 320. 1784; see *Taking* under *Robbery;* cf. *Farrell, ib.* 1787, below; see also *Samways,* D. & P. 371, 1854. So where a person takes a horse in a close, and is apprehended

before he can get him out of it, 3 Inst. 109. Defendant got into a waggon, and taking a parcel of goods which lay in the forepart, had removed it behind, when he was apprehended. The twelve judges were unanimous that as he had removed the property from the spot where it was, with an intent to steal, it was a sufficient taking and carrying away. *Coslet,* Lea. 236; East P. C. 556, 1782. But where defendant had set up a parcel containing linen, which was lying lengthways in a waggon, on one end, for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken anything, all the judges agreed that this was no larceny, although the intention to steal was manifest. 'For . . . the felon must, for the instant at least, have the entire and absolute possession of' the goods. *Cherry, ib.* 1781. Defendant snatched at a lady's ear-ring, and tore it from her ear. She thought it was lost, but it fell into her hair, where it was found on her return home. No one saw it in his hand, but the judges were of opinion that this was not only larceny but robbery; its being in his possession for a moment, separated from the owner's person, was sufficient, though he could not retain it, but probably lost it again the same instant that it was taken. *Lapier,* above. Defendant stopped prosecutor as he was carrying a feather-bed on his shoulders, and told him to lay it down or he would shoot him. This was done; but before the other could take it up he was apprehended. The judges were of opinion that the offence was not completed. *Farrell,* above. But where defendant, sitting on a coach-box, took hold of the upper part of a bag which was in the front boot, lifted it up from the bottom, handed the upper part of it to a person who stood beside the wheel and, both holding it, endeavoured to pull it out, but were prevented by the guard, the judges were of opinion that a conviction was right, thinking that there was a complete *asportation* of the bag, because each part of it had been moved, though it was not all completely pulled out. *Walsh,* 1 Moo. C. C. 14, 1824; 'the strongest case on the subject': 2 C. & P. 424. Where a servant *animo furandi* took more than he was entitled to of his master's hay from his stable, and put it into his master's waggon, it was held to be larceny. *Gruncell,* 9 C. & P. 365, 1839. Where a letter carrier did not deliver a letter sorted to him for delivery, nor return it in the pouch with the other undelivered letters as it was his duty to do, but kept it in his pocket, the jury found that he had detained the letter with intent to steal it, and it was held that there was a sufficient taking. *Poynton,* L. & C. 247; 32 L. J. M. C. 29; 9 Cox C. C. 249, 1862.

Severance] of the goods from the possession of the owner must take place. 'A man cutteth my girdle privily, my purse hanging thereat and the purse and girdle fall to the ground, but he did not take them up (for that he was espied) this is no felony: . . . but if he had holden the purse in his hand and then cut the girdle (although it had fallen to the ground and that he took it up no more) then had it been felony (if there had been above twelvepence in the purse) for he had it once in his possession': held in 1584, *Crompton's* Fitzherbert L'Office &c., 35 a (1606). So 3 Inst. 69, which adds: 'for the continuance of his possession is not required by law'; and 1 Hale, 533. Defendant took a purse out of a pocket, but the purse being tied to a bunch of keys, the keys remained in the pocket, and he was apprehended while they so remained: it was held no larceny, on the ground that the owner still remained in possession of his purse; and that

though there was *cepit* there was not *asportavit*. *Wilkinson*, 1 Hale P. C. 508, 1598; Lea. 321 *n*. So where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter, and defendant took them and carried them towards the door as far as the string would permit, and was then stopped, Eyre B. ruled that there was no severance, and consequently no felony. *Anon.*, about 1780, cited in *Cherry*, above. A purse picked from a man's pocket caught in the edge thereof and being grasped by him was restored to the pocket: conviction of larceny from the person varied to one of simple larceny: *W. Taylor*, 6 Cr. A. R. 12; 27 T. L. R. 108, 1910. See also *Stealing from the Person* and *Taking* under *Robbery*.

Asportation complete] See *Receiver or Thief?* under *Receiving*.

Gas, water] Indictment for stealing five thousand cubic feet of gas. The contract was to supply gas, to be paid for by meter in the ordinary way. Defendant fraudulently made a passage through which the gas rose to the burners without passing through the meter, which consequently did not show all the gas consumed. The jury found that he had not by contract any interest in or control over the gas until it passed the meter. It was held, that there was a sufficient severance of the gas in the entrance-pipe to make an *asportation*. *White*, 1 D. & P. C. C. R. 203; 22 L. J. M. C. 123, 1858. So water in pipes can be the subject of larceny at common law. *Ferens* v. *O'Brien*, 11 Q. B. D. 21; 52 L. J. M. C. 70; 15 Cox C. C. 332, 1883. Defendant bored a hole in a beer barrel and some beer ran into a can underneath in his presence: held a sufficient *asportavit* of what had flowed: *Wallis*, 3 Cox C. C. 67, 1848.

Mistake—taking without delivery] The new enactment in s. 1 (2) (i) (*c*), above, dispenses with several cases. ''Mistake' may affect a transfer or taking of a thing in divers ways. One or both of the parties may be unaware of the fact of the transfer or taking or may have mistaken the character of the thing or one may have mistaken the person or right of the other. Generally speaking, if a person in and by reason of a mistake of an essential fact gives consent to a change of property or of right to possession, which consent he would not have given but for the mistake, the consent goes for nothing and the property and right to possession are unchanged (*Vincent*, 2 Den. C. C. 464, 1852; *Middleton*, 1873).

There seems to be no reason why the same result should not follow with respect to change of possession ('delivery'), but it will be seen that there has been a division of opinion on this point.' W. p. 205.

'If the sheep of A. stray from the flock of A. into the flock of B., and B. drives them along with his flock, or by pure mistake shears him, this is not a felony, but if he knows it to be another's, and mark it with his marks, this is an evidence of a felony.' 1 Hale P. C. 507.

The following is the principal case. Defendant by mistake drove away with his flock the lamb of another, and afterwards finding out his mistake, immediately sold it as his own (and then denied the transaction), it was unanimously held, that as the original taking was not rightful, but was and continued a trespass, the subsequent resolve made the trespass felonious, *i.e.* larceny. *Riley*, 1 D. & P. 149; 22 L. J. M. C. 48; 6 Cox C. C. 88; 17 Jur. 189, 1853: five judges.

'It is a general rule that a possession acquired by trespass is a continuing trespass from moment to moment so long as the possession lasts. From this doctrine flow the most important consequences in the law of theft. Without this doctrine and without the converse rule that a possession obtained without trespass continues non-trespassory, the cases in trespass and theft would be a chaos of particular decisions bearing no certain relation to each other': W. p. 141. 'A supervening *animus furandi* at any moment of the continuing trespassory possession will complete the offence of larceny and make the trespasser a thief': *Pollock*, Torts, 9th ed. p. 399, citing *Riley*. And again in *Possession, &c.*, p. 109: 'It is also settled that if a man, without being aware of it at the time, takes another's goods which are mixed by accident with his own, that other not consenting or contributing to the mistake, he acquires a possession which is trespassory and may become felonious by the subsequent addition of *animus furandi* . . . As to the application of the principle in criminal law, the older authorities certainly regard an ambiguous or merely excusable possession as equivalent to rightful possession for the purpose of excluding criminal liability;

Modern cases] but the modern cases have no less certainly departed from this view.' The co-author of the work cited, W. *ib.* p. 210, also states this view, emphasising 'the grounds' of the judgment (*Riley*) that there was a taking and a complete change of possession and a complete trespass from the beginning by reason that the prisoner's act was *voluntary*. . . that the possession so acquired was *on general principles* of law (*not on special grounds limited to a case of mistake*) a *continuing* trespass afterwards; . . . notwithstanding that the 'actual physical taking' . . . was entirely innocent.'

With delivery] But there is a distinction between things *taken* by mistake and things physically *delivered* by mistake. P. p. 101, classifies '*Mistake:* I. As to the interest to be transferred' [see *By Trick*, below]. II. 'As to the identity of the thing delivered' [see *ib.*]. III. 'As to the person' (1) to whom (2) by whom a thing is delivered: see below.

In the case of things *delivered by mistake* one important circumstance to be considered is whether at the moment of delivery defendant had *animus furandi* or not. *Mucklow*, 1 Moo. C. C. 160, 1827; *Davis*, 25 L. J. M. C. 91; 7 Cox C. C. 104, 1856: C. C. R.; *Fish*, 131 C. C. C. Sess. Pap. 212, 1900, were all cases of post letters containing valuable paper delivered by mistake to persons with the same or similar names with those of the addressees; in all of them it was held that as there was no *animus furandi at the moment of delivery* there was (at any rate) no larceny. It is suggested by P. p. 113, cf. p. 210, that the authority of *Mucklow* and *Davis* is still maintainable, whatever view be taken of the conflict of opinion in *Middleton*, below (though since that case their 'grounds . . . must be considered too wide')—for in one view 'a lawful possession may be held to pass to the wrong person if the postmaster or carrier knows to whom he is in fact making delivery and the receiver takes delivery in good faith.'

In *Middleton*, 1873, defendant had eleven shillings in a savings bank. He gave notice to withdraw ten, and in due course delivered his warrant to the clerk, who by mistake referring to another depositor's letter of advice for 8*l.* 16*s.* 10*d.*, placed that amount on the counter, entered it in defendant's deposit book—stamped it, where-

upon defendant took the money. The jury found that he had *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it. Eleven judges were for affirming and four for quashing the conviction. Seven considered that the test of larceny in this case was whether the property had *in fact* passed or not, though, no doubt, it was the intention of the clerk—even *assuming* that he stood in the position of the Postmaster-General—to pass it. If, they said, a man obtains a sale and delivery to himself by fraud, the property passes to him, and he cannot commit larceny of it. But if things are delivered by mistake no property passes, and larceny may be committed by the person receiving. Thus, if a merchant sells six sacks of beans, and by mistake delivers six sacks of coffee—'if that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant on the ground that he had bought it from one who had the property in the coffee, though subject to be divested?' They held that the handing over by mistake did not pass the property, and as defendant knew the mistake and had *animus furandi* he committed larceny. They 'admitted that the case was undistinguishable from' that 'of handing a sovereign to a cabman by mistake for a shilling': but they were 'decidedly of opinion that the property would not vest in him,' and whether he 'was guilty of larceny or not would depend' whether 'at the time . . . he was aware of the mistake' and took *animo furandi*. Three judges thought that the matter was concluded because the clerk had authority (from the Postmaster-General) only to pass ten shillings and none to pass more, and therefore defendant got no property, and only got possession *animo furandi;* while another thought that before he even got possession he had formed the intention to steal, because he could tell from the clerk's mistake (in the book, &c.) that he was about to pay too large a sum—there was an appreciable interval'; *i.e.* as explained P. p. 111, 'there was not a complete manual delivery to the prisoner at all, but only a placing of the money within his reach, *i.e.* he was like a dishonest finder.' Four of the judges regarded the case from an entirely different point of view. They insisted that the money had not been taken *invito domino,* and therefore there was no trespass nor larceny.

'The true view,' says P. p. 112, 'seems to be that the clerk intended to part with the larger sum but only to the person showing title . . . for that sum; he handed the money to the prisoner as being that person and not otherwise, and as the prisoner was not that person. there was not and could not be any receipt according to his intention. Thus there was no transfer of property or of lawful possession (*Hardman* v. *Booth* seems really conclusive).' [There, 1 H. & C. 803, 1863: Ex., plaintiff invoiced goods to the address of the firm he intended, but by the fraud of a clerk in a *name* which enabled him to get hold of the goods and sell them: plaintiff recovered the proceeds in trover from the innocent taker, as there was no contract of sale and no property passed.] 'And so far the knowledge or intention of the receiver is immaterial. Variations on this case may, however, occur of such a kind that the receiver accepts in good faith that which was intended for another person; and then it might have to be considered whether the true owner was not estopped as against the receiver, or if not as against him, then as against innocent purchasers from him. At worst the receiver's possession would be excusable, as in the case of mistake in the identity of the thing delivered.'

Now, by s. 1 (2) (i) *c* of the Larceny A. 1916, 'takes' in s. 1 (1) thereof means:—'under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained:' which 'seems to establish the doctrine of the eight judges' [*i.e.* the seven and one cited above]: *Kenny,* Outlines, p. 209 (1917). In *Ashwell,* 16 Q. B. D. 190; 55 L. J. M. C. 65; 16 Cox C. C. 1; 50 J. P. 181; 53 L. T. 773; 34 W. R. 297, 1885: C. C. R., defendant having asked for the loan of a shilling prosecutor gave him a sovereign, believing it to be a shilling. The former took the coin in the same belief, but some time after discovering it to be a sovereign, he *fraudulently, i.e.* knowing there had been a mistake and well able to restore the coin (the receipt of which he denied), appropriated it to his own use—as the jury expressly found. Seven judges were of opinion that there was no larceny, and seven that there was: hence, on the principle *semper præsumitur pro negante,* the conviction was affirmed. (A majority also held that he was not guilty within 24-5 V. 96, 3, rpd., replaced by s. 1 (1) of Larceny A. 1916; the coin, of course, was not *bailed.*) The difference of opinion arose on the point of time at which the receipt took place. Those judges who held there had been no larceny thought that the receipt of the sovereign took place when the supposed shilling was taken, and the felonious intent arose *subsequently,* when defendant discovered that he had a sovereign—their view is summarised by P. p. 109: 'The receiver gets lawful possession and, it seems, property if the intention was to pass the property in the thing intended to be given'; while those judges who held there had been a larceny thought that the receipt of the sovereign *as* a sovereign, did not take place, and could not take place, *until the moment when he found out* that it was a sovereign, at which moment he feloniously made up his mind to steal it. Three judges held that the receiver did not get possession, 'but only a bare custody,' and the other four that there was 'no real delivery, and either the possession was not changed at all or a trespassory possession' was 'acquired; but this opinion is rather suggested than distinctly formulated': *ib.* 'We conceive the better opinion to be that the prisoner in the first instance, acquired possession as an excusable trespasser. If this be so, and if it is too late (as we think it is) to argue that an excusable trespasser's possession cannot in any case become felonious, the conviction was right': *ib.* p. 110. It was held by five judges to four in similar circumstances that there was no larceny: *Hehir,* 2 Ir. R. 709; 18 Cox C. C. 267, 1895: C. C. R. All the judges in *Ashwell* agreed with 'the ancient doctrine that an innocent receipt of a chattel and its subsequent fraudulent appropriation do not constitute larceny,' as was clearly stated in *Flowers,* 16 Q. B. D. 643; 55 L. J. M. C. 179; 50 J. P. 648; 54 L. T. 547; 16 Cox C. C. 33, 1886: C. C. R. There a paymaster handed, as he thought, an empty bag, which in fact contained 7*s.* odd, to defendant, to whom nothing was due, who almost immediately found out the mistake and appropriated the money. The jury found that defendant 'received' 7*s.* odd at one time, and at a 'subsequent' time fraudulently appropriated it, so that on that finding there was clearly no larceny, there being no *animus.* P. *ib.* p. 110, thinks that the facts of this case were 'not distinguishable from those of *Ashwell's.* Indeed, they are stronger for a conviction, for the handing over of a wrong sum of money (in a bag marked with the name of the person who ought to have got it) was the act not of the owner, but of a clerk with presumably limited authority.'

'*Delivery*'] W. *ib.* p. 210, consistently with his analysis of *Riley,* above, thinks the view of *Ashwell* 'most consonant with the former authorities is that there was in the voluntary receipt of the coin by the prisoner a change of the possession of it; that this change of possession was not a change of possession by 'delivery,' because there was no sufficient knowledge to constitute consent to a change of possession (as there certainly was not sufficient knowledge to constitute consent to change of property or of right to possession),' that as in *Riley,* the taking at first was innocent, but the possession so acquired trespassory, 'and that . . . when an act towards misappropriation was done' there was theft. . . . 'The chief doubt as regards *Ashwell's* case seems to be whether the doctrine established in *Riley's* case applies where there is in fact and physically a delivery. It is submitted that it does apply to all cases in which the essential element of delivery—namely, consent to a change of possession—is absent, and that where that consent is absent the only question is whether there has been in law any change of possession at all or at what moment of time it has taken place.'

In *Jacobs,* 12 Cox C. C. 157, 1872, it was ruled that where a purchaser gave by mistake a half-sovereign for a sixpence there was no larceny: 'directly against the conviction' in *Ashwell;* it was there 'overlooked.' P. as cited above. Cf. *Bramley,* 1861.

S. 1 (2) (i) *c,* quoted above, covers 'cases where the taker *knows* that he has obtained possession under a mistake on the part of the owner. This express provision for unilateral mistake seems to imply that ordinary cases of mutual mistake are not to fall within the definition of the crime.' *Kenny,* p. 217.

On the whole, it cannot be said that the law of *mistake* in larceny is settled: **P. pp. 109, 110.**

Mistakes classified] The convenient classification above, by P., is, it will be seen, of most frequent use in respect of III. below. For I. see *By Trick,* below. II. is of little practical account. If the receiver takes in bad faith, 'only the absence of active deception on the receiver's part distinguishes this from the case of obtaining by a trick'; there is no 'concurrent intention.' 'Thus there is a merely trespassory taking and a felonious one if the other elements of theft be present': p. 103.

III. 1, *a.* Giver knows 'he is delivering to John, but erroneously supposes John to be entitled to delivery in his own right'; 'if John is at the time aware of the mistake, this will prevent any real consent from taking place, and the case is like that of obtaining property by a trick'; possession is 'merely trespassory.'

b. Giver supposes receiver to be another person, and intends to deliver only to that other; if the receiver takes in bad faith, the law is as in *a.*

c. Giver 'knows he is delivering to John, but erroneously supposes John to be entitled to delivery in right of William.' Here 'there is fundamental error as to the legal person, though not the natural person of John.' He may have previously not known the name and person of John, and he deals with him solely in the name of and authorised by William. It seems this is exactly *Davenport's case,* 1826; it is 'like' *b.* 'John therefore acquires a possession of the same character as in' *b.*, 'and if morally innocent in its inception modifiable for better or worse in the same manner.'

2 is so rare as to be negligible.

Fraud—contract] 'If a person is induced by deceit to consent ['no matter by what fraud the consent was obtained': p. 220] to part absolutely with his property in a thing to another upon a contract [see *By Trick* and *Bailees*, below] with him, the property passes, subject to certain common law rights in the alienor to rescind or disaffirm, and subject to the statutory provision for restitution—for there was a concurrence of intentions on both sides that the property should pass, and accordingly the alienee cannot commit trespass or theft either by the obtaining the thing by such deceit or by a subsequent disposal of it. It would seem that in such a case no disaffirmance by the alienor could so affect the fraudulent alienee's position as to make him punishable as a thief for any subsequent disposal of the thing. [*Middleton*, above; *Prince*, 1868.] This doctrine is the occasion of the statutory offence of obtaining by false pretences.' W. p. 203.

No consent] See *Without Consent of the Owner*, above. 'If a person obtains possession of a thing under colour of a treaty for the transfer of possession, but really meaning to assume the property in (*i.e.* to steal) the thing, the nominal consent goes for nothing and the acquisition of the possession is a taking and (*animus furandi* being present) a theft, for there is no agreement *ad idem*, and the accused takes 'of his own head' (*per* Brian C.J., 1473), and not under the bailment. There are expressions in some cases which seem to imply that there must be some particular or specific trick, deception or misrepresentation, but it seems clear that it is sufficient if the accused meant to assume an entire and unconditional dominion over the thing and the owner did not in fact intend to concede to him an entire and unconditional dominion over it. The *animus furandi* will supply the rest; as it is said in *Sharpless* (1772, Lea. 92), a 'pretence to purchase with intent to steal' may suffice; see *Buckmaster*.' *Ib.* 218. [The apt phrase quoted is *not* in *Sharpless*, but in *Semple*, below; *Chissers*, T. Raymond, 275, 1680, decided the same of common frauds on shopkeepers.]

*** In the cases following it is impossible to keep fraud inducing bailment apart from other frauds leading to larceny, but the principles of the former are separately discussed below.

Common law] Defendant hired a mare for the day to go to S. and return thence; he gave a false reference, and on the same day sold the mare in Smithfield; held to be larceny, the jury having found that he had hired with the fraudulent intent of selling immediately. *Pear*, East P. C. 685, 697; Lea. 212, 1779. A postboy applied, in the name of E., to a livery-stable keeper for a horse, saying that E. wanted a horse for his servant to accompany a chaise going to Barnet, and return with it. The horse was delivered by a servant to defendant, who mounted him, and, saying he was going to Barnet, proceeded a short way on that road; on the same day he sold the horse. The court observed that the judges in *Pear* had determined that if a person, at the time he obtained another's property, meant to convert it to his own use, it was felony; that there was, however, a very 'nice' distinction to be observed here, for if they thought that defendant at the time of hiring to go to Barnet, really intended to (and perhaps did) go thither, but finding himself in possession of the horse, afterwards determined to convert it to

his own use, instead of going there, it would not amount to a felony. *Charlewood,* East P. C. 689; Lea. 409, 1786. Defendant, who had been in the habit of hiring carriages, hired a chaise for three weeks or so for a tour. The rate was agreed and a price for purchase on his return was mentioned, but no agreement took place for purchase. He took the chaise with his own horses and ultimately disappeared. Being indicted for stealing the chaise, it was argued for him that he had obtained it under a contract which was not proved to be broken, and that this distinguished it from *Pear* and *Aickles,* below; that it was hired generally for an indefinite time and not to go to any particular place; that he had a legal possession, at any rate, for three or four weeks, and that there was no evidence even of a tortious conversion, still less of a felony; for *non constat,* that he had disposed of the chaise.

Conversion—amount of proof] The court, however, while assenting to this reasoning directed that it was now settled that the question of intention was for the jury, and if they were satisfied that the original taking of the chaise was with a felonious intent, and the hiring a mere pretence to give effect to that design, without intention to restore or pay for it, it would fall precisely within *Pear, &c.,* and the taking would be felony; the jury must judge from the facts whether there had been a conversion; 'proof of actual conversion certainly is not necessary.' *Semple,* East P. C. 691; Lea. 420, 1786: guilty; see further, under *Bailees.* The court could not distinguish from this *H. Brown,* 1856, who offered, intending a trick, to take money for a man to pay a debt, and appropriated it; here the ground was 'constructive trespass by an original felonious intent, but it seems to have been assumed that the moneys being to be specifically delivered, he was a bailee' [and so not guilty in 1856] 'but for the fraud': W. 164, 220.

E. sent his clerk to defendant to know whether he could discount a bill. Defendant went with the clerk to the acceptor's house, where he satisfied himself and terms were agreed. He then said that if E. would go with him to his house, he should have the cash. E. sent his clerk to get the money and pay defendant discount, &c. out of it; defendant showed him into a room, and desired him to wait a little. The clerk, however, followed him, but missed him. He was apprehended in a few days, and promised to return the bill. The bill was not produced. It was objected, that the facts, if proved, did not amount to felony. The jury were asked whether, and they found that defendant had a preconcerted design to get the bill with intent to steal it; and, that E. did not intend to part with the bill to him without first having the money; and, generally, guilty of larceny. The judges held the conviction to be proper. *Aickles.* A friend, asked to post a letter, first abstracts the money in it: *M. A. Jones,* 7 C. & P. 151, 1835; a person sent to despatch a parcel, takes something out of it: *Jenkins,* 9 C. & P. 38, 1839—are both guilty of larceny.

Conduct of receiver] It is not 'even necessary that the accused should have made any positive representation. It is enough if he receives the thing from the owner *at his* [owner's] *request,* intending to appropriate it and knowing that the other does not' mean this: W. 219, citing *Stock,* 1825, 1 Moo. 87; *Campbell,* 1792; cp. *Mucklow,* 1827; and cp. *G. Thompson,* 1862; *Semple; Aickles,* above.

Larceny and false pretences distinguished] This distinction has

been several times insisted on (under *both* these titles). W. p. 220, adds: 'It is not clear, however, that the distinction does not rather depend on a difficulty as to *animus furandi*, viz. the difficulty of holding that the accused knew that the appropriation would be *invito domino*. . . . The distinction arises if credit is given even for a moment.'

Fraud ab initio] 'It seems doubtful how far the distinction applies where the whole transaction is a mere concoction of premeditated fraud. See, for authorities that it does still apply, *Parkes*, 1794; *Coleman*, 1785; *Harvey*, 1787; *Prince*, 1868; *Essex*, 1857; *Wilson*, 1837—on the other hand: *Middleton*, 1873; *Buckmaster*, 1887; *Morgan*, 1854; *Bramley*, 1861. The distinction seems to apply not only where the defrauded person is general owner of the thing, but also where he is a bailee, though it may be doubtful whether it applies to the case of a bailee who has no 'special property' (cp. *Jackson; Longstreeth*, 1826). In such cases the general owner might still prosecute for the theft unless he has given the bailee a general power of disposition or the bailment is such as to exclude for the time the owner's rights.

The distinction is subject to the important limitation that if the contract to part with the property is made for the owner by a person who had not authority to give such consent, it will not avail the deceiver. . . . See *Middleton*.' *Ib.* Defendant had two (worthless) bicycles in an auction at a reserve price of 2*l.* 3*s.* By arrangement with S. the latter bid for them and got them at that price. Defendant knowing the auctioneer's practice to pay before he got the money got 2*l.* from his clerk: c. for larceny q.: *E. Fisher*, 4 Cr. A. R. 102; 74 J. P. 427; 26 T. L. R. 589; 103 L. T. 320, 1910: held to be obtaining by false pretences or conspiracy to defraud. The suggestion of the C. C. A. that on a charge of larceny a verdict for the former should be valid is now carried out by s. 44 (3) of the Larceny A. 1916.

Larceny by trick and fraud or false pretences] In *Whitehorn* v. *Davison*, 1911, 1 K. B. 463: C. A., jewellers sent pearls to Bruford with an 'approbation note,' which ran, *inter alia*, 'On sale or return. . . . Net cash'; they believed that Bruford wanted to sell them to a customer of his; he pledged them. The jury found that he obtained possession by fraud with intent to steal. Plaintiffs failed to recover them from the pawnbroker. The plaintiffs contended that 'net cash' meant that the property should not pass until cash was paid. Buckley L.J. thought that this was not larceny by a trick by Bruford. 'I think there is larceny by a trick where the owner of goods being induced thereto by a trick voluntarily parts with the possession of the goods but does not intend to pass the property in them, and the recipient has the *animus furandi;* and the same is true where the owner of the goods does not intend to pass the property in them to the particular person with whom he is dealing and has been deceived by that person as regards the identity of the person with whom he is dealing. [See *Davenport.*] . . . *Cundy* v. *Lindsay* (3 Ap. C. 459 [1878]). On the other hand, goods are obtained by false pretences where the owner of the goods, being induced thereto by a trick, voluntarily parts with the possession of the goods and does intend to pass the property. . . . Suppose the facts are that the owner . . . , being induced thereto by a trick, intends not to pass the property in them but to confer on the person to whom he gives possession a power to pass the property; under which head does that case fall? *Primâ facie* it would look,

inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences. It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession and either intends to pass the property or intends to confer a power to pass the property. If he gives and intends to give that power and the power is exercised, the person who takes under the execution of the power obtains the property not against but by the authority of the original owner and none the less because the authority was obtained by fraud. . . . A man may steal a chattel, but he cannot steal the power to dispose of a chattel. A man may obtain the grant of a power of attorney by fraud, but he cannot steal a power of attorney. He cannot steal a contract; he can only steal a chattel. . . . The plaintiffs . . . were . . . making [Bruford] this offer: 'You may have possession of this article and if you are so minded you may pass the property in it to the customer whom you tell us you have'; but there was no present passing of the property to him. . . . That is not larceny by a trick, but is obtaining goods by false pretences.' To the same effect Vaughan Williams and Kennedy LL.JJ., the latter 'even on the plaintiffs' own view.'

See this case under *Bailment*, below.

Larceny and cognate crimes] See *Embezzlement, Introductory*, and sub-s. 44 (2) of the Larceny A. 1916, *ibid.*

By s. 44 (3) of the Larceny A. 1916: 'If on the trial of any indictment for stealing it is proved that the defendant took any chattel money or valuable security in question in any such manner as would amount in law to obtaining it by false pretences with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel money or valuable security by false pretences and thereupon he shall be liable to be punished accordingly.' For the converse, see sub-s. (4). The preceding sub-s. provides analogously in *Embezzlement*, which see. Hence it must be borne in mind that though on one indictment there may be a verdict as if on another, yet the verdict must be found according to the facts, and there cannot be a legal conviction of one of these offences on facts which constitute the other: *Gorbutt*, D. & B. 166; 26 L. J. M. C. 47; 7 Cox C. C. 221, 1857. Thus on an indictment for false pretences, the false pretences must be proved as laid: *per* Crompton J., *Bulmer*, 1864. It has already been pointed out that practice in such cases has been greatly aided by the Indictments A. 1916. But, of course, if a defendant has been convicted of obtaining goods (or credit for them) by false pretences, he cannot afterwards be convicted for larceny of the same: *King*, 1897: latter c. q.

'*By trick*'] This homely phrase is adopted s. 1 (2) (i) (*a*), above; it = 'A crafty or fraudulent device of a mean or base kind; an artifice to deceive or cheat': N. E. D. (1914). 'Here the question of honest mistake will hardly arise in practice': P. p. 101, of his class I. (*Mistake*, above); see II. and III. 'The giver intends to pass possession for a limited purpose or property on a specific trust. The receiver intends to receive possession for the purpose of exercising unlimited dominion. . . . If the receiver, knowing the giver's real intention'—cf. s. 1 (2) (i) (*c*) of the Larceny A. 1916—'intends

to obtain the thing in order to convert it to his own use, there is no real consent and no transfer of rightful possession . . . he . . . takes as a trespasser and may be a thief. As in every case of taking by trespass (*de bonis asportatis*), he acquires possession in law, though a wrongful possession as distinguished from bare physical detention or custody. This is the case of obtaining possession by a trick as distinguished from obtaining property by false pretences. The rule is well established' (*Gumble*). *Ib.* 'The distinction,' said Blackburn J. in *Prince*, 1868, 'is inscrutable to my mind, but it exists in the cases.'

One of the latest discussions of the point was by the C. A. in *Oppenheimer* v. *Frazer and Wyatt*, 1907, 2 K. B. 50; 76 L. J. K. B. 806; 12 Com. Cas. 289; 23 T. L. R. 410. There a (civil) jury had expressly found that 'larceny by a trick' had been committed, though the trial judge directed them that the facts were obtaining by false pretences or larceny by a bailee. Gorell Barnes P. pointed out that 'the various decisions with regard to the exact meaning of' this phrase 'appear to be somewhat conflicting.' 'What has been said in some of the decisions on the subject,' said Fletcher Moulton L.J., 'leads me to doubt whether there may not possibly be cases in which, even though there was an intention to part with the property, there may be larceny by a trick'; he interpreted Manisty J.'s definition in *Buckmaster*, 'so that the person getting possession [but not property] of the goods, steals them then and there, that is larceny by a trick. . . . These cases shade into one another by almost imperceptible degrees, and the offences of larceny by a trick, larceny by a person as bailee and obtaining goods by false pretences are often almost undistinguishable in the circumstances of particular cases; but the crucial point for the purpose of establishing larceny by a trick, as distinguished from larceny by a bailee, seems to me that there should have been an intention at the moment of obtaining possession of the goods then and there to steal them. A man may get possession of goods, thinking that he may thereby be enabled at a later period to appropriate them. He may obtain possession of them, contemplating the disposition of them wholly or partly for the benefit of their owner, but desiring to have in his hands the power of misappropriating them, if later on he wishes to do so. In such cases he becomes a bailee of the goods, and if he misappropriates them subsequently, he is guilty of larceny as a bailee,' and he accepted the verdict. But Kennedy L.J. was not so certain about 'the dividing line between larceny by a trick and obtaining goods by false pretences. . . . I do not think the matter very clear on the cases.' There is often in practice 'great difficulty in distinguishing exactly between the two classes of offence.' It cannot be said that the Larceny A. 1916, has done anything to diminish this difficulty.

Where defendant concealed coals in a cart by covering them with *slack*, and declared it for weighing and paid for it as slack, and so got the coal, it was held that this preconceived fraud was a larceny of the coal, for prosecutor had not parted and never intended to part with the *coal*. *Bramley*, L. & C. 21; 8 Cox C. C. 468; 7 Jur. N. S. 478; 4 L. T. 389, 1861. If the owner intends to part with property in his goods, but it does not pass *in law*, his intention is immaterial, and defendant can commit larceny of the property. The distinction was well illustrated in *Tideswell*, 21 Cox C. C. 10; 2 K. B. 273; 74 L. J. K. B. 725; 69 J. P. 318; 21 T. L. R. 531, 1905: C. C. R.,

where for many years E. had agreed with defendant whenever E. had an accumulation of ashes, to sell him so much of the bulk as he should require at so much per ton; 'no specific quantities would be mentioned, the understanding being that the quantities purchased should be defined by the weighing.' By a fraud jointly with E.'s servant, defendant got more than he paid for. It was contended that there could be no *larceny* of 'undefined goods,' but that there was a sale (and then a subsequent fraud), but it was held that there was a larceny of the *excess* quantity; 'if a person sells all the sheep in a field . . . at so much per head, but not knowing for certain how many sheep there are sends his servant with the purchaser to count them, and they fraudulently agree to say there are only nineteen sheep when there were really twenty, there is no larceny, because all the sheep have been sold: the property has passed before the fraudulent agreement was made; but the purchaser and the servant have conspired, &c. . . . If, however, a farm bailiff, having authority to sell his master's sheep . . . says to a purchaser 'there are twenty sheep in the field . . . but he does not know how many there are; you can take them all. I will tell my master you had nineteen only, and you can pay him for nineteen, and give me a present for myself,' then in that case there is clearly a larceny of one sheep, and that whether the bailiff professes to sell the twenty sheep, or whether he professes to sell nineteen only, for the fraud of the servant is known to the purchaser, and no property passes in the twentieth sheep' by that fraudulent act, 'even if the bailiff proposes to part with the property in it': *per* L. Alverstone C.J. and Channell J.

Contract] There was no contract of purchase except that made with the servant, and so *Hornby,* 1844, was expressly followed. The difficulty of identifying the stolen part was no greater in one case than the other. 'If,' said Kennedy J., 'there had been a fixed contract with E. no subsequent arrangement, however fraudulent, would have made the offence larceny.'

Imposture] Indictment for stealing two ewers. Defendant ceased to be servant to a gentleman, who dealt with the owner; he called at his shop, and said that his (late) master wanted some ewers, and desired him to give him one, and to put it down to his master. The man gave him two, in order that his master might choose. He took both, sold them, and absconded. The tradesman swore that he did not charge the master (his customer) with the things, nor did he intend to charge him with either until he had selected. 'It was objected that this amounted merely to the obtaining of goods by false pretences, but Bayley J. held, that as the prosecutor had parted with the possession . . . only, and not the right of property, the offence was larceny; that if he had sent but *one* ewer, in execution of the pretended order, and had charged the customer with it, it would have been otherwise,' presumably because it would have been a sale. *Davenport,* 1826; 1 Archbold's Peel's Acts, 271, 3rd ed.; 2 Russ. Cri. 1211: approved by seven judges at least in *Middleton;* see *Mistakes Classified,* above, and *Adams,* 1812. *Davenport* was discussed in *Savage,* 1831, where the only material difference was that it was assumed that a mistress *did* send a servant for goods 'on appro,' and that the latter therefore 'received the goods properly, and it afterwards entered into her mind to convert them to her own use'; she therefore had *possession,* and Patteson J. directed an acquittal. If she

had really been sent, she should have been indicted for embezzlement. 'Here it would seem that the mistress, and not the servant, was the bailee, for there was no contract with the servant. . . . As between the servant and the mistress,' the judge's view that the former had possession just as if there had been a sale, 'could hardly be questioned; and as between the servant and the bailor, the servant could not commit trespass *vi et armis* or theft, for no one but herself had possession.' W. p. 168.

Sale—payment on delivery] The contract most frequently sought for purposes of fraud is that of sale: a 'pretence to purchase with intent to steal': *Semple,* above; see W. p. 187, and all the cases under *Not Larceny,* below. In the following cases the owner has expected to be paid on delivery, and has therefore, till that event, not completely parted with his property. 'For the purposes of trespass and theft the case is as if there had been no bargain and sale, for the vendor retains at least a 'special property' both as against the vendee and as against strangers.' W. p. 188. Defendant having selected some trinkets, they were sent to his address. The tradesman was prevailed on to leave them there, under a promise that he should be paid that evening. Both of them desired they might be taken care of at that address, and prosecutor swore he considered the goods to be sold if he got his cash, but not before. Half an hour afterwards defendant returned, and took the things away. It was contended there was a complete sale, but the judge directed the jury that if they were satisfied from the circumstances that defendant from the first had no intention of buying and paying for the goods, but gave the order for the express purpose of getting them out of the owner's possession, they should find him guilty; the judges held the direction and conviction right. *Campbell,* 1 Moo. C. C. 179, 1827. Defendant having agreed for some oxen, went to the place where they were in the care of a boy, and took them away. By the custom of the trade, the oxen ought not to have been taken away till the price was paid. It was left to the jury whether, though the beasts had been delivered under a contract, they thought defendant originally got possession of them without intending to pay, the bargain being a mere pretext. On a conviction, the judges were unanimous that the offence amounted to felony. *Gilbert,* Gow N. P. C. 225 *n.*; 1 Moo. C. C. 185, 1828. Here the consent was conditional.

Conditional delivery] Defendant bargained for four casks of bristles, to be paid for on delivery, and was told he could not have them on any other terms. The owner's clerk ultimately consented that he should take them away, and gave him a delivery order, on the express condition that they should be paid for at the door of his house, before they went in. He never took the goods to his house, but lodged them elsewhere. On indictment for stealing, the jury found that he had no intention to buy the goods, but to get them by fraud, and on this finding the judges were unanimous that the felony was complete, and the conviction good; the transfer of the delivery order not having been absolute but conditional. *Pratt,* 1 Moo. C. C. 250, 1830. So, where defendant agreed to pay a price for goods, but on their being put into his gig drove off without paying for them, and absconded for two years; and the jury found that the goods 'were parted with conditionally that the money was to be paid at the time, and that' he 'took them with a felonious intent'; it was held to be larceny.

Cohen, 2 Den. C. C. R. 249; T. & M. 576, 1851. So *J. Stephens,* 4 Cr. A. R. 53, 1910, who ordered goods in a shop, saying he had a customer for them, and on getting them called in someone from outside and told him to take them somewhere; he then negotiated for others without buying. When asked for payment, he said: 'You must look to the other man': conviction upheld. A tailor thought it worth while to cut and fit a suit on credit, but not to part with it on credit: a conviction for retaining it was upheld as larceny by a trick: *Edmundson,* 8 Cr. A. R. 107, 1912. There may be larceny by the *three-card* trick, if it was not intended to pass the property won; if, *e.g.* the loser was drugged: *Hilliard,* 1913: c. q. See *Deposit, &c.*, below. See also *Morgan,* D. & P. 395, 1854; *Bramley,* 1861; *Slowly,* 12 Cox C. C. 269, 1873: C. C. R.

Sale on credit] when followed by non-payment does not as a rule imply larceny in the vendee. But a fraudulent vendor may steal a *deposit:* see that title below. See W. cited under *Larceny and False Pretences,* above. An itinerant vendor got bread from a baker on the understanding that he would pay for it each day after collecting cash from his customers, but did not pay: c. for larceny q.: *A. Jones,* 74 J. P. 168; 26 T. L. R. 226; 4 Cr. A. R. 17, 1910. See *Not Larceny,* below.

Sale without delivery to vendee] 'A mere executory agreement to sell or otherwise alien has no effect on property, right to possession or possession. Further, even when the property has passed by the terms of the bargain . . . he [the vendee] has no possessory right. For the purposes of trespass and theft the case is as if there had been no bargain and sale, for the vendor retains at least a 'special property' both as against the vendee and as against strangers.' W. p. 188. 'But from the moment when the vendee obtains a right to immediate possession of the thing . . . while the thing remains with the vendor without his' being 'the vendee's bailee, it would seem clear that the vendor cannot steal it . . . but if he submits to hold the thing as the vendee's bailee, then . . . he seems to be within the statute against . . . bailees. But such a submission is not to be implied from his mere custody after the change of right. . . . A stranger can steal from the vendor in such a case.' It seems also that the taking by the stranger might be complained of 'by the vendee in respect of his present right to possession, for the vendor may not unreasonably be thought to hold his possession as the agent or representative of the vendee' (*Hudson* v. *Hudson,* 1628, Latch. 214). *Ib.* A vendor's bailee who has possession before the change of right to possession, and who does not attorn to the vendee, 'cannot commit theft against' him—'not by the statute, for he is not his bailee, nor as a stranger, for he is lawfully in possession by delivery of an owner'; he is, it seems, still the *vendor's* bailee. *Ib.* p. 189. 'Where a person has received and holds a thing as bailee for a vendee who has the present right to the possession, the vendee may in virtue of that right sue or prosecute a stranger who takes from the bailee.' *Ib.* p. 190, citing *Remnant,* 1807; 'cp. 1 Hale 668,' which case, however, is *general* (and not one of vendees), for there, one agent of N. had sent by N.'s order to another bank-notes for the latter to forward by coach; defendant was charged with stealing from the coach 'N.'s' property; the judges held this good (though N. had never had the actual possession). 'Or the bailee [for the vendee] may sue or prosecute

strangers; but as between the vendee and his bailee the bailee has an exclusive possession and he cannot commit theft at *common law*': *ib.* (*Walsh*, 1812). See further *In Transitu*, below.

'*Ringing the changes*'—*keeping change*] Defendant went into a shop, and asked a boy to give him change for half a crown; the boy gave him two shillings and sixpennyworth of coppers. Defendant held out half a crown, which the boy caught hold of by the edge, but did not get. Defendant then ran away. Park J. held this to be a larceny of the two shillings and the coppers; but said if the charge had been only stealing the half-crown he should have had great doubt. *J. Williams*, 6 C. & P. 390, 1834. Kelly C.B. thought this was 'exactly' the next case.

Defendant and another man asked for a pennyworth of sweets in a shop. He put down a florin which the shopkeeper put into the till. She then placed on the counter a shilling, a sixpence, and five pence: he took up the change. The other man said, 'You need not have changed,' and put down a penny, which defendant took up; he then put down a sixpence and six pennies, and asked for a shilling. She put a shilling on the counter, when the prisoner said, 'You may as well give me the two-shilling piece, and take it all.' She then put the same florin on the counter, expecting she was to receive two shillings in exchange for it. He took the florin, and she took her own shilling, the sixpence, and the six pennies, and was in the act of putting them into the till when she discovered the fraud; but before she had time to speak he left the shop. She said that she did not intend parting with the florin without getting full change for it. He was convicted of larceny of the florin; and the court held, confirming the conviction, that the transaction was not complete, and that the property in the florin had not passed to defendant. *McKale*, 37 L. J. M. C. 97; L. R. 1 C. C. R. 125; 11 Cox C. C. 32, 1868. See also *Twist*, 12 Cox C. C. 509, 1873: C. C. R.; *Hollis*, 12 Q. B. D. 25, 1883: C. C. R. ('ringing the changes').

Indictment for stealing 19*s.* 6*d.* Prosecutor having to pay defendant 6*d.*, asked him if he had change for a sovereign, and on his saying 'yes,' gave him a sovereign. The chairman (who was held to have amended the indictment, and to have had power to do so, to one for stealing a sovereign) directed the jury that if they believed that defendant, at the moment of obtaining it, intended by a trick feloniously to deprive prosecutor of the sovereign, they were to find a verdict of guilty, and it was held that the direction was right. *Gumble*, L. R. 2 C. C. R. 1; 42 L. J. M. C. 7; 12 Cox C. C. 248, 1872; 'clearly larceny of the sovereign, not of 19*s.* 6*d.*': P. 101 *n.* Where the indictment was not amended, defendant, who, being entitled to one penny out of a sovereign, first gave elevenpence, and then denied that she had received anything but a shilling, could not be convicted of the larceny of nineteen shillings, as she had never taken nineteen shillings at all; but the majority of the judges thought that she might have been convicted 'on an indictment for stealing one sovereign, if the issue had been properly left to the jury.' *Bird*, 12 Cox C. C. 257; 42 L. J. M. C. 44; 27 L. T. 800; 21 W. R. 448, 1873: C. C. R.: fifteen or sixteen judges.

Deposit—Stake—'Confidence trick'—gaming] Where money has been merely deposited there may be larceny of it. Thus, obtaining goods by *ring-dropping* has been held to be larceny. Defendant, with some

accomplices, meeting prosecutor, pretended to find a valuable ring and a paper, appearing to be a jeweller's receipt 'for a rich brilliant diamond ring.' They offered to share the value of it with him, if he would deposit some money and his watch as a security. He having accordingly laid down his watch and money on a table, was beckoned out of the room by one of them, while the others took away his watch and money. This was held to amount to larceny. *Patch,* Lea. 238; East P. C. 678, 1782. So, where, by a similar fraud, defendant procured from prosecutor twenty guineas, &c., promising to return them the next morning, and leaving the jewel pretended to be of far greater value, but really almost worthless, with him as security, this was held by nine judges to be larceny, the money being deposited as a *pledge* for the ring, but two thought that the transaction was a loan with security, and that the property had been parted with as well as possession. *Moore,* Lea. 314; East P. C. 679, 1784. To the same effect is *Watson,* Lea. 640; East P. C. 680, 1794. Indictment for stealing two bank post bills and seven guineas. One defendant called on prosecutor, and discovering that he had some money, induced him to go to a public house, where he met other sharpers. By (what is now known as) the 'confidence trick' they induced him to go and fetch money and inveigled him to play at betting games, at which at first he won, but he ultimately lost, as he believed, fairly, all his money, to their taking which he made no objection. There was abundant evidence that they were expert sharpers. For them it was contended, that this was a mere gaming transaction, or at most only a cheat, and not a felony, but the jury found that it was a preconcerted scheme in all of them; but the judges held the conviction wrong, for the property as well as the possession [so Leach must be read] had been parted with under the idea that it had been fairly won. *Nicholson,* East P. C. 669; Lea. 610, 1794. So where prosecutor was induced, by a plot, to deposit his money with one of the defendants, under colour of a pretended bet, and the stakeholder, on one of his confederates winning the bet, handed over the money to him, it was left to the jury to say whether, at the time the money was taken, there was not a *plot* that it should be kept, under the colour of winning the bet fairly, and the jury found there was; this was held to be larceny, 'because at the time of the taking prosecutor parted only with the possession': *per* L. Coleridge C.J. in *Buckmaster. Robson,* R. & R. 413, 1820: 'very near *Nicholson.*' Defendant, who was at a race-meeting offering to lay odds against various horses, made a bet with prosecutor, who deposited his money with him; he eventually went away with it, never having intended to repay it if the horse won, as it did. It was clear that prosecutor did not expect his identical coins back. It was held—following *Robson*—that there was no contract by which the property in the money could pass, nor was there any intention to pass the property, and that there was therefore evidence of larceny. *Buckmaster,* 20 Q. B. D. 182; 57 L. J. M. C. 25; 16 Cox C. C. 339, 1887: C. C. R.

Defendant agreed to sell a horse for 23*l.*; prosecutor handed him 8*l.*, in return for which he gave him a receipt, which stated that the balance was to be paid on delivery. He never delivered and never intended to deliver the horse. It was held that he was rightly convicted of larceny by a trick, since the prosecutor had not intended to part with the property in the 8*l.* until he received the horse, but had only paid it as a deposit. *Russett,* 1892, 2 Q. B. 312; 17 Cox C. C. 534: C. C. R., following *Buckmaster.*

Not larceny] The following instances illustrate negatively the essence of larceny, the *property* having passed to defendant. One of defendants, in the presence of the prosecutor, picked up a purse containing a watch, a chain, and two seals—all worthless—which a confederate represented to be gold, and worth 18*l.*; on which prosecutor purchased the share of the man who picked up the purse for 7*l.*, another confederate having promised to buy it back from him; Coleridge J. held that this was not larceny, as 'the prosecutor meant to part with his money for ever . . . he never intended to have it back again, but meant to sell' his share 'for himself': defendants were, however, convicted of a conspiracy to defraud. *Wilson,* 8 C. & P. 111, 1837. Compare this case with *Patch,* where defendant had only a deposit of the money. Indictment for horse stealing. After bargaining, prosecutor, who knew him, told defendant at a fair he should have his horse for 8*l.*, and calling his servant, ordered him to deliver it to defendant, who immediately mounted the horse, saying that he would return immediately and pay him. Prosecutor replied, 'Very well,' and defendant rode away, and never returned. Gould J. ordered an acquittal, for here was a complete unconditional contract of sale and delivery; the property as well as possession was entirely parted with: the fraud was of *the price. Harvey,* East P. C. 669; Lea. 467, 1787.

Indictment for stealing silk, the property of W. P. called at W.'s warehouse, and having looked at several pieces of silk, selected one, and said that if W. would send it that evening, he would pay him for it. W. accordingly sent his shopman. P. examined the bill, and gave the man bills for more than the price. The man had not enough change, but P. said he wanted more goods, and should call the following day, which he did not do. The bills were proved to be good for nothing, and forgeries; the address had only just been taken, and P. left a few minutes after he got the goods. They had been entered in the regular course of business to P. as a debtor. It was left to the jury whether there was from the beginning a premeditated plan by P. to obtain the goods without paying for them, or whether this was a sale by W., and a delivery of the goods with intent to pass the property, he having received bills in payment. The jury found the former, and that it was not W.'s intention to give him credit. But the judges were of opinion that the conviction was wrong, the *property,* as well as the possession, having been parted with, on receiving that which was accepted as payment by the shopman, though that afterwards turned out to be of no value. *Parkes,* East P. C. 671; Lea. 614, 1794. See *Small,* 1837, and several cases under Larceny *By Servants,* below.

Defendant pretended to put three shillings into a purse and offered the purse and its contents to prosecutor, who took it, for one shilling; on opening it he found it contained only three half-pence. It was held that defendant could not be convicted of larceny of the shilling since prosecutor clearly intended to part with the property in it. *Solomons,* 17 Cox C. C. 93; 62 L. T. 672, 1890: C. C. R.—'the purse trick,' than which there cannot be 'a clearer illustration of the difference between' false pretences and larceny: *per* Hawkins J.

Trick through innocent third person] Indictment for stealing a hat, in one count laid to be the property of Beer, in another of Paul. Defendant wanted to buy a hat of Beer, a hatter, but was told he could not have it without paying for it. Having left the shop he met a

boy, and told him that Paul, who (as he had just heard) had a hat waiting for him at Beer's, had sent him to Beer's for it; but that, as he owed Beer money, he did not like to go; and asked him, for a reward, to go and fetch it to him. He told him not to go into the shop if Paul, whom he described, was there. The boy went, and got the hat, which, after carrying part of the way by defendant's desire, he delivered to him, when he said he would take it himself to Paul, which he never did. It was objected for him that this was not larceny, but false pretences; and the judges so decided, the owner having parted with his property in the hat. *Adams,* R. & R. 225, 1812 (the second sentence in the headnote there is not warranted by the case and has given rise to much confusion); cf. *Box,* 9 C. & P. 126, 1839.

This judgment seems to overlook the fact that there had been an out-and-out sale to Paul, for whom the hat was made to order [see W. p. 188 *n.*]. Paul therefore was the owner, and the boy *in fact* purported to represent Paul (either as servant or bailee), who certainly had not passed the property. The boy's mistake was exactly that classified by P., above, as III. 1, *c.* (and that of the shopkeeper in *Davenport*), viz.: he mistook defendant's 'legal person'—through the latter's trick—believing him to be the servant or agent of the owner. Defendant's violation of the latter's possession was therefore felonious. The fact that the owner did not know that the hat had become his does not affect the point.

'In a weighty though not numerous series,' says P. p. 111, 'of modern decisions it is laid down (and this against innocent third parties) that property does not pass where a person fraudulently gets delivery of chattels, as in right of another person, either by pretending to be that person or by pretending to be authorised by him.' 'Some cases in which no consent has in fact been given to a change of possession are treated as if they were cases of bailment, as for instance . . . the thing is taken for *the benefit of the owner,* as a watch from . . . a drunken owner . . . or some cases of finding.' W. p. 133. See *Custody as Against Wrongdoers,* above; contrast this case with *Butcher,* 1858; and cf. W. p. 188, above, on *Remnant.*

Or, the boy was a servant-bailee, 'the one case' where a servant possesses by virtue of his custody, viz.: 'when he receives a thing from the possession of a third person to hold for the master, and then he is held to possess as a bailee until he has done some act by which the thing is appropriated to the master's use': P. p. 60. Both shopkeeper and boy regarded the latter as a bailee. So W. p. 191: 'If the vendee's servant rightfully receives the thing in the course of his employment he is held to acquire the lawful possession,' though the vendee never had possession. The authorities show that the master's possession begins 'when although the thing continues in the apparent possession of a servant, the servant agrees with the master to hold it finally for the master in the master's right.' 'It is conceived that a mere acknowledgment by the servant'—this case—'that he held for the master would be sufficient.' *Ib.* pp. 195-6. See *Sale Without Delivery,* above. Further, W. shows *ib.* p. 197, that stealing from a servant a thing *in transitu* could be prosecuted by the master as well.

If the doctrine of *Innocent Agent* (which see, above) be applied, defendant himself must be deemed to represent himself as the owner's servant, and then the case becomes exactly that of *Davenport.* See *Mistakes Classified,* above.

Adams and *Atkinson,* 1778, 'appear to have been decided on the

ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principles the cases can be supported if *Davenport* [1826] and the others involving the same principle are law . . . we ought not to feel bound by two cases which, as far as we can perceive, stand alone and seem to us contrary both to principle and justice' (joint judgment of seven of the judges in *Middleton*). Brett J., too, though dissenting from them, says there that no property passed to *Adams;* Cleasby B. *ib.*, who also dissented there, agreed that *Adams, Atkinson,* and *Coleman,* 1785, 'must be overruled if this new test [viz. 'the effect of the transaction in passing the property, which might raise in many cases a question of law'] be adopted'—to which he objected. 'The proper test' is 'the intention of the owner to deliver over the property (which is a question of fact) . . . the definition of larceny makes the mind and intent of the owner the test'; but see now s. 1 (2) (i) *c* of the Larceny A. 1916.

Presence or control of owner] A landlord went to his tenant (who had removed all his goods) to demand his rent, amounting to 12*l.* 10*s.*, taking with him a signed receipt; the tenant gave him 2*l.*, and asked to look at the receipt. On its being handed to him he refused to return it, or to pay the remainder of the rent, as 'he had got his receipt.' The landlord, at the time he gave the receipt, thought defendant was going to pay him all the rent, and would not otherwise have parted with the receipt; he did not expect or want to have it again. Coleridge J. held that it was a larceny of the receipt, as it was only lent him to look at, and that the fact of the prisoner paying the 2*l.* made no difference. *Rodway,* 9 C. & P. 784, 1841: 'it would seem that a bailment or possession ought not to be held to arise in . . . a case'—'when the thing is delivered to be used only in the immediate presence of the deliveror'—'in the absence of evidence of an intention by the deliveror to part with possession by parting with control.' W. 161. He remarks, p. 140, on these two cases (and *Chissers, Johnson,* 1851): 'the person may have had the thing not as a servant, but to examine or use under the present control of the possessor, as in the case of a customer allowed merely to examine or try a watch or a horse under the eyes of the owner; or the use of the thing may have been permitted under an express or tacit condition that it is not to be taken away, as in the case of a guest; and in all such cases the possession continues unchanged in law, and the person will commit trespass or theft by carrying the thing away. . . . It would seem in such cases to make no difference whether the use of the thing is for the benefit of the owner or for that of the accused, so long as there is no bailment. On the other hand, if there is a sufficient intention to give separate and exclusive control for the time being, the mere condition that the thing is not to be carried from the owner's presence or premises does not necessarily exclude a bailment. In that case the owner's possession would be destroyed or interrupted by the bailment.'

Where a lady gave defendant a sovereign in order that he might obtain for her a railway ticket, and he ran away with the money, and the jury found that he had placed himself near the booking-office for his fraudulent purpose, it was held that he was rightly convicted of larceny. *G. Thompson,* L. & C. 225; 32 L. J. M. C. 53; 9 Cox C. C. 244, 1862.

'Where the second person, being a mere trespasser, *delivers* the thing to a third, it seems that the third person's acquisition of the possession is not of itself, even for civil purposes, trespassory against the owner, because the owner's possession had already ceased to exist, though the third person may in some cases by . . . assenting to the . . . trespass . . . make himself civilly liable . . . and for the purposes of . . . theft it is proved by the existence of the distinct crime of receiving that *even* such guilty knowledge and consent will not in any case make him liable as a trespasser': *ib.* 151. See esp. *King*, 1817; *M'Makin*, 1808; *Kelly*, 1820; *Dyer*, 1801; and *Attwell* [all under *Receiving*]. 'And on the whole it is conceived,' continues W., 'that subject, perhaps, to' an 'exception . . . the rule established by the early authorities has not been overturned, at least for . . . criminal law, and indeed that no other rule would be consistent with the general legal conceptions of possession and trespass, for *ex hypothesi* the original possessor is out of possession, and it would be a strong fiction to hold that he has a right to treat a violation of an adverse taker's possession as if it were a wrong done to possession held on his own behalf.' The 'possible exception' W. refers to is 'suggested by Hale' in the *second* following case.

More than one taking] But 'if A. steals the horse of B., and after C. steals the same horse from A., in this case C. is a felon both as to A. and as to B., for by the theft by A., B. lost not the property nor in law the possession of his horse or other goods, and therefore in that case C. may be appeal'd* of felony by B. or indicted of felony *quod cepit et asportavit* the horse of B.: 4 H. 7, 5 *b* [pl. 1]; 13 E. 4, 3 *b* [pl. 7]': P. C. 507.

'If A. steals the horse of B. and afterwards delivers it to C., who was no party to the first stealing, and C. rides away with it *animo furandi*, yet C. is no felon to B., because tho the horse was stolen from B. yet it was stole by A. and not by C., for C. *non cepit*, neither is he a felon to A., for he had it by his delivery.' 'But even this exception seems not to be established by the authorities cited, for . . . they both refer not to indictment, but to appeal* . . . and in both . . . the distinction is expressly made between' the two: W. *ib.* He concludes that these cases are 'rather' authorities that theft (and trespass) 'do not lie against the third person' than that they do, and 'at any rate . . . are no authorities that trespass or theft lies against the third person *unless where the second person took as a thief*': *ib.* p. 156.

'This rule' [above, thief *delivering* to third person] 'will not extend to protect a person who by mere licence of a person not authorised to give the licence takes a thing while it remains legally in the possession of the owner, as where a shop-servant not authorised to part with goods assents to the taking of a thing out of the shop': W. p. 151, who then shows that a passage in the judgment of Gould J. in *Wilkins*, 1789 [as reported], 'the only authority directly opposed to this [W.'s] view,' is clearly wrong. [*Wilkins*, above, was a case of theft from *a servant*, considered by the twelve judges, and *as such* has always been accepted.]

* 'Appeal is the suit of the party' and restitution could be obtained by it which the common law did not allow on indictment 'because it is the suit of the King': it was first allowed on indictment by 21 H. 8, 11, rpd.; 3 Inst. 242.

I. *From servants*—II. *By servants*] The following principles have been laid down: (By exception to a general rule) a servant in charge of his master's property or a person having the use of anything by the mere licence of the owner, as a guest has the use of the furniture and plate at an inn, generally has not possession.

There may be cases of handing over for a limited purpose which are on the face of them not obviously within either of these classes. It must then depend on the true intent of the transaction as ascertained from all the circumstances whether there is a bailment or a mere authority or 'licence to deal with the thing in a certain way . . . in a great number of common cases the servant may be said not even to have possession, in fact, for he would not be supposed by any ordinary observer to have the physical custody of the thing otherwise than on his master's behalf and at his master's disposal . . . the rule is settled in our modern law that a servant does not possess by virtue of his custody, except in one case, namely, when he receives a thing from the possession of a third person to hold for the master; and then he is held to possess as a bailee until he has done some act by which the thing is appropriated to the master's use ['as the possession must be in someone, it must be in the servant until he does some act, &c.': W. p. 130] . . . The holder of goods may make his servant a bailee if he thinks fit [cf. *Hopkinson* v. *Gibson*] . . . but the law does not regard this as a normal' state of things, and probably rather strict proof would be required . . . delivery to a servant on his master's behalf does not immediately confer possession on the master. This peculiar rule for practical purposes belongs exclusively to the criminal law.' P. pp. 58, 60. See *In Transitu*, below.

But delivery to an alienee's *servant* for him 'was not held to vest the possession in him as against the servant (though it would entitle the master to sue or prosecute a stranger . . .)': W. p. 130.

I.

Servants' authority] 'The distinction' insisted on by W. p. 219, above, 'is,' he continues, p. 221, 'subject to the important limitation that if the contract to part with the property is made for the owner by a person who had not authority to give such consent, it will not avail the deceiver. And for the purposes of this limitation a person has not authority to make such contract unless he has a general authority to act for the owner or a specific authority for the particular object. For instance, the authority of a carrier's servant to part with goods was held not to extend to parting with them to the wrong person, and the authority of a shopman to sell goods was held not to extend to parting with them for bad half-crowns; but the authority of a bank cashier was held to extend to parting with money for a forged order; see *Middleton*.'

'There seems to be no doubt in principle that a possession acquired by delivery or consent of a servant or other similar person, not himself having nor authorised to give the master's or owner's consent to a transfer of the possession, is trespassory, for the possession of the master continues and he has not consented to its being transferred; see *Middleton*, 1873': W. p. 217.

The earliest (Gould J. thought) of these servant cases, was one where defendant stopped an apprentice with a parcel, and by a series of lies persuaded him to part with it. The judges in confirming a conviction, laid down, *per* Gould J., the following rules 'as clearly settled: that the possession of personal chattels follows the right of

property in them; that the possession of the servant was the possession of the master; that this law held in all cases where servants had not the absolute dominion over the property,' but were 'only entrusted with the care or custody of it for a particular purpose. These doctrines also hold where the goods are taken from the possession of the true owner by means of *fraud,* for otherwise a man might derive an advantage from his own wrong.' *Wilkins,* Lea. 520, 1789; East P. C. 674, who points out that in *Parkes,* 1794, the servant had power to sell.

In the following cases it has been held that the servant having only a limited authority and not having pursued it, the property has not passed, and the conviction for larceny was right. But P. observes, p. 113, 'It is obvious that many of the earlier cases in which convictions for larceny were sustained on the ground of want of specific intention or authority to pass the property in the goods (*e.g. Longstreeth*), might have rested on broader grounds if the doctrines of the leading majority in *Middleton* and those who affirmed the conviction in *Ashwell* are correct.' See *ib.* p. 111, cited above. Carmen had orders to deliver goods to a certain person; their servant, through defendant's imposture, in mistake delivered them to him; he misappropriated them; he was guilty of larceny, as the servant had no authority to part with the ownership to him. *Longstreeth,* 1 Moo. C. C. 137, 1826; *Little,* 10 Cox C. C. 559, 1867, accepted in bad faith goods left by mistake.

Defendant, by false statements, induced a tradesman to send by his servant, to a particular house, goods with change for a crown. On the way he met the servant, and induced him to part with the goods and change, giving him a crown which proved to be bad. Both master and servant swore that the latter had no authority to part with goods without payment, but the former admitted that he intended to sell the goods, and never expected them back again. The jury were directed, perhaps with the concurrence of two judges, that if they thought the servant had an uncontrolled authority to part with the goods and the change, they ought to find the prisoner not guilty; but if they should be of a contrary opinion, and find it a preconcerted scheme, then it amounted to larceny. *Small,* 8 C. & P. 46, 1837; see *Prince,* below.

A. received goods of B., the servant of C., under colour of a pretended sale, mainly shown to be such by the absence of an invoice. It was held that the fact of A.'s having received such goods with knowledge that B. had no authority to sell, and that he was in fact defrauding his master, was sufficient evidence of larceny against A. jointly indicted with B. *Hornby,* 1 C. & K. 305, 1844, expressly followed in *Tideswell.*

Defendant for a fraudulent purpose stopped a letter carrier, and by a lie induced him to deliver up letters directed to others. Denman J. ruled that the letter carrier could not be held to be the agent of the Postmaster-General for wrongfully giving up the letters, and that the offence was larceny. *Dowdeswell,* 1873; previous editions of this work. Where defendant induced a postman to hand over to him letters which were not addressed to him, it was held that he could be convicted of the *larceny,* as he was either a joint (principal) thief with the postman or an accessory before the fact, and therefore liable by 24-5 V. 94, 1, to be convicted as a principal. *James,* 17 Cox C. C. 24, 1890: C. C. R. (24 Q. B. D. 439; 59 L. J. M. C. 96, contain a confusing mistake).

Full authority] In some cases the servant has a general authority to part with the goods, and thus there is no larceny; 'in general . . . the contract by a servant or agent must . . . be such as to pass the property for civil purposes': W. p. 221, citing several of the cases under this and the last heads, and also *Webb,* 5 Cox C. C. 154, 1850; *Sheppard,* 9 C. & P. 121, 1839; *Stewart,* 1 Cox C. C. 174, 1845; *Sparrow,* 2 Cox C. C. 287, 1847; *Simpson,* 2 Cox C. C. 235, 1847; *Robins,* 1854; *Campbell,* 1792; *Hench,* R. & R. 163, 1810; *Barnes,* 1850; *Middleton,* 1873.

Defendant, who had often pawned things at a shop, brought some diamonds there to pawn and to redeem things already pledged. The shopman, who had general authority to act in his master's business, after pricing the diamonds, delivered them back to defendant to seal up, who then substituted a packet of *false* stones. He then got back the articles previously pledged (out of a loan on the supposed diamonds). Being convicted of stealing *those* articles, the judges resolved unanimously that there was no larceny, because the servant, who had a general authority from his master, parted with the property, and not merely with the possession. *Jackson,* 1 Moo. C. C. 119, 1826.

The cashier of a bank has a general authority to pay money and to judge of the genuineness of cheques, and it is not larceny (but false pretences) to obtain money from him by a forged cheque, and the receipt of such money is not *felonious. Prince,* L. R. 1 C. C. R. 150; 38 L. J. M. C. 8; 11 Cox C. C. 145, 193, 1868: c. q. The difference from *Longstreeth* is 'there the servant had no authority to deal with the property in the goods, but merely with the possession': *per* Blackburn J.

Owner stealing from servant] East P. C. 558, 654, speculates on this point, which has no practical value; see W. pp. 139, 165, who doubts this, and *Wilkinson,* below. There is a passage in the Year Book, 7 H. 6, f. 43, 18 at end, in which it is said, 'if I bail to you certain goods to keep, and then retake them feloniously, I shall be hung, and yet the property was in me: and Norton said that this was law,' &c. This passage, however, must be understood with the qualification found in all the criminal treatises, '*with design probably to charge him for them in an action of detinue,*' as 1 Hale P. C. 513, puts it, citing the Year Book, 3 Inst. 110; Stamf. P. C. 26*a* [24, 25?]: when W. says Hale is 'not supported by any of the references' he means for the qualification in italics. Foster C. C. 123; East P. C. 558, 654; 4 Bl. Com. 231. In *Wilkinson and J. Marsden,* R. & R. 470, 1821, Marsh & Co. were employed by C. to pass nux vomica through the custom-house for *export.* They entered it for a vessel in the London Dock, and having done what was necessary, delivered back the cocket bill and warrants to C., and joined with C. in a bond to government to export these goods (for which there was no duty); they then employed defendants to convey the goods to the ship, and lent them a lighter for the purpose. One defendant accordingly took the nux vomica on board the lighter, but instead of delivering it on board the ship, he, the co-defendant, and W. Marsden emptied the bags, refilled them with cinders, and delivered *them* on board as the nux vomica. There was a large duty on the home *importation.* They were indicted for stealing *the property of Marsh & Co.,* but it appeared that it was really the property of *W. Marsden* (who was not charged), and that C. had only lent his name to facilitate passing, and that the object of the transac-

tion was to defraud the government of the duty. Of eleven judges, four thought that it was no larceny, as there was no intent to cheat or to charge Marsh & Co., but only the crown; seven 'held it a larceny, because Marsh & Co. had a right to the possession until the goods reached the ship; they had also an interest in that possession, and the intent to deprive them of their possession wrongfully, &c. was . . . felonious as against them, because it exposed them to a suit upon the bond.' (They had not been so sued or called on for duties.) Some of the seven judges thought 'this would have been larceny, although there had been no felonious intent against Marsh & Co., but only an intention to defraud the crown.'

It may be doubted whether the law was not somewhat distorted in this case in order to punish a flagrant fraud. If the true owner of the goods had demanded them, Marsh & Co. could scarcely have refused to deliver them to him; so that the decision at least comes to this, that he obtaining possession of his own goods, to which possession he had an undeniable right, by a false pretence, with intent to defraud, was guilty of larceny. . . . It is extremely difficult to reconcile even this case with any accurate view of the offence of larceny; and, moreover, *Wilkinson* stands almost, if not quite, alone.* W. doubts whether this is good law: p. 229. Much the same point arose in *Wadsworth,* 10 Cox C. C. 557, 1867, where defendant had bailed a horse as *security* for (in effect) a debt and retook it, but the charge failed on a question of evidence.

II.

By servants] See the introductory remarks to *Embezzlement,* where it will be seen that *larceny* by servants (and clerks) is now specially dealt with by *statute.*

The following principles have been laid down:—

'An owner in possession may deliver the thing to his servant to be by him kept, used, carried or applied in the course of his employment as a servant. Here it was once thought (Staundf. P. C. 1, p. 25; [*W.*] *Watson,* 1788; East P. C. 562; cf. 21 H. 8, 7) that the possession passed to the servant, at any rate when the charge was to be executed away from the master, and particularly when the thing was not to be kept but to be delivered absolutely to a third person; but it has long been settled that in all such cases the master's possession continues (3 Inst. 108; 1 Hale 505, 1686; East P. C. 565-6; 1778, *Atkinson;* 1782, *Bass;* 1789, *Wilkins;* 1820, *Hutchinson,* R. & R. 412; 1838, *Heath;* 1842, *Beaman;* 1843, *Ashley,* 1 C. & K. 198; 1856, *Green;* 1850, *Barnes;* 1862, *H. Thompson,* as explained in *Cooke,* 1871 . . .). The servant is said to have not the possession, but a mere charge (*onus*) or custody': W. p. 138 [so P. p. 58, cited above]. 'The foregoing statement is however subject to the following limitations: The mere fact of service does not prevent the servant from playing a different part at the same time in respect of other relations. A servant who takes his master's things in a manner wholly outside the scope of his employment may be regarded as a mere stranger in this respect. Again, if the master gives money to the servant, even for the purposes of his

* This paragraph is *substantially* as it was in the 7th edition of this work, which is by F. Stephen, J., who, *Digest,* art. 327, says: 'It seems it would have been larceny if no bond had been given.'

employment, still, if the master means to part with the property in the money wholly to him, and to treat him as a debtor or accountant [or as the agent of others: *Barnes,* 1866], the master's possession is transferred together with the right of property to the servant.' [Contrast *Goode,* 1842.] 'So that which was originally a mere custody by the servant may become changed into a possession by him as a bailee or as a trespasser. . . . In any view the language of' *Deakins,* 1800, 'is a strong authority against holding that a servant's custody is in general sufficient to support an action or prosecution as for a taking of the thing from his possession, even as against a mere wrongdoer' (cp. *Hopkinson* v. *Gibson,* 1805, 2 Smith, 202), 'though it may be that it [a servant's custody] will sometimes as against strangers be treated as a possession in cases where the servant's charge is to be executed at a distance from the master and where the manner of the execution is necessarily left in a great degree to the discretion of the servant.' *Ib.* See *Deakins,* below. In *Hopkinson* v. *Gibson,* cited by W., L. Ellenborough said of a sergeant carrying out the orders of a colonel (whom he held to be 'the servant' or 'agent of government') 'there may be an action of trover perhaps brought by the person who had the actual custody of the horse,' the property of the crown taken in distress 'at the time.'

Possession of servants] Thus it is larceny 'if the butler who has charge of his master's plate, or the shepherd who has that of his master's sheep,' appropriates them, and so of an apprentice who feloniously embezzles his master's goods. 1 Hale P. C. 506; East P. C. 554. So where a carter goes away with his master's cart. *Robinson,* East P. C. 565, 1755.

Defendant was employed by prosecutor as his foreman, &c., but did not live in his house. Prosecutor, as usual, delivered a bill of exchange to him, with orders to take it to the post for London. He got cash for the bill, and absconded. It was objected that by the delivery prosecutor had parted with the possession of the bill, and the case was likened to that of a carrier entrusted with goods; but the judges held it larceny, on the principle that the possession still remained in the master. *Paradice,* East P. C. 565-6, 1766; Lea. 523, 524.

Where a servant went to her master's wife, and told her she was acquainted with a person who could give her ten guineas' worth of silver, and the latter gave her ten guineas for that purpose, with which she ran away, she was found guilty of the larceny. *Atkinson,* Lea. 302 *n.*, 1778; East P. C. 673.

Prosecutor delivered a parcel to a porter in his employ to carry to a customer. While carrying it he met two men, who persuaded him to dispose of the goods, which he did, taking them out of the parcel and receiving part of the money. All the judges held this to be larceny, as the possession still remained in the master. *Bass, ib.* 1782.

So where prosecutor delivered to his servant a sum of money to carry to a person, who was to give him a bill for it, and the servant appropriated it to his own use, the judges were of opinion that this was not a mere breach of trust, but a felony. *Lavender,* East, *ib.* 1793; see also *Heath,* 2 Moo. C. C. 33, 1838.

A bill having been once decidedly in the possession of the master by one clerk who got it accepted, putting it amongst the other bills in the master's desk, defendant, another, feloniously took it out of that

possession. He discounted it and converted the proceeds to his own use; he was held to have stolen *it* (not the proceeds), though he had authority to discount bills: *Chipchase,* East P. C. 567; Lea. 699, 1795; cf. *Murray,* 1830, and *Masters,* 1848.

Defendant was a drover employed by prosecutor; he sold several of his drove, which he was taking to market, and used the money. He was found guilty of larceny; but the jury found that he did not intend to steal the sheep *at the time* he got possession. The judges were of opinion, that as the owner parted with the *custody* only, and not with the possession, defendant's possession was the owner's, and that the conviction was right. *M'Namee,* 1 Moo. C. C. 368, 1832. See *Hey,* 1 Den. C. C. R. 602, 1849.

Employment for one job] See under *Embezzlement.* A. employed B. to take his barge from one place to another, and paid him his wages and expenses in advance, and gave him a separate sum of 3*l.* to pay dues. B. took the barge sixteen miles, and paid for the dues under 2*l.*, and appropriated the rest of the 3*l.* Patteson J. held that it was immaterial here whether the relation of master and servant existed; he clearly spoke of defendant as a 'servant' for that purpose [only]; the felony consisted of the appropriation of a distinct sum to be spent in a particular way; see above. In *Cooke,* 1871, 'the court seems to have thought' [*sed qu.*] *Goode* 'was decided on the ground that accused was a servant': W. p. 163, who thinks (p. 138, cited above) that even a servant may be his master's bailee by express appointment. *Goode,* C. & M. 582, 1842. See also *Beaman, ib.* 595, 1842.

One servant fraudulently getting property through another—(a) *his master's*] Defendant was a servant of grocers who purchased 'kitchen stuff.' In the absence of the chief clerk, he had authority to buy and pay the seller, and afterwards, on producing a ticket to the chief clerk, was repaid. He presented a ticket in the usual form to the chief clerk, and received the sum of 2*s.* 3*d.*; there had been no sort of sale. The court held that this was a case of false pretences, and not of larceny, 'as the clerk delivered the money to the prisoner with the intent of parting with it wholly to him.' *Barnes,* 2 Den. C. C. R. 59, 1850: c. q.

Cases like the following often occur. Defendant, being prosecutor's bailiff, it was his duty to receive and pay moneys for him, and to make entries thereof. On one occasion the book showed a balance of 2*l.* in his favour, by his taking credit for a payment he had never made, and he got the 2*l.*: c. for larceny q., though an indictment for some other offence might have been sustained. *Green,* D. & P. 323, 1854; but see *Cooke,* below.

So where a clerk getting money in due course from a cashier to pay away falsely represented a sum of 3*l.* 10*s.* 4*d.* to be due, whereas a less sum was then due, and having got it, took the difference, it was held not to be obtained by larceny, but by false pretences. *H. Thompson,* L. & C. 233; 32 L. J. M. C. 57; 9 Cox C. C. 222, 1862. That decision 'went entirely upon the question whether there was a larceny in the first instance. The point was not considered whether the subsequent misappropriation was larceny, nor was any question raised about the A. [1861] relating to fraudulent bailees. The present case is not governed by it but' by *Goode,* 1842: *per* Bovill C.J. *Cooke,* L. R. 1 C. C. R. 295; 40 L. J. M. C. 68; 12 Cox C. C. 10,

1871, where a servant whose duty it was to pay workmen obtained fraudulently a larger sum from the cashier than was necessary, *intending at the time* to appropriate the balance, and it was held that whether the obtaining was in the first instance larceny or false pretences, yet the money while in the servant's custody was the property and in the possession of the master, and therefore the misappropriation of the excess by the servant was larceny.

Of *Barnes, H. Thompson,* and *Cooke,* and such cases, W. p. 221, says: 'The owner may be induced by deceit to consent to give a bare physical possession to another as his servant or licensee in his presence or on his premises. In such a case the deceit is unimportant for the purposes of the law of theft, since the owner's possession continues equally whether there is deceit or not, and a taking and carrying away is an act of theft independently of the deceit. There is in effect a double theft.' See *Presence of Owner,* above.

(b) *A stranger's*] *Robins,* by false pretences to another employee, got wheat belonging to a consignor in bailment to his employers: larceny, not false pretences; he could not be better off by telling a lie: D. & P. 418; 6 Cox C. C. 420, 1854.

Servants' intent] In *Morfit,* R. & R. 307, 1816, defendants were charged with stealing beans. They were servants of the owner, and took care of his horses, for which he made them an allowance of beans. They had entered the granary, and carried away beans, which the jury found they intended to give to his horses. A majority of the judges thought it larceny. See *Handley,* C. & M. 547, 1842. In *Privett,* 1 Den. C. C. 193, 1846, the jury found distinctly that defendants 'took the oats with the intent of giving them to their master's horses, and without any intent of applying them for their private benefit.' This distinguished the case from *Morfit,* where the majority thought the element '*lucri gratia*' consisted in the grooms' easier work owing to the horses' better food, but most of the judges agreed that they were bound by the previous decisions to hold this larceny; otherwise several would have dissented, and two did. But since 26-7 V. 103, 1, any servant taking from his master's possession 'any corn, pulse, roots, or other food,' contrary to his master's orders, for the purpose of giving the same to his horses or other animals, 'shall not *by reason thereof* be deemed guilty of . . . felony,' but may be convicted summarily; see *Servants.*

Defendant was supplied with pig-iron by his employers, which he was to put into a furnace, and he was paid according to the weight of the metal which ran out of the furnace. He put the pig-iron into the furnace, and also put in with it an iron axle of theirs, which was not pig-iron; the value of the axle to them was 7*s.*, but the gain to him by melting it was 1*d.* Tindal C.J. held that if he put it in with a view to his own profit, it was larceny. *Richards,* 1 C. & K. 532, 1844.

Where defendant took some skins, as a special verdict found, 'not with the intent to sell or dispose of them, but to bring them in and charge them as his own work,' they having been dressed, not by him, but by another workman (it was a common practice at that tannery for one man to lend his dressed work to another, though it was not proved to have happened here); it was held not to be a larceny. *Holloway,* 1 Den. C. C. 370; 18 L. J. M. C. 61; 3 Cox C. C. 241, 1848, which Parke B. said was 'precisely' *Webb,* 1835: miners' ore: no

larceny. The distinction between these two cases seems to be this: that in *Richards* there was such a conversion of the goods to defendant's own purposes as that the master never could have them again in their original condition; whereas in *Holloway* their condition was never altered. *Holloway* was followed in *Poole*, D. & B. 345, 1857; defendants were glove finishers, and the practice was to take the finished gloves to a room on the master's premises, and lay them on a table, in order that each workman might be paid according to his number. Defendants took a number of finished gloves out of the store-room, which they broke into, and laid them on the table with intent to obtain payment for them as their work. It was held on the authorities that this was not larceny; but had the point been *res integra* the judges apparently would have decided otherwise.

Where a servant took his master's goods, in order to offer them for sale to *him*, he was held guilty of larceny, as it was clear that he intended to assume the entire dominion over the goods. *Hall*, 1 Den. C. C. 381; 18 L. J. M. C. 62; 3 Cox C. C. 245, 1848; *Manning*, D. & P. 21; 22 L. J. M. C. 21; 6 Cox C. C. 86, 1852.

Who is a servant or clerk?] is discussed under *Embezzlement*.

Constructive possession—in transitu] For larceny, where there is an appropriation by a servant, who is already in possession, it must appear that the goods were at the time in the *constructive possession* of the master: see Year Book, 21 H. 7, pl. 21, 1506, cited *Kenny's* Selected Cases, p. 216. They will be so considered if they have been once in his possession and have been delivered by him, or by his orders, to the servant. But if the money or goods have come to the possession of the servant *from a third person*, and have never been in the hands of the master, they will not be considered to be in the constructive possession of the master for the purposes of larceny. This is the distinction which gave rise to the Acts (beginning with 39 G. 3, 85) creating the offence of embezzlement.

An unincorporated company used to send their messenger once a week to bring back their paid cheques, &c. from their bank. Defendant was their clerk, whose duty it was to receive them from the messenger, and to preserve them; the directors used them as vouchers that they had paid; but he fraudulently destroyed a cheque (which he had forged and paid in to his own account at another bank). Creswell J. directed that embezzlement and stealing an order to pay money failed, but it was held that he was rightly convicted of larceny *of a piece of paper*, inasmuch as the cheque, when delivered into his custody in the usual course of business, was constructively in the possession of the directors, who, in the circumstances, were his masters; his being a shareholder gave him no property in the paper. *Watts*, 2 Den. C. C. R. 14; 19 L. J. M. C. 193; 4 Cox C. C. 336, 1850: his forgery, &c. could not be proved, and 'the case was decided as if the company were strangers to the cheque until its return': W. p. 193; unlike *Masters*, 'here the paper had reached its ultimate destination.'

In transitu] 'Where the thing is with the vendee's servant on the way to the vendee, who has not yet had possession . . . occurs the chief difficulty in criminal law as to the commencement of possession': W. p. 191, who cites chronologically the old cases [below, and (*B*)

(*D*)*ingley*, 1687, *Bazeley, Headge, Gill*, 1854] as 'still important as illustrating the meaning and commencement of possession.'

If the things be deposited in some receptacle which is itself in the actual or constructive possession of the master, then they are in his constructive possession, so that a subsequent appropriation of them will be larceny. See (*B*) (*D*)*ingley*. Thus defendant was ordered by his masters to go with *their* barge to fetch corn they had bought in cargo. He received it on board, and afterwards appropriated some of it. The question was whether this was felony, the corn never having been in the possession of the master, and the judges held that this was larceny, for it was 'a taking from the actual possession of the owner as much as if the oats had been in his granary.' *Spears*, East P. C. 568; Lea. 825, 1798 ('more authoritatively in *Reed* [1854, below]. See also *Walsh* [1812], at 4 Taunt. 476': W. p. 192: the fact that the corn was bought had nothing to do with the decision); *Johnson*, 2 Den. C. C. R. 310; 21 L. J. M. C. 32, 1851. See also *Abrahat*, East P. C. 569; Lea. 824, 1798, which either relates to the *same* theft as in *Spears* or a very similar one at the same time, except that in *Abrahat* the stolen corn was never on the owner's barge, but taken direct from the cargo boat. *Abrahat*, says W. p. 191, 'was a case where the servant obtained the thing nominally for the master, but in fact dishonestly and by his own mere wrong or fraud'; his possession was therefore 'trespassory, and he may thereby commit theft like any other stranger.'

'One clerk hands another clerk 'the master's money' to pay a bill. An appropriation by the second clerk. Held, a taking from the master's possession. See *Masters*.' *Murray*, 1 Moo. 276, 1830': W. In *Murray*, 'the master had had possession . . . by the hands of another servant,' and when given by him to defendant 'to be paid away' for the master, it was in law given by the master, 'the fraudulent appropriation being thus a tortious taking in the first instance': *per* Pollock C.B. in *Masters*. Goods received by servant into master's cart and taken thence by him: a taking from the former's possession. *Norval*, 1 Cox C. C. 95, 1844 (practically *Harding*, R. & R. 125, 1807).

'Quite different' was *Masters*, 1 Den. 332; 2 C. & K. 930, 1848 (accepted in *Watts*, 1850, which see). Monies passed through a chain of clerks, the last being the cashier, and the last but one defendant, who kept some of them. Here 'the original taking was lawful'; the money never reached the master at all: embezzlement.

A. had agreed to buy straw of B., and sent his servant C. to fetch it. C. did so, and put down the whole quantity of straw at the door of A.'s stable, and then went to A. and asked him to send some one with the key of the loft which was over the stable, which A. did, and C. put part of the straw into the loft and carried the rest away and sold it. Tindal C.J. held that this carrying away of the straw by C., if done with a felonious intent, was a larceny, and not an embezzlement, as when the straw was put down at the stable door, the reduction into the master's possession as against the servant was complete. *Hayward*, 1 C. & K. 518, 1844. ('But note that there were further circumstances beyond the mere deposit to show that the delivery to the master was complete': W. above, *e.g.* the key.)

When defendant was sent with his master's cart for some coals the latter had bought, which were delivered to him *in the cart*, and on the road home he disposed fraudulently of some of them, it was held by ten judges that this was larceny and not an embezzlement

or breach of trust at common law, the coals being constructively in the possession of the master when deposited in his cart, following *Spears*, above. *Reed*, D. & P. 257; 23 L. J. M. C. 25; 6 Cox C. C. 284, 1854: Parke B. saying, 'were it *res nova*' he should not think it larceny (as if in his cellar in defendant's charge: *per* L. Campbell): the cart was certainly in the master's possession; but 'if defendant, having remained in personal possession of' the coals, '*as by carrying them on his back in a bag*,' nothing having 'determined his original exclusive possession,' had done the same, it would have been embezzlement.

A very similar case to *Reed* was *Wright*, D. & B. C. C. 431; 27 L. J. M. C. 65; 7 Cox C. C. 413, 1858. Defendant was a branch bank manager. In his office was a safe, provided by the bank, into which it was his duty to put the daily money received. Another official kept a key of this box as well as he; the former furnished weekly accounts to him. For two years, though the weekly accounts were furnished as usual, the cash balance was not examined. The manager having come to examine the cash balance, defendant said he was 3000*l*. short, and handed over to him 755*l*. 16*s*., which he said was all the cash he had left, and which sum he took from a drawer in the counter, and not from the safe. The jury found him guilty of larceny of some of the money received from customers, placed in the safe and accounted for weekly, and the C. C. C. R. held that there was evidence that he, as his duty was, placed in the safe the money which he had received from customers; that he thereby determined his own exclusive possession of the money, and upheld the conviction. They could not distinguish this from a shopman's taking money out of his master's till. 'Note,' says W. above, 'no stress seems to have been laid upon the accounting.'

Not larceny by servant] The following are cases in which the master's possession has not been such as to make the servant guilty of larceny.

A bank clerk was indicted (before s. 12, rpd., of 15 G. 2, 13) for stealing certain bonds, as 'the property of the bank' in one count, and in another, of a person unknown. The bonds when paid in by a customer, ought to have been deposited in a chest. Defendant, who received them, put them into his own desk, and afterwards sold them. The court was of opinion that this was not larceny at common law, that the possession of the bonds was always in him, and that the bank never had possession till they were in the chest. *Waite*, East P. C. 570; Lea. 28, 1743, which was relied on in *Bazeley*, which see. Prosecutor suspecting his shopman, employed a customer to come to his shop and pay defendant some marked silver of the master's for goods. Not finding it in the till, in which defendant ought to have deposited it, he had him searched, when it was found on him. The judges were of opinion that he was not guilty of felony, but only of a breach of trust, the money never having been in the possession of the master. *Bull*, Lea. 841, 1797; followed in *Headge*, where the facts were precisely the same: 'objection expressly overruled that the marked coin was previously in the master's possession and that his possession should be held to continue constructively as against the servant.' So *Sullens*, 1 Moo. C. C. 129, 1826: servant sent for change of a note, appropriates it: not a taking from the master's possession; cf. *Murray*, 1830. So where A. owed B. 5*l*. and paid it to defendant, who was B.'s servant, supposing him authorised to receive it, which he was not; and defendant never accounted for the

money to B., Alderson B. held that this was neither embezzlement nor larceny. *Hawtin,* 7 C. & P. 281, 1836.

A clerk was entrusted with *cheques* to buy goods; this he did on credit, cashed the cheques and appropriated part of the cash: c. for larceny q. *Goodenough,* D. & P. 210, 1853.

Servant agent for others] Where defendant was sent by his fellow-workmen to get their wages, and he received the money in a lump sum wrapped up in paper, on which the names and sums due to each (including himself) were written, it was held that he was the agent of the workmen, whose property it had become, and could not be convicted of larceny of the property laid in the employer, because he had paid the men's agent: it had originally been laid in the men, but had been amended by the prosecution. Shee J. took the point that defendant was a co-owner. *Barnes,* L. R. 1 C. C. R. 45; 35 L. J. M. C. 204; 10 Cox C. C. 255, 1866.

Effect of the cases] 'The effect of these authorities,' says W. p. 195, 'appears to be as follows:—

1. The servant's possession will terminate and that of the master will commence at the first moment when either the thing is delivered to the master or when, although the thing continues in the apparent possession of a servant, the servant agrees with the master to hold it finally for the master in the master's right.
2. So long as thing is with the servant merely *in transitu* towards the master, the master has not yet the possession as against the servant, but the servant has the possession as against the master.
3. When the thing ceases to be *in transitu* and is held for the master, the master's possession commences even as against the servant.'

Possession by bailees] See s. 1 (1) of Larceny A. 1916.

Bailment] 'A delivery of a thing by a possessor (otherwise than in case of alienation) with intent to transfer separate undivided and exclusive control for the time being upon a condition or trust is a bailment and it transfers the possession to the bailee.' W. p. 131.

Common law] 'The general rule . . . is that no dishonest or wrongful act whatever done by a bailee during the bailment can be a trespass or theft.'

Exceptions: 1. 'A person who obtains possession of a thing by deceit as upon a bailment, but really meaning to steal it (as distinguished from a person who really means to get and hold the thing by way of bailment and who merely uses deceit for this purpose [cf. *Whitehorne* v. *Davison*]) is held not to obtain a bailment at all, but such a trespassory possession as is of itself a theft and such intention of stealing may be inferred from subsequent acts.'

2. 'The bailment may become determined and then the possession . . . either ceases or becomes trespassory.' *Ib.*

'Upon the whole, it is conceived that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person (see *McDonald,*

1885).' W. p. 163. Where there is actual delivery, 'such a delivery, whether the transaction be gift, sale or bailment (even a gratuitous bailment: see *Rooth* v. *Wilson*, 1817, 1 B. & Ald. 59), always transfers possession to the deliveree.' P. p. 58. The inclusion of a 'gratuitous' bailment is important because 'ordinarily a contract is an essential element of a bailment': W. p. 160 (though 'that there may be a bailment without a contract' is 'an opinion not without judicial support in England. See Cave J. in *McDonald*, 1885, 15 Q. B. D. at 327 [below]; this seems right. . . .' P. p. 41, n. 1); at any rate, contract, in respect of larceny, need not imply *consideration*, at any rate, in the ordinary sense, but merely an agreement or understanding, 'a condition expressed or implied,' as Sir W. Jones (on Bailments, 1781) put it, between the parties. See *Anson* on Contract, p. 110, 14th ed.

However, P. continues, *ib.*: 'There may be cases of handing over for a limited purpose which are on the face of them not obviously within either of these cases. It must then depend on the true intent of the transaction, as ascertained from all the circumstances, whether there is a bailment or a mere authority or licence to deal with the thing in a certain way.' It must be remembered that since 1857 (20-1 V. 54, 4) a bailee has been subject to the ordinary law of larceny; earlier cases, therefore, are not (except incidentally) of practical value. Moreover, many cases would also be offences against s. 20 (1) (iv) (*a*) of the Larceny A. 1916.

Probably it is not necessary to aver 'as a bailee': *per* L. Coleridge C.J., *Macdonald*, 1885; but it is certainly better to do so: see R. 6 (1) under Indictments A. 1916.

Bailment obtained by fraud] 'If the one party means only to give a bailment of the thing and the other accepts the thing meaning not to hold it as upon a bailment but to appropriate it contrary to the known intention of the bailor, this may be of itself a theft and no further complication arises, for there is no concurrence of intention or contract *ad idem*. It is not that the contract is avoided by the fraud, but that there is no contract, and here the possession does not pass by contract but by wrong and is trespassory. There may be a transfer intended by both parties as a bailment but obtained by the transferee by a deceit. Here the question is whether or not the bailment is void so as to neutralise the nominal consent and make the acquisition trespassory, and on this point there seem to be no authorities. Since the statute against fraudulent bailees the question is not material, except as it may affect the amount of the penalty, for if the bailment stands the statute will apply and if it is void the common law will apply. Should it become necessary to determine the point on an indictment containing only a special count for larceny as a bailee, it would probably be held that as a transfer of a general property is not absolutely avoided by deceit, so neither is a transfer of a special property or possession [cf. *Whitehorne* v. *Davison*]. Indeed, if this were not so there would have been no occasion for the numerous ancient decisions that where a bailment has been obtained by deceit the jury may infer an original *animus furandi* from subsequent conduct; for if the bailments had in those cases been void the possession of the accused would have been trespassory throughout and any conversion *animo furandi* would have been theft (as much as in the case of a servant) even though there was originally no *animus furandi*.' W. p. 204.

Breaking bulk] W. 133: 'The bailment cannot be determined by any tortious act which does not destroy the very subject of the bailment; and the only extension which this doctrine ever received at common law was that a bailee of a package or bulk might by taking things out of the package or breaking the bulk so far alter the thing in point of law that it becomes no longer the same thing . . . which he received and thereupon his possession was held to become 'trespassory.'

Proof of conversion] 'It is an important and difficult question whether an actual conversion must be proved or whether it is sufficient to show such conduct as for civil purposes is evidence of a conversion such as an absolute refusal to deliver.' W. p. 222; cf. *Semple*, above, for *common law*. The point of non-delivery on demand was discussed in 1581, and in 1595 there was some authority that it was evidence of conversion: *Eason* v. *Newman*, Cro. Eliz. 495; see *Reeves* and *Wakeman*, below.

Larceny by bailee] A man who receives money to procure goods and does so, but *fraudulently* retains the money, is 'a bailee' within 20-1 V. 54, 4, rpd.: *Wells*, 1 F. & F. 109, 1858. So one who takes a watch from the pocket of a tipsy man not objecting is not guilty at common law of larceny, but may be as a bailee within that s. if, when asked, he declines to restore it: *Reeves*, 5 Jur. N. S. 716, 1859. But one who receives money with an obligation to return certain moneys, but *not* the identical coins, is not a bailee of such coins within that s., which must mean a return *in specie: Hassall*, L. & C. 58; 30 L. J. M. C. 175; 8 Cox C. C. 491; 4 L. T. 561, 1861: c. q.; see also *Garrett*, 2 F. & F. 14; 8 Cox C. C. 368, 1860, and *Hoare*, 1 F. & F. 647, 1859, both under that s.

Defendant received money to pay for some coals, and he was paid to bring them home in his own cart, which he did, but on the way abstracted a portion of the coals. It was held that he was guilty of larceny as a bailee, some of the judges thinking that the money being prosecutor's, the property vested *ipso facto* in him, and that thereupon a bailment arose, and others, that there must be a specific appropriation of the coals to the prosecutor, and that there was evidence of such appropriation. *Bunkall*, 33 L. J. M. C. 75; L. & C. 371; 9 Cox C. C. 419, 1864. A carter employed by a coal-owner to go and load the coals in defendant's cart, and deliver specified quantities to persons on a list, sold two of the loads fraudulently, and not to such persons, and appropriated the moneys: he was held to be rightly convicted as a bailee. *D. Davies*, 10 Cox C. C. 239; 14 L. T. 491, 1866: C. C. R.

The owner of a wrecked ship made a contract to salvage it with a person who sub-contracted with defendant's father. Defendant was in charge of the wreck, and while so engaged corresponded with the contractor of the wreck, although the latter swore that he still considered the father responsible. The jury found that defendant stole some of the wreck *animo furandi*, but they were not asked whether he was bailee. It was held by a majority that he was a bailee and was rightly convicted. *Clegg*, 11 Cox C. C. 212, 1869: C. C. R. Ir.

Where defendant was to have two brooches for a week or ten days to sell for the owner, but after that interval he sold them but arranged terms for their redemption after two months, he was held guilty of larceny as a bailee, for his duty was to return the two

brooches in ten days if he could not sell them before. *Henderson,* 11 Cox C. C. 393, 1870: C. C. R.

Where a traveller receives from his employers silk to sell for them, but which is to remain their property until disposed of to customers, and to be returned to them within six months, he is rightly convicted of larceny as a bailee, if he fraudulently disposes of them within the six months. *Richmond,* 12 Cox C. C. 495, 1873: C. C. R. See also *Aden,* 12 Cox C. C. 512, 1873: C. C. R.

Defendant, who received a bill of exchange to his own order, accepted by prosecutor, for the purpose of getting it discounted, and handing back the proceeds, instead of getting it discounted, indorsed it as if it had been his own to a creditor in payment; the jury finding he intended to pass the bill absolutely to the creditor, he was held to be a bailee of a valuable security, and guilty within the 1861 A. *Oxenham,* 46 L. J. M. C. 125; 13 Cox C. C. 349, 1876: C. C. R.

Where defendant obtained back an equity of a redemption which he had given as security for a loan to prosecutor, for the purpose of raising money on it to pay off the lender, and obtained the money and gave the deed as security to the second lender but appropriated the money, it was held that he was a bailee of the deed, and that it was immaterial that he was at liberty either to return the deed or the money to the first lender. *Tonkinson,* 14 Cox C. C. 603, 1881: C. C. R.

Refusal to restore] A bicycle lent to be returned the same day was not given up; one of several excuses was that defendant was keeping it as security for a claim for services against the lender's husband; a conviction was upheld because the jury thought the intention was fraudulent, and the claim of right not *bonâ fide: Wakeman,* 8 Cr. A. R. 18, 1912. The rule in *Jackson,* 10 Cox C. C. 224, 1866—'determination of bailment must be something analogous to larceny and some act must be done inconsistent with the purposes of the bailment'—was here complied with. See *Taking* and *Restoring*, above. Cf. *Reeves,* above.

Loan by bailee] The *onus* is on him to prove loan and not fraudulent conversion, which *sale* of the chattel is presumed to be: *F. Price,* 9 Cr. A. R. 15, 1913.

Not a bailee] Defendant induced a man to buy horses by pretending that he had to pay 135*l.* for them and was getting nothing but commission, whereas they were his, and he had bought them for 110*l.*: the false pretence failed because it was not averred, and it was held that he was not a bailee of the money under rpd. 20-1 V. 54, 4. There cannot be 'bailment by fraud,' or as counsel put it in *Brown,* 1856, 'Fraud destroys the bailment.' *Hunt,* 8 Cox C. C. 495, 1861.

No contract] A married woman can be guilty under that s. *Robson.* And so also can an infant. In *Macdonald,* 15 Q. B. D. 323; 15 Cox C. C. 757; 49 J. P. 695; 33 W. R. 735, 1885: C. C. R., defendant who was twenty years of age was supplied with furniture under 'a hire purchase' agreement—void under the Infants' Relief A. 1874—by which he was to pay by instalments, and till all were paid and the goods became his, not to dispose of them. Before they became his he fraudulently converted them. It was held (by five judges) that he was rightly convicted of larceny as a bailee: and after further argument

before these and eight other judges (sitting 'as an assembly of the judges in accordance with the old practice at common law,' *i.e.* before the creation of the C. for C. C. R.), this was confirmed by a majority. See *Bailment*, above.

Third person stealing from bailee] presents no difficulty: see W. p. 166 and p. 228.

Owner stealing from bailee] See *Owner stealing from Servant*, above.

Money when bailed] 'As a deposit of coins not to be returned or applied *in specie* is for civil purposes not a bailment but a trust or debt, so neither is it a bailment within the statute (*Hassall; Hoare*, 1859; *Garrett*). But it will be otherwise if the specific moneys are to be applied or re-delivered (cp. *Brown*, 1856, D. & P. 616) as when they are enclosed in a bag or letter (*Jones*, 1835; *Jenkins*, 1839 . . .).' W. p. 161; see also his remarks on *Wells*, 1858. All the cases here cited will be found above. Under this head W. classifies *Goode* and *F. Smith*, 1 C. & K. 423, 1844, where a girl nursing in a house, not for wages, fraudulently appropriated money given her to pay a bill. Coleridge J. held that she was not a servant and was guilty of larceny 'at common law (*i.e.* . . . not a bailee). But it must be taken that in' these 'cases the undertaking was to pay over or apply the specific coins, since otherwise the accused (not being servants) were mere debtors and could not have been guilty of theft; and that being so, it would seem that they were bailees in the same way as any other agents or factors.'

Can a servant be his master's bailee?] 'You cannot,' said L. Ellenborough, 'make my servant, whose possession is my possession, my bailee. He is not liable as a bailee': *Hopkinson* v. *Gibson*, 2 Smith 204, 1805; *i.e.*, apparently, without express appointment as such by his master; see W. p. 138, and P. p. 60, both above.

Things found] The right of a person who finds goods is to take possession of them, if they have no apparent owner.

If at the time of taking possession there be no apparent owner, the subsequent discovery of one will not render the original taking unlawful, nor will it render the finder a bailee for the true owner. No conversion of the property, therefore, subsequent to the discovery of the true owner, will render the finder guilty of larceny.

This statement has the authority of F. Stephen (J.) in the 7th ed. of this work (1868).

In order, therefore, to constitute a larceny of lost goods there must be a felonious intent *at the time of the finding* coupled with reasonable means at the same time of knowing the owner. It will be found that this is the result of the authorities. W. p. 180, classifies the cases thus: '(a) where the finder has at first no clue to find the owner'; (b) where he has such a clue; (c) 'colourable but not real loss or finding.'

'*Pure finding*'] *per* Parke B. in *Mole:* (a) implies that there is no 'reasonable inference that the owner knows where to find the thing.' An intention to appropriate *whenever formed* is not theft (with a possible limitation in *Glyde*).

With a clue] In (b) 1. Taking with intent to appropriate: it is theft, for '*dominus apparet* though at first *incertus*' (*Milburne*, 1829, 1 Lew. 251; *Merry* v. *Green; Thurborn; Preston*, 1851; *Christopher*).

2. Without intent 'at first' to appropriate.

'If the question is still open it is submitted that there is no sufficient ground for extending to a person who had from the first a knowledge that the owner could be found the exceptional immunity accorded to the pure finder, and still less ground for extending it to a case in which the finder with a clue appropriates after actual knowledge of the owner.'

In (c) 'the only question is the one of fact,' whether the taker is 'like any other trespasser, excusable in so far as he acts *bonâ fide*, but guilty . . .' if at *any* time he has *animus furandi, i.e.* (b) (or falls under (a))—except where '(1) the thing has been left with or delivered to the so-called finder unknowingly, but so as that the owner . . . is likely to be able to trace it . . . (*Lamb, Wynne, Sears, West*, 1854, *Moore*, 1861 . . .)': by lapse of time, &c. he may hold lawfully (unlike a trespasser); (2) the thing although mislaid by the owner remains under a 'protection,' either his own house, &c., or such as he is likely to remember (*Pope*, 1834; *Peters*, 1843; *Coffin; Pierce*, 1852). 'In these instances, if the so-called finder is the occupier or possessor of the inn, carriage or theatre, the case passes back into' (1), 'but otherwise he is a trespasser excusable in so far as he acts *bonâ fide*, and entitled to the thing if the case subsequently proves to be one of real loss, but otherwise subject like other trespassers *de facto* to the general law of theft as between such a person and the occupier . . .' See *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75, 1851; W. pp. 185-7: the cases will be found below.

The great question, therefore, is to discover when the property can be said to have no discoverable owner. That has been the main subject of discussion in the following cases.

Trunk left in a cab; the driver 'took and converted it [contents?] to his own use'; held larceny; 'for he must have known where he took up the' fare, 'and where he set him down, and therefore he ought to have restored it. . . .' *Lamb*, East P. C. 664, 1694. So *Wynne*, 1786, *ib.*: with what intent were the contents taken?; mere *detention* in the hope of reward [and *ultimate* restoration intended: Lea. 413]; 'not a criminal conversion.' See *Peters*, 1843. A man having had his hat knocked off in a quarrel with a third person, defendant picked it up and carried it home. Parke J. ruled, 'If a person picks up a thing, when he knows that he can immediately find the owner, and instead of restoring it to the owner, he converts it to his own use, this is a felony.' *Pope*, 6 C. & P. 346, 1834.

In *Merry* v. *Green*, 7 M. & W. 623; 10 L. J. M. C. 154, 1841, Parke B. said, 'Suppose a person finds a cheque in the street, and in the first instance takes it up merely to see what it is; if afterwards he cashes it, and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it. . . . The old rule (3 Inst. 108) that if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion *animo furandi* constitutes a larceny. Under this head fall the cases where

the finder of a pocket-book with bank-notes in it, with a name on them, converts them *animo furandi;* or a hackney-coachman who abstracts the contents of a parcel which has been left in his coach by a passenger (*Wynne*) whom he could easily ascertain; or a tailor who finds and applies to his own use a pocket-book in a coat sent to him to repair by a customer whom he must know: all these have been held to be cases of larceny. . . . It is said that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems, also, from *Wynne* that if, under the like circumstances, he acquire possession and mean to act honestly, but afterwards alter his mind, and *open* the parcel, with intent to embezzle the contents, such unlawful act would render him guilty of larceny.' Any 'other unequivocal act of misappropriation'—besides that of *opening—e.g.* 'spending or changing' the notes, would, it seems, be sufficient: W. *ib.; Sears,* Lea. 415, 1786, a cabdriver neglected to give a parcel (as bidden, but this he denied) to the servant of a fare, just alighted. A reward was advertised in vain; defendant when caught denied the whole transaction, but the parcel was traced to him and something was missing thereout: convicted of felony.

Notes (*50l.*) clearly not abandoned, found in a theatre, though utterly without trace of owner, may not be converted without advertisement, &c.: *Coffin,* 1 Cox C. C. 44, 1846.

The whole law with reference to this subject was considered in *Thurborn,* 1 Den. C. C. R. 387; 18 L. J. M. C. 140; 2 C. & K. 831, 1849; 3 Cox C. C. 277, 453, where it is reported as *Wood.* Defendant found a bearer bank-note on the high road. 'There was no name or mark on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. [This sentence probably means that he did not think about the true owner at all.] The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor's property before he thus changed the note,' and Parke B. directed a verdict of guilty, but after conferring with Maule J. thought that originally the taking was not felonious and later there was no taking at all; and he and six other judges held that the conviction was wrong; 'the original taking was not felonious and if' he 'had changed the note or otherwise disposed of it before notice of the title of the real owner, he clearly would not have been punishable. . . . It would not have been larceny if he had done so [taken the chattel innocently and afterwards appropriated it without knowledge of the owner], nor would it . . . if he had done so knowing who was the owner, for he had the lawful possession in both cases and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense'—these words perhaps mean (all the reports are *verbatim*) that defendant did not think of the true owner; otherwise they seem meaningless, for the case stated in effect says that he could not reasonably expect to find

the owner—'But we think that makes no difference.' 'Though the possession was accompanied by a dishonest intent it was still a lawful possession and good against all but the real owner. . . .' Mr. Greaves, 2 Russ. Cri. 4th ed. (1865) p. 180 *n.*, criticised this judgment very severely; he evidently understood the references to defendant's dishonest intent as simply meaning that he did not remove the note *for the owner's benefit*, which, he says, plainly made him in law a trespasser and his possession unlawful. W., above, p. 181, however, says that this case, though some of its 'reasons and dicta have been occasionally impeached . . . has been universally followed and for the most part approved.' L. Alverstone C.J., *e.g.*, said in *Mortimer*, 72 J. P. 349; 24 T. L. R. 745; 99 L. T. 204; 1 Cr. A. R. 20, 1908, if *Thurborn* 'went the length of saying that in every indictment for larceny it was imperative for the judge to tell the jury that the prisoner must have the *animus furandi* at the time of his first getting physical possession, then I think it went a great deal too far.' 'The doctrine that the *animus furandi* must exist at the time of gaining possession must not be carried too far' (L. T. headnote). *Mortimer* turned chiefly on the direction to the jury, and the direction that there must be an intent to appropriate when first possession is taken 'depends upon the defence set up' (J. P. headnote). 'Where there is evidence ['defence?'] that *at first* the intent was to restore but later to keep, 'such a direction should be given': *ib.*

The criterion, then, according to *Thurborn*, is reasonable belief at the time of taking that the owner can be found. 'Both intention and belief' must exist at the time of the taking to constitute larceny: 9 Halsbury 631.

As this question was not put to the jury in *Knight*, 12 Cox C. C. 102, 1871: C. C. R., but only whether *they* were satisfied that defendant could have found him in a reasonable time (and not whether he himself so *believed*), c. q., though there were several strong indications of dishonesty about his conduct after (as he said) his wife, the finder, gave him the note found.

In *Preston*, 2 Den. C. C. R. 353; 21 L. J. M. C. 41; 5 Cox C. C. 390, 1851—lost bank-note with the owner's name on it found in a street, it was decided 'that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether, at the time he took possession of it, he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind or resolution to appropriate to his own use would amount to larceny': *Thurborn* followed: c. q. Where railway servants converted hand baggage left in a carriage, Williams J. said, 'it was absurd' to compare this to finding lost property. 'It was nothing' like it: *Pierce*, 6 Cox C. C. 117, 1852.

In *West*, 1 D. & P. 402; 24 L. J. M. C. 4; 6 Cox C. C. 415, 1854, a purse containing money was left by a purchaser on the defendant's stall. A third person afterwards pointed it out to her, supposing it to be hers. She afterwards concealed it; and on the return of the owner denied all knowledge of it. The jury found that she took up the purse knowing that it was not her own, and intending at the time to appropriate it, but that she did not know who was the owner at the time she took it. Held, that the purse was not lost property, but mislaid in circumstances in which the owner could find it, and that she was properly convicted of larceny.

Where the jury found that the notes were lost, that defendant did not know the owner, but that it was probable that he could have traced him, it was held that he was 'not bound to go out of his way to seek for a clue': W. p. 184: c. for stealing q. *Dixon,* 25 L. J. M. C. 39; 7 Cox C. C. 35, 1855: C. C. R.

In *Christopher,* 1 Bell C. C. 27; 28 L. J. M. C. 35; 8 Cox C. C. 91, 1858, the court distinctly laid down the principle, that in order to convict of larceny, it is essential that there should be evidence of an intention to appropriate the property *at the time* of finding; the jury had been directed that a felonious intent was necessary to every larceny, but that the intent might be inferred from acts subsequent to, as well as immediate on, the finding, and that if defendant when he discovered the owner, did not take measures to make restitution, they might from his behaviour infer such an intention; he had, in fact, said on arrest, 'I know I've done wrong.' The C. for C. C. R., however, held this direction wrong, as it was calculated to lead the jury to suppose that a felonious intent *subsequent* to the finding was sufficient, and not merely that they might look at the subsequent circumstances, with a view of seeing what was the intention *at the time of finding:* c. q. Williams J. criticised *Thurborn.*

Moore, L. & C. 1; 30 L. J. M. C. 77; 8 Cox C. C. 416, 1861, was an indictment for stealing a bank-note. A customer dropped the note in defendant's shop. When the customer asked about it next day, he denied all knowledge of it, but parted with it that day. In answer to questions, the jury found that: (1) he found the note in his shop; (2) he, at the time he picked up the note, did not know, nor had reasonable means of knowing, who the owner was; (3) he afterwards acquired a knowledge of who the owner was, and after that converted the note to his own use; (4) he intended when he picked up the note to take it to his own use, and deprive the owner of it, whoever he might be; (5) he believed at the time he picked up the note, that the owner could be found. The C. for C. C. R. held, apparently in view of (4), that he was rightly convicted, Williams J. criticising *Thurborn.* It is difficult to reconcile the fifth finding with the second; but the court probably considered that, taken together, the two findings came to this, that there were no marks apparent on the face of the note indicating who was the owner, but that defendant must, nevertheless, have thought that the owner would come back to inquire. At any rate, there is no indication that the court had any intention of overruling the previous cases. It is perhaps very doubtful whether the property was, strictly speaking, lost property at all. See *West,* above.

Thurborn was followed (with evident reluctance by some judges) in *Glyde,* 37 L. J. M. C. 107; L. R. 1 C. C. R. 139; 11 Cox C. C. 103, 1868, where a man found a sovereign, and had no means of knowing the owner, but (probably) intended at the time of finding to keep it as against the owner, and on the owner being found, refused to give it up. It was held that this was no larceny. Cockburn C.J. suggested that if it was 'doubtful whether the property would be claimed,' but the finder made up his mind to keep it even if it was, 'that might be larceny.' His direction to the jury stated concisely in what circumstances abandonment could reasonably be presumed. *Matthews,* 12 Cox C. C. 489, 1873: C. C. R., was, perhaps, indistinguishable from *Thurborn,* but it was not argued.

In *Deaves,* 11 Cox C. C. 227, 1869: C. C. R. Ir., defendant's child found six sovereigns and brought them to her; she told the by-

standers she had found one sovereign only, and offered to treat them. She also found a half sovereign and a bag at the same spot. The same evening she told a woman, who came to inform her that the owner was found, to mind her own business, and next day gave her half a sovereign. Four judges thought there was no evidence to show that she knew at the finding the property could be traced to an owner, while three of them thought the fact of concealing the amount at the time of finding and buying the silence of those who knew of the matter, was evidence that she believed that the owner could be found. All concurred in following *Thurborn:* c. q.

Detention for reward] *Wynne,* above; Rolfe B. in *Peters,* 1 C. & K. 245, 1843, (doubted but) inclined to the view here mentioned. But taking with the *animus,* and only restoring because of the reward, is felony.

In *Mole,* 1 C. & K. 417, 1844, defendant did in fact convert money in a purse he found on the highway (and denied finding it), but *as there was no mark on the purse* and there was a reasonable presumption that the owner did not know where it would be found, Parke B. would not allow a conviction.

A chest, with owner's label on, sunk in a river, was accidentally fished out, and the contents converted; whether the label was on there was no evidence. Parke B. thought the jury must be asked, had defendants means of discovery, or did they wilfully abstain? If so, larceny; but not if they thought inquiry useless. *Scully,* 1 Cox C. C. 189, 1845.

Indictment for stealing a (found) watch: special verdict: 'Not guilty of stealing of the watch, but guilty of keeping possession of it in the hope of reward *from the time he first had the watch,*' this was held to amount to 'not guilty.' *York,* 1 Den. C. C. 335; 18 L. J. M. C. 38; 3 Cox C. C. 181, 1848. So, also, where a boy found a cheque and defendant obtained it from him, knowing to whom it belonged, and kept it in the hope of getting a reward for it, refusing to deliver it to either of them, it was held that this was not a larceny. *Gardner,* 32 L. J. M. C. 35; 9 Cox C. C. 253, 1862: C. C. R. See W. on this point above, *Deprival, &c.*

Taking from a finder] *Swinson* refused to return a purse taken from the finder who was retaining it in the hope of reward: conviction for property laid in the finder; doubtful whether it could be laid in owner: 74 J. P. 73, 1900. But a finder is not a bailee, and so the owner could take without theft. W. p. 187.

By part owners] As with owners so with part owners, *e.g.* joint tenants or tenants in common, a larceny cannot in general be committed of the goods which they have in common, for 'one tenant in common taking the whole doth but what by law he may do.' 1 Hale P. C. 513. This, at common law, would not apply to a larceny of the goods of a corporation by a member, because an individual member has no right of property or possession in the goods of the corporation; and it might be doubtful whether it applied where by mutual arrangement the part owner had no right to the possession of the goods, or when it was clear that there was an intention by the part owner to deprive his partners entirely of their property; Hale means no more than that a part owner may *presumably* assume the entire possession without committing a trespass.

Statute now deals with the matter, viz.: s. 1 (1), helped by s. 1 (2) (iii), of the Larceny A. 1916, and s. 40 (4).

The following cases were at common law. *Bramley*, R. & R. 478, 1822, was an indictment for burglary; defendant was a member of a female friendly society, whose money was kept in a box at the house of N. She broke into the house and carried off the box—at a moment when it was doubtful whether she was a member or not. The property was laid in one count as belonging to N.; and in the other as belonging to the three stewardesses of the society. The judges were clear that as N. *was responsible for the loss of the property* the conviction was right. 'If co-owners bail a thing to one of themselves, it can be stolen from the bailee' by any one of them, for they have parted with their possession to him: W. p. 213. In *Webster*, L. & C. 77; 31 L. J. M. C. 17; 9 Cox C. C. 13, 1861: C. C. R., the same point arose as in *Bramley*. There H. was a member (which did not affect the case) and the sole manager of a friendly society, and, as such, carried on a shop and was responsible for all the moneys coming in. Defendant was also a member, and assisted H. in the shop; he appropriated some marked sovereigns, &c. from the till. It was held that he might be convicted, though the property was laid in H. alone. So *Burgess*, L. & C. 299; 9 Cox C. C. 302; 32 L. J. M. C. 185, 1863. Cf. *Stainer* and *Tankard*.

A father and son took a farm jointly, and jointly kept sheep; on the death of the son, the father carried on the business jointly for himself and the son's children, infants; held, on an indictment for stealing sheep bred from the joint stock, some before and some after the death of the son, that the property was well laid in the father, and his grandchildren. *Scott*, R. & R. 13; East P. C. 655, 1801.

Where C. and D. had carried on business in partnership, and the widow of C., without taking out administration, attended to the business as partner, and part of the stock was stolen, it was held that the goods were properly described as the joint property of the surviving partner, and the widow (and that there was no need to join her children or the ordinary). *Gaby*, R. & R. 178, 1810.

Partnerships] See the definition of 'owner' above, and R. 6 of the Indictments A. It is not requisite that a 'strict legal property' or partnership should exist. A Bible had been given to a society of Wesleyans, and was bound by them. No trust deed was produced. The Bible having been stolen, the property was laid in A., a trustee and a member of the chapel, and others. Parke J. held the indictment right: *Boulton*, 5 C. & P. 537, 1833.

Friendly, Trade union, Loan and other societies] By 59-60 V. 25, 51, which is very much like 34-5 V. 31, 8 (amended by 39-40 V. 22, 3), of trade unions: 'In all legal proceedings whatsoever concerning any property vested in the trustees of a registered society or branch, the property may be stated to be the property of the trustees in their proper names as trustees for the society or branch without further description.' These ss.—and others, below—seem superfluous in view of R. 6 (2) of the Indictments A. 1915.

So by 3-4 V. 110, 8, of loan societies; by 26-7 V. 87, 10, of savings banks: the *registered* names of industrial provident societies may be used, by 56-7 V. 39, 21. See *By Part Owners*, above, and *Willis*, 1833.

The effect of these statutes is to vest the property in the trustees as against the members. *Cain*, 2 Moo. C. C. 204, 1841.

'*Beneficial owner*'] 'Any person who has 'the control of the disposition of' a sum of money or 'the power of devoting it to his enjoyment or amusement' is a 'beneficial owner' within rpd. 31-2 V. 116, 1. The expression (which, *per* Wills J., is not a term of art and ought to be liberally construed) is no longer in a Larceny A., but the next case throws light on it. Where a number of persons have a right to have a fund applied to the extinction of their liability under a guarantee, these persons are all 'beneficial owners,' and any one of them who misappropriates any of it may be properly convicted of stealing. A. was a member of a committee which had guaranteed the expenses of an entertainment. He, in the discharge of his duty, obtained the entrance moneys and paid them into the banking account of one B. Subsequently, by false representations, he obtained a cheque for the amount from B., and absconded with the proceeds. Held that under that s. of the moneys which he took he with others was the 'beneficial owner,' and, also, that a count which charged that A. had stolen the moneys of the members of the committee was bad.' *Neat*, 19 Cox C. C. 424; 69 L. J. Q. B. 118; 64 J. P. 39; 81 L. T. 680, 1899: C. C. R. The point whether the conviction for larceny was right was not expressly raised and the court did not consider it. Wright J. so stated (evidently thinking that there was no larceny, for) he added that there was another crime in 'obtaining a cheque from' B. 'by false pretences': the second count disclosed no larceny, because when the money was paid into the bank it became the property of the bankers.

By 7 G. 4, 46, 9, in all proceedings for crimes against the property of banks the name of their 'public officer' may be used instead of their several names. So in such a proceeding against any bank co-partner (shareholder), when there are more than six partners: by 3-4 V. 111, 2. Both ss. are superseded for 'the description of property' by Rule 6 of the Indictments A. See s. 40 (4) of the Larceny A. 1916.

By wife] By s. 36 of the Larceny A. 1916: '(1) A wife shall have the same remedies and redress under this Act for the protection and security of her own separate property as if such property belonged to her as a *feme sole:* Provided that no proceedings under this Act shall be taken by any wife against her husband while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife.

(2) A wife doing an act with respect to any property of her husband, which if done by the husband in respect to property of the wife would make the husband liable to criminal proceedings by the wife under this Act, shall be in like manner liable to criminal proceedings by her husband.'

Whether spouses are 'living together' or one is 'about to desert' the other at a given moment is for the jury and they should be directed thereon: *T. E. V. King*, 10 Cr. A. R. 44; 24 Cox C. C. 146; 110 L. T. 783, 1914, where a husband gradually selling up the home during his wife's absence, though he went to her every night and she

only found out the fraud long after he had committed it, was held 'about to desert' her, as he knew his conduct must make it impossible for them to live together. But 'living together' refers to the legal *consortium* and not to mere presence in or absence from the home: *Creamer*, 14 Cr. A. R. 19, 1919: five judges: c. q. of paramour; husband abroad in the army; wife's c. q.: *ib.* 32; *Tidey*.

By the common law if a wife—even a guilty wife, *Kenny*, below—took goods of which the husband was the sole—or joint—owner, the taking was not larceny, because they were but 'one person in law; and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause, even a stranger cannot commit larceny in taking the goods of the husband by the delivery of his wife; as he may by taking away the wife by force and against her will, together with the goods of the husband.' Hawk. P. C. 1, 33 (pt. 1), 32. Therefore, where the wife of a member of a friendly society stole its money, lodged in a box in her husband's custody, under the locks of the stewards of the society, it was held not to be larceny, the property being laid in the husband amongst the other thirty or forty members, all named. *Willis*, 1 Moody C. C. 375, 1833. But where a married woman was intrusted with goods and she stole them, the husband being entirely innocent, it was held that she was guilty of either simple larceny, *or* larceny, as a bailee under rpd. 20-1 V. 54, 4 (though then she could not *contract*); it was expressly not settled which. *Robson*, L. & C. 93; 9 Cox C. C. 29; 31 L. J. M. C. 22, 1861.

By wife and paramour] Whether, where a stranger and the wife jointly stole the husband's property, it was larceny in the stranger, was the subject of contradictory decisions. *Clark*, 1818, 1 Moo. C. C. 376 *n.*; *Tolfree*, *ib.* 243, 1829. See the distinction in Hawk. P. C. above. It is clear that in the case of a joint taking by a wife and her paramour the presumption of her agency for her husband is rebutted. 'If any man takes another man's wife with her husband's goods against the husband's will, this is . . . felony. If a married woman shall deliver to her adulterer her husband's goods, this is felony in the adulterer. Lecture, Mr. Cook': *Dalton's* Justice, c. 157 (ed. 1742), cited 1 Hale P. C. 514. In *Thompson*, 1 Den. C. C. 549; 4 Cox C. C. 191, 1850, defendant went away with prosecutor's wife, and took several articles from his house. The jury found 'guilty'; adding that they did so on the ground that there was a joint taking by him and the wife; and the court were unanimously of opinion that the conviction was right. In *Featherstone*, D. & P. 369; 23 L. J. M. C. 127; 6 Cox C. C. 376, 1854, the wife had taken money from her husband's bedroom, and on leaving the house called out to defendant below, 'George, it's all right, come on.' He left a few minutes afterwards, and they were traced to a house where they passed the night. When taken into custody he had 22 sovereigns on him. The jury found him guilty, 'on the ground that he received the sovereigns from the wife, and that she took them without the authority of her husband': conviction held right. It is the same whether the adultery be actually committed or only intended. *Tollett and Taylor*, C. & M. 112, 1841; *Thompson*, above. If the wife and the adulterer take away only the wife's necessary wearing apparel it is not larceny. *Fitch*, D. & B. C. C. 187; 26 L. J. M. C. 169; 7 Cox C. C. 269, 1857.

The fact that the man was in the husband's service, and acted under the wife's directions in removing the property, is no answer to the

charge. *Mutters*, L. & C. 511; 34 L. J. M. C. 54; 10 Cox C. C. 50, 1865. But the man cannot be convicted of stealing the husband's money (missed on his and the wife's departure) unless he be proved to have taken some active part in removing the goods or spending the money. *Taylor*, 12 Cox C. C. 627, 1874. Where there was no evidence of a taking by any one other than the wife, it was held that the man could not be convicted of receiving the property, knowing it to have been stolen, though he was found with the wife in Ireland in actual possession of some of the husband's property, and also that whether the wife had committed adultery or not she could not steal her husband's goods. *Kenny*, 2 Q. B. D. 307; 46 L. J. M. C. 156; 13 Cox C. C. 397, 1877: C. C. R.

There must be a joint possession within the jurisdiction of the court in order to convict the man. *Prince*, 11 Cox C. C. 145, 1868, where the goods were taken from London and defendant and the woman were found at Liverpool—not triable in London: cf. *Barnett*, 1818.

There must be express direction on proof of the paramour's guilty knowledge: *Bloom*, 4 Cr. A. R. 30; 74 J. P. 183, 1910: c. q. *Rendle*, 1909, shows that on a joint indictment for larceny the prosecution need not go on against the wife but may against the man.

The Married Women's Property Acts, 1882 *and* 1884] first provided for a wife taking her husband's goods and deserting him, and, if with an adulterer—as she would now be found guilty of stealing—for *his* conviction for receiving or jointly stealing. S. 36 of the Larceny A. 1916, above, closely follows the earlier A.

By s. 12 of 45-6 V. 75: 'Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso, hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding.' The proviso to s. 12 *plus* s. 16 are almost word for word identical with the proviso to s. 36 (1) *plus* s. 36 (2), above, respectively.

'*While they are living together*,' *s.* 12] A husband prosecuted his wife and a man for larceny; pending trial husband and wife were reconciled, she pleaded not guilty, her co-defendant put in an affidavit that she was then living with her husband, no evidence was offered against her, and she was discharged, whereupon his counsel moved to quash the whole indictment (larceny; receiving), but this was refused: on a conviction on the first count (as a principal), the second being abandoned, the C. C. A. affirmed it. *Rendle*, 2 Cr. A. R. 33, 1909.

Evidence] In *Brittleton, &c.*, 12 Q. B. D. 266; 16 Cox C. C. 431, 1884: C. C. R., the husband was held not competent to give evidence against his wife on a charge of stealing his goods: c. q. of wife and a man; but by 47-8 V. 14, 1: 'In any such criminal proceeding against

a husband or a wife as is authorised by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence,' *i.e.* for prosecution or defence. See *Husband and Wife* under *Witnesses.*

Averment] The proviso to s. 12 merely afforded a defence and the circumstances stated therein did not require to be negatived. *James*, 1902, 1 K. B. 540; 71 L. J. K. B. 211; 66 J. P. 217; 50 W. R. 286; 20 Cox C. C. 156: C. C. R. This is clearly so of the (same) proviso to s. 36 (1), above, and the same result follows from Rule 5 (2) of the Indictments A.

From the person] By s. 14 of L. A.: 'Every person who steals any chattel money or valuable security from the person of another shall be guilty of felony': maximum sentence, p. s. for 14 years.

Possession through threat] Defendant, who was an auctioneer, obtained money for some goods by asserting that a woman had bid for them, and by threatening to detain her if she did not pay, and it was held that he was guilty of larceny of the money. *M'Grath*, L. R. 1 C. C. R. 205; 39 L. J. M. C. 7; 11 Cox C. C. 347, 1869; *Hazell*, 11 Cox C. C. 597, 1870: C. C. R. So where defendant obtained by threats a larger sum than was due for knife grinding, he was held guilty of larceny. *Lovell*, 8 Q. B. D. 185; 50 L. J. M. C. 91, 1881: C. C. R.

Possession by false process of law] Where the possession is obtained 'by fraud or perjury . . . by legal process without colour of title,' East P. C. 555, there is a 'taking.' Thus if A. has a design to steal the horse of B.—impounded in a distress—and enters a plaint of replevin in the Sheriff's Court for the horse, and thereby 'gets him delivered to him, and then rides him away, this is taking and stealing, because done *in fraudem legis*.' So 'A., hath a mind to get the goods of B. into his possession privately, delivers an ejectment, and obtains judgment against a casual ejector, and thereby gets possession and takes the goods, if it were *animo furandi*, it is larciny.' 1 Hale P. C. 507; *Farre*, 1665; Kelyng 43-4; T. Raymond 276, where the claim was purely fictitious, but for a time the tenant was legally put out of possession; East P. C. 660.

Identity] If it is denied that property found in possession is that charged to be stolen, there must be a careful direction on the point: *Joiner; Bruhin:* c. q.

Interval between theft and possession] See under *Presumptions* —those relating to stolen property.

Proceeds—evidence] A jury is entitled to find that money found in defendant's possession is proceeds of a larceny, and to convict him thereof: *Kelson*, 3 Cr. A. R. 230, 1909. The disposal of proceeds may affect the issue of larceny or not: *C. Sturgess*, 1913.

Value] See s. 1 (3) of the Larceny A. 1916. 'A thing may be of no value in fact or of no value in law. Things of no value in fact are such as are of no value to sell or exchange, and are of no value

to the owner by reason that they can be replaced without expense or trouble.' W. p. 233. The rule that evidence of some value must be given, for which it is usual to quote *Phipoe,* 1795, was qualified by Parke B. in *Morris,* 9 C. & P. 349, 1849, in that the value need not be that of any coin known to the law. See *Watts,* 1850, where the stealing of pieces of paper (cheques) was charged. Three pigs which had been bitten by a mad dog were shot and buried three feet deep, and were the same evening dug up and sold by defendant; it was argued that the pigs had been abandoned, and were of no value to the owner, but the jury found that the pigs were not abandoned, and the court upheld the conviction. *Edwards,* 13 Cox C. C. 384, 1877: C. C. R. Neither is it necessary that the property should be of value to third persons, if valuable to the owner. Therefore there may be a conviction for stealing bankers' re-issuable notes. which have been paid. *Clarke,* R. & R. 181; Lea. 1036, 1810; *Ranson, ib.* 1090; R. & R. 232, 1812, followed in *West,* D. & B. 109; 7 Cox C. C. 183, 1856. In *Walsh,* R. & R. 215; 4 Taunt. 258; Lea. 1054, 1812, the judges held, *inter alia,* that a cheque 'in the hands' of the drawer is of no value, and could not be the subject of larceny; this case led to the passing of rpd. 52 G. 3, 63. But where a clerk received from his employers a cheque on their bankers, for and payable to a creditor, and he got it cashed and appropriated the money, the judges affirmed a conviction for larceny. *Metcalf,* 1 Moo. C. C. 433, 1835.

'*Special*' *value*] By statute the thing stolen must sometimes be *proved* to be of a certain value; see, *e.g. Trees,* and s. 13 (a) of the Larceny A. 1916, and R. 6 (1) of the Indictments A.

Hence, when there was no direction under the s. of the 1861 A., which s. 13 (a) displaced, the maximum sentence thereunder, viz. fourteen years' p. s., had to be reduced to ten under the s. now represented by s. 37 (1): *H. Harris,* 12 Cr. A. R. 54, 1916.

Choses in action] See under *Written Instruments.* 'Things of no value at common law are documents which are merely evidences of rights, agreements or other choses in action.' W. p. 233. Valuable securities, &c. 'made subjects of theft by statute . . . must be so far complete and operative as to satisfy the statutory denomination which is alleged in the indictment, and failing this it is remitted to its character . . . either as a chose in action or as a piece of paper' (citing cases under *Written Instruments,* and *Aslett*). *Ib.*

Documents—written instruments] See that title. By s. 7 of Larceny A. 1916: 'Every person who steals the whole or any part of (1) any document of title to lands; or (2) any record, writ, return. panel, petition, process, interrogatory, deposition, affidavit, rule, order, warrant of attorney, or any original document of or belonging to any court of record or relating to any cause or matter, civil or criminal, begun, depending or terminated in any such court; or (3) any original document relating to the business of any office or employment under His Majesty, and being or remaining in any office appertaining to any court of justice, or in any of His Majesty's castles, palaces or houses, or in any government or public office, shall be guilty of felony': maximum sentence—five years' p. s.

'*Goods,*' *&c. in the indictment*] See *The Property as Laid,* above, and P. p. 82, and W. pp. 144, 202.

In possession of children] 'Cloaths and other necessaries provided for children by their parents are often laid to be the property of the parents, especially while the children are of tender age; but it is holden good either way.' East P. C. 654. Cf. *Forsgate,* Lea. 463, 1787: see note there; *Hughes,* C. & M. 593, 1842; *Green,* 1856.

Of carriers] See East P. C. 652. 'If the alienor hands' a thing 'to a carrier employed by the alienee or by the alienor as agent for the alienee or to a common carrier, the possession is transferred to the carrier (ordinarily) as bailee of the alienee.' W. p. 130. So the property may be laid in the driver of a stage-coach. *Deakins,* Lea. 862, 1800; East, *ib.* W. explains this case, p. 139, above. It is submitted that the twelve judges' decision is *not* 'a strong authority against . . . a servant's custody' founding possession 'even as against a mere wrong-doer' [cf. his own and other authority to the contrary, above]. They said that 'as against his employers, the masters, he as mere driver' had 'only *the bare charge* of the property,' but 'as against all the rest of the world . . . a *special property,*' which supported the indictment. They *may* have limited this opinion to *carriers,* but they did not say so.

Of deceased persons] Where a person dies intestate, and the goods of the deceased are stolen before administration granted, the property must be laid as '*bona episcopi de D.* ordinary of the diocese'; but if he dies, leaving a will, and making executors, the property may be laid in them, though they have not proved the will; and it is not necessary that they should 'show specially their title as ordinary or executor,' because 'it is of their own possession.' 1 Hale P. C. 514; East P. C. 652. Where the deceased had appointed executors who would not prove the will, it was held, that the property must be laid in the ordinary, and not in a person who, after the commission of the offence, but before the indictment, had taken out letters of administration. *G. Smith,* 7 C. & P. 147; 7 Cox C. C. 739, 1835.

Indictment for stealing things, 'the property of the Bishop of P.' An unsuccessful search had been made for a will of the deceased; no administration had been taken out. Some of the articles charged, it was shown, were in the possession of the deceased at her death; but about the majority there was no evidence of this, but on the day of the funeral they were taken by defendant to the house of a witness. The court refused to confine the case to the things shown to have been in possession at the time of the death. On a conviction, it was held that there was sufficient evidence of the intestacy of the deceased, and that the property was in the ordinary, and that the conviction was right; it was quite enough to prove one article was in possession of the deceased at her death. *Johnson,* D. & B. C. C. 340; 27 L. J. M. C. 52, 1857. But W. p. 128, thinks that since *Tharpe* v. *Stallwood,* 5 M. & G. 760, 1843, the law is otherwise settled.

'A shroud stolen from the corpse must be laid to be the property of the executors, or whoever else buried the deceased, and not of the deceased himself.' A coffin may be laid to be the goods of the executors. 'But if it do not readily appear who is the personal representative of the deceased, laying it to be the goods of a person unknown is sufficient.' East P. C. 652. A knife was stolen from the pocket of A. as he lay dead on the road in the diocese of W. A.'s last place of abode was at T. in another diocese, but Patteson J., the jury finding the theft took place after death, held, that the

knife was 'of the property of the Bishop of W.' *Tippin*, C. & M. 545, 1842.

Of goods in a church] See *Wortley*, 1 Den. C. C. 162, 1846.

Of lodgers] Where furniture is let to a lodger (for a term certain or determinable 'upon any occurrence which does not depend on the will of the bailor': W. p. 16), he has the sole right to the possession, and if the goods are stolen, the property must be laid in the lodger. *Belstead*, R. & R. 411, 1820; *Brunswick*, 1 Moo. C. C. 26, 1824.

Of persons unknown] Felony may be committed in stealing goods, though the owner is not known, and they may be described in the indictment as 'the goods of a person to the jurors unknown.' 1 Hale P. C. 512; East P. C. 651. 'But if the owner be really known, an indictment alleging the goods to be the property of a person unknown would be improper.' *Dealkins*, East, *ib.* See R. 7 of Indictments A.

'In prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino;* for it is not enough that the prisoner is unable to give a good account how he came by the goods.' 2 Hale P. C. 290; East, *ib.*, and 657.

Of trustees of turnpikes, &c.] By 7 G. 4, 64, 17: 'In any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing erected or provided in pursuance of any Act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any such trustees or commissioners.'

Goods of corporations] See R. 6 (2) of the Indictments A.

Verdicts possible on indictments] See L. A. s. 44 (2), (3), (4).

Sentence] By s. 37: (1) 'Every person who commits the offence of simple larceny after having been previously convicted of felony shall be liable to penal servitude for any term not exceeding ten years.

(2) Every person who commits the offence of simple larceny or any offence made punishable like simple larceny after having been previously convicted—(*a*) of any indictable misdemeanour under this Act; or (*b*) twice summarily of any offence punishable under s. 6 of the Summary Jurisdiction (Ireland) A. 1851, or under the Larceny A. 1861, or under the Malicious Damage A. 1861, or under this A. (whether each of the convictions has been in respect of an offence of the same description or not and whether such convictions or either of them have been before or after the passing of this A.); shall be liable to penal servitude for' seven years maximum.

By (3), a male under sixteen may *also* be 'once [see (6), below] privately whipped.' By (4), where penal servitude may be imposed for an offence under this A., a sentence of two years' imprisonment

with hard labour—as a maximum—may be substituted. By (5) (*a*) for a misdemeanour under this A. a fine may be substituted for or added to any other sentence; by (*b*) for felony, defendant's recognisances, with or without sureties, to keep the peace, &c. may also be ordered; (*c*) so for misdemeanour—in which they may be *substituted* for any other punishment; (*d*) 'Provided that a person shall not be imprisoned for more than one year for not finding sureties.' (6) regulates the severity of the whipping: (*a*) age not exceeding 16, maximum, 25 strokes with a 'birch-rod'; (*b*) in any other case the maximum is 50 strokes; (*c*) the court must specify the number and the instrument in each case; (*d*) no whipping may take place after six months from the passing of sentence; (*e*) if inflicted with penal servitude the whipping must be done before prisoner 'is removed to a convict prison.'

Venue] See s. 39 of the Larceny A. 1916—sub-s. (1) under *False Pretences*, and sub-ss. (2) and (3) under *Venue*. Note that sub-s. (1) deals with '*any* offence against this Act.' See also s. 115 of 24-5 V. 96. Where goods stolen in one county were carried by the offender into others, he might be indicted in any of them, 'for the continuance of the asportation is a new caption,' *i.e.* 'the offence is complete' in all: 'but if he be indicted of robbery, it must be in the county where the force and putting in fear was.' 1 Hale P. C. 507-8; 4 Bl. Com. 305; 1 Moo. C. C. 47, *n.*; Hawk. P. C. 1, 33 (pt. 1), 52. Thus there was a conviction in Durham where property was stolen on the 4th November, 1823, in Yorkshire, and carried into Durham on the 17th March, 1824. *Parkin*, 1824. This rule did not, however, hold with regard to 'compound' larcenies, in which case there could only be trial for the 'simple' larceny (which see, above) in the second county. Thus, where defendant robbed the mail of a letter, either in Wiltshire or Berkshire, and brought it into Middlesex, and was there indicted, the judges held, that he could not be convicted *capitally* out of the county in which the letter was taken from the mail. *Thomson*, 2 Russ. Cri. 1304, 1795, 'the felony travels,' *i.e.* but not the aggravation. So 'if A. rob B. in county C., and carries the goods into county D., A. cannot be indicted of robbery in the county of D. . . . but he may be indicted of larceny' there 'because it is theft wherever he carries the goods . . . 4 H. 7, 5 *b;* 7 Co. Rep. [49] 2 *a: Bulwer's case*' [1584]. Hale 2 P. C. 163, and above. Where the theft from the person was at Swindon (Wilts.), Jelf J. held he had no jurisdiction to try in the city of Gloucester (where the arrest was) and that the jury could not find 'simple' on the indictment for compound larceny. *Fenley and others*, 20 Cox C. C. 252, 1903.

'If the thing stolen is altered in character in the first county, so as to be no longer what it was when stolen, an indictment in the second should describe it according to its altered, and not according to its original, state,' because the larceny continued in the second county may to some extent be considered as a new offence. 2 Russ. Cri. 1304; see *Edwards*, 1823. Thus an indictment in county H., for stealing 'one brass furnace,' is not supported by evidence that it was stolen in county R., and there broken to pieces, and the pieces brought into county H. *Halloway*, 1 C. & P. 127, 1823.

A joint original larceny in one county may become a separate larceny in another. Thus where four men (probably) stole goods in Gloucestershire, divided them there, and then carried their shares into Worcestershire in separate bags, it was ruled that the joint indictment against

all of them could not be sustained as for a joint larceny in Worcestershire; and counsel was put to his election which of them he would proceed against separately. *Barnett,* 2 Russ. Cri. 1305, 1818. Cf. *Prince,* 1868. But where a larceny was committed by two, and one of them carried the stolen goods into another county, the other still accompanying him, without their ever having been separated, they were held both indictable in either county, the possession of one being the possession of both in each county, as long as they continue in company. *M'Donagh,* Car. Suppl. 23, 3rd ed., 1824.

A man may be indicted for larceny in the county into which the goods are carried, although he did not himself carry them thither. C. and D., laid a plan to get some coats in Surrey under pretence of buying them. They got the owner to leave them with D. while she went with C. to get the money for them. In her absence D. carried them into Middlesex, and C. afterwards joined him there, and concurred in securing them. They were indicted in Middlesex, and the judges were unanimous that as C. was present aiding, &c. in Surrey at the original larceny, his concurrence afterwards in Middlesex, though after an interval, might be connected with the original taking, and brought down his larceny to the subsequent possession in Middlesex. *County,* 2 Russ. Cri. 1305, 1816.

Defendant was tried in Kent for stealing two geldings in that county. The horses were stolen in Sussex. He was apprehended with them in Surrey. The only evidence to support the charge of stealing in Kent was, that when he was apprehended he made excuses that the horses belonged to his brother in Kent, and being conveyed thither with an officer on the horses, he made his escape thence, without the horses. The judges were unanimous that there was no evidence of stealing in Kent, and that no judgment ought to be given on the conviction, but that he should be removed to Surrey. *Simmonds,* 1 Moo. C. C. 408, 1834. Indictment in Middlesex, at common law, for stealing lead from the roof of a church in Bucks. Defendant being indicted at the Central Criminal Court, which had jurisdiction in Middlesex (where the lead was found in his possession), and not in Bucks, the court held that he could not be convicted there, 'on the ground that the original taking not being a larceny [at common law], but created by statute a felony, the subsequent *possession* could not be considered a larceny.' *Millar,* 7 C. & P. 665, 1837.

R. and B. were indicted at the Middlesex sessions for stealing and receiving a watch; B. pleaded guilty, R. was convicted of stealing. The watch was stolen at Liverpool, and was delivered by railway to B. in Middlesex. R. had by letter advised B. of this, but it was not proved that he had left Liverpool. It was held under (now) 6-7 G. 5, 50, 39 (2), that R. was still constructively in possession of it in Middlesex, and, therefore, triable there. *Rogers,* L. R. 1 C. C. R. 136; 37 L. J. M. C. 83; 11 Cox C. C. 38, 1868.

If 'the original taking was not such a felony whereof the common law takes cognisance,' as if the goods be stolen at sea, *e.g.* by 'a pirate carrying the goods . . .' into any county: Hawk. P. C. I. 33, 52, the thief cannot be indicted (*at common law*) for larceny in that county, citing 3 Inst. 113; *Millar,* above; but 24-5 V. 96, 115, provides for that case.

And so where the goods are stolen abroad, though within the King's dominions (as in Guernsey), carrying them to England will not render the offender indictable here. *Prowes,* 1 Moo. C. C. 349, 1832; *Debruiel,*

11 Cox C. C. 207, 1861. So where the goods are stolen in France. *Madge,* 9 C. & P. 29, 1839, because at common law stealing abroad is not a crime: *Debruiel.* Cf. *Garrett,* 1853.

Things not subject to larceny] See under *Animals, Dead Bodies.*

Corpses] 'There can be no property in a dead corpse,' and though 'a very high misdemeanour,' the stealing of it is no felony: East P. C. 652.

Land and air are physically incapable of being stolen, as is practically *free* water.

Triable at Q. S. (except as stated under *Written Instruments*).

LETTERS, LARCENY OF, &c.

See *Post-Office.* For forgery, see *Howse* and *Cade* and cf. *Riley,* 1896; for threatening letters, see under *Threats.*

LEVYING WAR.

See *Treason.*

LIBEL.

A. Blasphemous, Indecent and Seditious Publications.

Blasphemy—common law] In view of the decision of the House of Lords in *Bowman* v. *Secular Society, Limited,* 1917, A. C. 406; 33 T. L. R. 376; 61 S. J. 478, it is hardly worth while referring in detail to earlier cases, all of which are therein cited and many discussed. Finlay C. was the only dissentient—on a point not here relevant; Lords Dunedin, Parker, Sumner and Buckmaster upheld the C. A. (L. Cozens-Hardy M.R., Pickford and Warrington, LL.JJ.), who had confirmed Joyce J.'s judgment for the Society: 1915, 2 Ch. 447. A legacy to the Society was disputed by the testator's next of kin, &c. on the grounds that the objects of the Society or some of them were unlawful—generally, as it was put before Joyce J., because the Society 'was a mere screen for the National Secular Society, against the leaders of which numerous prosecutions for blasphemy had in the past been undertaken by the Government of the day.' A book issued by the Society in which the Bible was held up to ridicule was tendered in evidence but rejected. A special ground on the appeals was the main object of the Society as stated in its memorandum of association, viz.:—'To promote . . . the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action.' This clause, it was agreed, governed the whole instrument, and Finlay C. thought that it amounted 'to abnegation of all religion, including, of course, the Christian religion, as governing human conduct,' and described the appellants' argument as being 'that it is criminal [at common law] to attack the Christian religion, however decent and temperate may be the form of attack,' but he declined to go to that extent. 'There are, no doubt,' he said, 'to be found in the cases many expressions to the effect that Christianity is part of the law of England, but no decision has been brought to our notice in which a conviction took place for the advocacy of principles at variance with Christianity, apart from circumstances of scurrility or intemperance of language. . . . I think we must hold . . . that the crime of blasphemy is not constituted by a temperate attack on religion in which the decencies of controversy are maintained.' On *this* principle the House was unanimous. Consequently, the headnote (L. R.) is: 'Assuming that this object [as above] involved a denial of Christianity, it was not criminal, inasmuch as the propagation of anti-Christian doctrines, apart from scurrility or profanity, did not constitute the offence of blasphemy.'

It continues: 'The principle of *Ramsay and Foote* applied. *Briggs* v. *Hartley,* 19 L. J. Ch. 416, 1850, and *Cowan* v. *Milbourn,* L. R. 2 Ex. 230, 1867, overruled.'

The earlier case on which this rests, *Ramsay,* 15 Cox C. C. 231; 48 L. T. 733; 1 Cab. & E. 126 (practically one case with *Bradlaugh*—both) in 1883, and the controversy with Stephen J. to which it led,

may very conveniently be studied in the latter's Digest Crim. L., note to c. 17, art. 179.

The judgments of Lords Parker and Sumner contain a complete *rationale* of the present law and the latter's gives a conclusive explanation of the decreased severity of the *tone* of the law; to-day 'all religions depend fundamentally on the safety of the state and not on the doctrines or metaphysics of those who profess them.' Below, Pickford L.J. had said: 'the doctrine of public policy cannot be considered as being always the same and many things would be and have been held contrary to public policy which are not so held now.'

On the other hand 'malicious' blasphemy designed to hurt the feelings of professing Christians has been held indictable. On an information alleging, amongst others, a libel to the effect that 'Jesus Christ was an impostor, a murderer in principle, and a fanatic,' a juryman inquired whether a work 'which denied the divinity of our Saviour was a libel,' Abbott C.J. replied, that 'a work speaking of Jesus Christ in the language' *here* used 'was a libel,' and the defendant was found guilty. On a motion for a new trial, on the ground that this was a wrong answer to the question put, the K. B. held the answer correct. *Waddington*, 1 B. & C. 26, 1822. It was held indictable at common law to publish a blasphemous libel of the Old Testament. *Hetherington*, 5 Jur. 529, 1841, apparently on account of its theological and historical connection with the New Testament, but no court would now enter into this question. In *Petcherini*, 7 Cox C. C. 79, 1855, a Catholic priest in Ireland was acquitted of the common law charge (Irving, *Annals of our Time*, December 7, 1855) of contemptuously burning in public a Protestant Bible. There is a curious restriction by an Irish judge of the privilege of the Bible to the English 'Authorised Version.'

For spoken *Blasphemy*, see that title and p. 782.

Statutes] By 1 E. 6, 1, persons who 'deprave, despise or contemn' the sacrament of the Lord's Supper 'shall suffer imprisonement of his or their bodies and make fyne and ransome at the king's will and pleasure.' By 1 Eliz. 2, (3 or) 9, applied to the *present* Book of Common Prayer by 14 Car. 2, 4, 20 (to which it is annexed: see The Statutes Revised, 2nd ed., note to s. 1), any one who 'shall in anye entreludes playes songes rymes or by other open woordes declare or speake anye thing in the derogation depraving or despising of the same booke, or of any thing therein conteyned or any parte therof' is punishable as therein mentioned. See also 13 Eliz. 12; 3 J. 1, 21 (rpd. 6-7 V. 68, 1).

By 9-10 W. 3, 35 (otherwise 32, the Blasphemy A. 1697-8, s. 1: 'If any person or persons having been educated in or at any time having made profession of the Christian religion within this realm [shal, by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or] shal assert or maintain there are more gods than one, or shal deny the Christian religion to be true or the Holy Scriptures of the Old and New Testament to be of divine authority, and shal upon indictment or information in any of his Majesties courts at Westminster or at the assizes be thereof lawfully convicted by the oath of two or more credible witnesses such person or persons for the first offence shal be adjudged incapable and disabled in law to all intents and purposes whatsoever to have or enjoy any office or offices imployment or imployms. ecclesi-

astical civil or military or any part in them or any profit or advantage appertaining to them or any of them. And if any person or persons so convicted as aforesaid, shal at the time of his or their conviction enjoy or possess any office place or imployment such office place or imployment shall be voyd, and is hereby declared void. And if such person or persons shall be a second time lawfully convicted as aforesaid of all or any the aforesaid crime or crimes then he or they shal from thenceforth be disabled to sue prosecute plead or use any action or information in any court of law or equity or to be guardian of any child or executor or administrator of any person or capable of any legacie or deed of gift or to bear any office civil or military, or benefice ecclesiastical for ever within this realm and shall also suffer imprisonment for the space of three years without bail or mainprize [= delivering to sureties], from the time of such conviction.'

By s. 2, information of such words must be given upon oath before a justice, within four days after such words *spoken*, and the prosecution of such offence be within three months after such information.

By s. 3, persons convicted shall, upon 'renunciation of such offence or erronious opinions' in the court where they were convicted, within four months after such conviction, for the *first* offence, be discharged from all penalties and disabilities so incurred. See *Blasphemy* for this A.

So much of 1 W. & M. 18, 17, and 9-10 W. 3, 32 (above), as relates to persons denying the doctrine of the Trinity, was repealed by 53 G. 3, 160 (itself rpd. S. L. R. A. 1873); 9-10 W. 3, above, has been held not to affect the common law offence, but to be cumulative. *Richard Carlile,* 3 B. & Ald. 161, 1819; *Waddington,* 1 B. & C. 26, 1822: both at common law.

It was held by L. Coleridge C.J. that 6-7 V. 96, 7, applies to blasphemous libels: *Bradlaugh,* 1883, which, and *Duffy*, see below, under 1888 A.

Seizure of copies] may be ordered as part of the sentence: 60 G. 3 & 1 G. 4, 8, 1.

Indecent literature, &c.] Although an opinion formerly prevailed that the publication of an obscene or indecent writing or, indeed, any writing not containing reflections on any individual was not a libel nor an indictable offence (though 'the author may be bound to his good behaviour as a scandalous person of evil fame'): Hawk. P. C. 1, 73, 9; yet a different rule has been since established, and it is now clear that an indictment at common law may be maintained for any offence which is against public morals or decency. *Sidley*, Sid. 168, 1664; *Wilkes,* 4 Burr. 2527, 1764: information for the Essay on Woman; Holt on Libel, 73, 2nd ed., 1816, who says, 'Under this head of obscene exhibition may be comprehended every species of representation, whether by writing, by picture, or by any manner of sign or substitute which is indecent and contrary to public order, and natural feeling.' Cf. *Grey*, 1864. The principle of the cases also seems 'to comprehend other indecent and immoral communications, especially when made before a large assembly, such as the performance of an obscene play, which offence, it seems, has formed the ground of many prosecutions.' *Curl*, Str. 790; 17 St. Tr. 153, 1727; 2 Stark. on Slander, 159, 2nd ed., 1830; cf. 6th ed., p. 632, 1897; Holt, above. See further, *Obscene Publications.*

Indictment] It is not necessary to set out the obscene matter, but it is sufficient to deposit the literature, with particulars, indicating the passages complained of. The s. enacting this is now rpd., and particulars are now regulated by R. 4 (4) of the Indictments A., the proviso to which limits such particulars to those 'any statute or rule of law' requires; and that A. repeals the s. which regulated those particulars in lieu of setting out the obscene passages. A form (23) is provided in the Appendix to the Indictment Rules. The effect of *Bradlaugh* v. *R.*, 3 Q. B. D. 607; 14 Cox C. C. 68, 1878: C. A., would now be that if the alleged obscene passages were not clearly identified by the indictment, the defect would not be cured by verdict. See also *Barraclough*.

Seditious language—graphic or oral] A rule exactly analogous to that in *Blasphemy* has been gradually evolved. In *Aldred*, 22 Cox C. C. 1; 74 J. P. 55, 1909 (alleged encouragement by newspaper articles of Indian disaffection), L. Coleridge J. said: 'A man may lawfully express his opinion on any public matter, however distasteful, however repugnant to others, if, of course, he avoids' defamation, blasphemy or obscenity. 'Matters of state, matters of policy, matters even of morals—all these are open to him. He may state his opinion freely, he may buttress it by argument, he may try to persuade others to share his view . . . if he thinks that either a despotism, or an oligarchy, or a republic, or even no government at all is the best . . . he is at perfect liberty to say so. He may assail politicians, he may attack governments . . . he may seek to show that rebellions, insurrections, outrages, assassinations, and such like are the natural, the deplorable, the inevitable outcome of the policy which he is combating. . . . But, on the other hand, if he makes use of language calculated to advocate or to incite others to public disorders, to wit, rebellions, insurrections, assassinations, outrages or any physical force or violence of any kind, then, whatever his motives, whatever his intentions, there would be evidence . . . that he was guilty of a seditious publication.' There defendant had published 'political assassination is no murder,' apropos of the murder of an Anglo-Indian in London by a native who promoted the independence of India. Earlier authorities are: Starkie, 2 Slander, 183, 2nd ed.; 650, 6th ed. (with great respect to a very learned writer, it may be doubted whether 'a view to benefit society' as the 'line of demarcation' *is* 'plain'); 1 Russ. Cri. 302; *Lambert and Perry*, 2 Campb. 398, 1810; *Tuchin*, Holt Rep. 424, 1704; 14 St. Tr. 1095; *Holt* on Libel, cc. 5-7; *Collins*, 9 C. & P. 456, 1839; *Lovett*, *ib.* 462, 1839; *Sullivan and Pigott*, 11 Cox C. C. 44, 1868, where Fitzgerald J. said: 'L. Kenyon has quaintly said [*Cuthell*, 27 St. Tr. 675, 1799] 'a man may publish whatever a jury of his countrymen think is not blamable,'' *i.e.* the predominant intention must be inferred from the circumstances of each case—a conclusion which has been expressed, in varying terms, in almost every judgment on the subject. Thus in *Aldred*, above, 'the language used' in view of 'the audience addressed,' the state of public feeling and 'the place and the mode of publication' are topics to be taken into account. So when an Italian anarchist defamed said of an ex-anarchist that he had become an Italian spy (in England) in a circular addressed to the Italian colony of London, the C. C. A. thought that *in the circumstances* the libel was dangerous: *Malatesta*, 7 Cr. A. R. 273, 1912. See *Newspaper Reports*, below.

The sovereign] The intimate connection in this country between the crown and the government makes the general rule of seditious utterances laid down above the same in both cases. Hence the line between criticism of his moral character and treason is more conveniently considered under the latter title. Mere personal abuse of Charles I. in a speech was held by all the judges not to be treason (nor, apparently, would the imputation of vice be) in *Pine's Case,* Cro. Char. 117; 3 St. Tr. 359, 1629; they agreed, according to the headnote, that it was at most a misdemeanour. So a gross libel on his present Majesty was treated in *Mylius*, the *Times* newspaper, Feb. 2, 1911: *ex-officio* information by the A.-G. tried in the K. B. D. with a special jury. See also *J. Hunt,* 1824, below.

Foreign governments] are not protected by the law of seditious libel; 'a document published here . . . calculated to disturb' such a government is not indictable: *per* Phillimore J., *Antonelli,* 70 J. P. 5, 1906. Incitement against 'the sovereigns and rulers of Europe' indicates a class sufficiently well defined to found an indictment: *Most.* Individual foreigners may be protected: below.

Publication in these *cases*] How far it differs in others, see *Publication in General.*

Spoken words] No indictment will lie for mere defamatory words not in writing; *Beare,* 1 L. Raym. 414; Carth. 407; 2 Salk. 417, 1698; *Langley,* 6 Mod. 125, 1704—slander on a mayor—where Holt C.J. said, 'Words [*i.e. spoken*] that directly tend to breach of peace may be indictable; but otherwise, to encourage indictments for words would make them as uncertain as actions for words are;' *unless* they be seditious, or blasphemous, or obscene, or reflect on the administration of justice, or convey a challenge to fight. Thus blasphemous, seditious or obscene speech is criminal. Instances of the first are *Traske,* Hob. 236, 1618; *Atwood,* Cro. Jac. 421; 2 Roll. Abr. 78, 1618; *Taylor,* 1 Ventr. 293; 3 Keb. 607, 621; Tremayne's Entries 226, 1676—all early cases. A convenient history of the subject will be found in *Odgers's* Libel, 5th ed. p. 489.

'. . . Prosecutions for seditious words were not uncommon about . . . 1794. No such prosecution, I believe, has taken place for very many years. Seditious language, however, has on several occasions been made the subject of prosecutions, the charge being that of unlawful assembly or seditious conspiracy, of which violent speeches have been regarded as overt acts.' *Stephen,* 2 Hist. Cr. L. c. 24.

Seizure of copies] as in *Blasphemy.*

The administration of justice] See *Perversion of Justice.* Here, too, the general rule is analogous. Where a person by any means calumniates the proceedings of a court of justice, 'the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the Constitution itself': *per* Buller J., *Watson,* 2 T. R. 199, 1788. It certainly is lawful, 'with decency and candour, to discuss the propriety of the verdict of a jury or the decisions of a judge . . .' but if the writing impugned 'contained no reasoning or discussion, but only declamation and invective,

and were written, not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice,' it is punishable: *per* Grose J., *White*, 1 Campb. 359, 1808.

B. Defamation.

Individuals—common law—definition] 'A libel in a strict sense is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule.' The 'larger sense' includes all graphic and pictorial forms. Hawk. P. C. 1, 73, 1, 2. 'Though the words impute no punishable crimes,' yet if 'they contain that sort of imputation which is calculated to vilify a man and to bring him, as the books say, into hatred, contempt, and ridicule,' an indictment lies: *per* Mansfield C.J., *Thorley* v. *L. Kerry*, 4 Taunt. at 364, 1812; *Digby* v. *Thompson*, 4 B. & Ad. 821, 1833. 'No man has a right to render the person or abilities of another ridiculous—not only in publications—but if the peace and welfare of individuals or of society be interrupted, or even exposed by types and figures, the act, by the law of England, is a libel': *per* L. Ellenborough, *Cobbett*, 29 St. Tr. at 50-1, 1804. For the great bulk of libels (viz. those by words) the following definitions are useful: 'Words which produce in any given case appreciable injury to the reputation of another are called defamatory.' *Odgers*, Libel 1, 5th ed. 'A defamatory statement is a statement concerning any person which exposes him to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or trade.' *Fraser*, Libel, 5th ed. Part I. [civil] art. 1; Part II. [crim.] art. 1 adopts this definition 'provided that the publication of such statement is calculated to cause a breach of the peace.'

Thus an information was granted against *Smollett*, the novelist, for a libel in the 'Critical Review,' on Admiral Knowles, insinuating that he wanted courage and veracity, and suggesting that he was 'of a conceited, obstinate, and incendiary disposition, &c.': 1759, Holt on Libel, 224 *n.* (1816). So an information was granted against the printer of a newspaper 'for a ludicrous paragraph' giving an account of the Earl of Clanricard's marriage with an actress at Dublin. *Kinnersley*, 1 W. Bl. 294, 1760. And for a libel on the Bishop of Derry contained in a paragraph which represented him as a 'bankrupt.' *Anon.*, 1812; Holt, as above, 224 *n.*

Truth] 'It is not material whether the libel be true or whether the prosecutor be of ill-fame, for libel is like secret poisoning': Coke, 5 R. 125 b: *de libellis famosis*.

Information] It has been held by a specially reinforced court of five judges that 'the rule to be collected from the modern decisions is that a criminal information for libel can only be granted at the suit of persons who are in some public office or position, and not at the suit of private persons.' *Labouchere*, 12 Q. B. D. 320; 15 Cox C. C. 415, 1884 (defamation of deceased nobleman); *x. p. Pollard*, below; cf. *Peltier*.

Limits] It is difficult to define the boundaries beyond which

reflections on the character of an individual become torts or crimes: see *Odgers* on Libel, 5th ed. 18. It is said by Mr. Holt, 218 (as above), 'where there is no imputation on the moral character of the plaintiff; no words of ridicule or contempt; nothing which can affect his reception in life, or exclude him from general society, it is no libel.' An alleged libel was this: 'The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room.' This libel was published in the 'Cassino room' at Southwold, by posting it on a paper. It was held, that the paper and mode of promulgating it did not amount to a libel: 1st, because 'it did not, by any necessary or probable implication, affect the moral fame of the plaintiff; 2nd, that it was the regulation of a subscription assembly, and the paper might import no more than that the plaintiff was not a social and agreeable character in the intercourse of common life; 3rd, that the words charged him with nothing definite, threw no blemish on his reputation, and implied no unfitness for general society.' *Robinson* v. *Jermyn*, 1 Price, 11, 1814; '*sed quære*,' says *Odgers* on Libel, 21, 5th edn.

In *Gregory* v. *R.*, the Ex. Ch. held the following words indictable for libel (on B.): 'Why should T. be surprised at anything Mrs. W. does? if she chooses to entertain B. she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all infatuated foreigners who crowd our streets to her table if she thinks fit.' A placard ran as follows: 'B. Oakley, of Chillington, game and rabbit destroyer, and his wife, the seller of the same in country and town.' Quain J. ruled that this was not *primâ facie* libellous, and, as there was no innuendo showing that it charged an indictable offence, or that it related to the calling of B. O., quashed the indictment. *Yates*, 12 Cox C. C. 233, 1872. It is a *defamatory* libel to write of a person who has been convicted of felony that he is 'a convicted felon,' if he has received a pardon, or suffered his sentence, for he is by law no longer a felon. *Leyman* v. *Latimer*, 3 Ex. D. 352; 47 L. J. Ex. 470, 1878: C. A. Cf. *Hay* v. *Justices of Tower Division*, 24 Q. B. D. 551, 1890.

A letter containing immodest proposals to a respectable woman has been held to be a libel, on the ground that (though she never saw it) it was of a character to provoke a breach of the peace. *Adams*, 22 Q. B. D. 66; 58 L. J. M. C. 1; 16 Cox C. C. 544; 50 J. P. 377, 1888: C. C. R.

'The person libelled may pursue his remedy for damages or prefer an indictment; he may both sue for damages and indict': *per* Smith J., *Lord Mayor of London*, 16 Q. B. D. 777, 1886.

The crime and the tort] There seems to be no precise legal distinction between the *crime* and the *tort* of libel. See *Definition*, above, and *Justification*, below. It is stated that L. Hardwicke 'puts actions and indictments for libels precisely on the same footing.' Holt on Libel, 215-16; cf. 1 Russ. Cri. 1022. 'Not every publication which would be held a libel in a civil case can be made the foundation of criminal proceedings': *Odgers*, Libel (1911), p. 455, who lays down the rule: 'When no action would lie without proof of special damage, no indictment or information can be preferred whether the words be written or spoken,' *i.e.* for *defamatory* libel. Dr. Kenny, Outlines, ch. 21, which see, observes, 'The judges of the present day desire to see indictments for defamation restricted to

those cases in which the libel is aggravated either by its intrinsic gravity or by its obstinate repetition.' Informations are even more closely restricted. In *Ex parte Pollard,* 17 T. L. R. 773, 1901, a magistrate sought one against the publisher of a local newspaper who had seriously attacked his behaviour on the bench, but as applicant had written demanding an apology or threatening an action for libel, Wills and Kennedy JJ. refused a rule because 'applicant had chosen his forum and made the matter one of damages'; an information was an 'indulgence' and an 'extraordinary remedy.' Hence, *Odgers,* Libel, p. 739, points out that a prosecutor proceeding by information may have to consent to waive his action, and not to stop till verdict.

The dead, foreigners, &c.] *Coke,* 5 R. 125 *a*, expressly admits libels on the dead, be he 'private man or magistrate,' and gives an instance: so criticised in *Labouchere.* But a writing, reflecting on the memory of a dead person, not *alleged* to be published with a *design* to bring scandal or contempt on the family of the deceased, or 'to induce them to break the peace in vindicating the honour of the family,' is not indictable. *Topham,* 4 T. R. 126, 1791, where L. Kenyon C.J., in arresting judgment, expressly safeguarded the rights of historical or biographical criticism; and see *Paine,* 1695 (information for libel against the late Queen Mary), and *Taylor,* 3 Salk. 198; 2 L. Raym. 879, 1704, where the conviction was rather for seditious words in favour of regicide than for defamation of Charles I., Charles II., James II., or William III.; Holt on Lib. 230, 2nd ed.; and *semble,* that an indictment or criminal information for a libel on a deceased person, prosecuted by his representative, will be refused—unless the circumstances are exceptional. *Labouchere,* below. In 1692, *Anthony Wood* was prosecuted in the court of the Vice-Chancellor of the University of Oxford by the second Earl of Clarendon for having libelled the first earl, his father, the Lord Chancellor at the Restoration, by the statement that he had sold offices, and was condemned in costs and expelled the University. 4 Wood's Life and Times, by A. Clark (Oxford Historical Society, 1895), pp. 1-50.

In *J. Hunt,* 2 St. Tr. N. S. 69, 1824, for a libel on the late George III. by publishing Byron's 'Vision of Judgment,' Abbott C.J. laid it down to a special jury in the K. B. that hurting the feelings of descendants (Geo. IV., &c.) and bringing scandal on them was sufficient for a conviction. This was approved not only by Bayley J., *ib.*, but by Holroyd and Littledale JJ.: *Times,* June 21, 1824. See now under *Threats.*

A libel on a foreigner is indictable. Thus *L. George Gordon* was found guilty on an information for a libel on the Queen of France, 22 St. Tr. 213, 1787; and informations have also been granted and convictions obtained for libels on the characters of the Emperor of Russia, *Vint, &c.,* 27 St. Tr. 627, 1799, and of Napoleon Buonaparte, then Chief Consul of the French Republic, *Peltier,* 28 St. Tr. 530, 1803, where L. Ellenborough appears to have considered the rank of the individual as forming one ground of the decision, saying, 'I lay it down as law that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries.' The last sentence gives the true ground, and the cases show that *fair* criticism on *public* matters is protected.

The fact that the applicant for an information does not reside in this country is a strong reason for rejecting the application. *Labouchere.*

It is not necessary that the libel should reflect on the character of any particular individual, provided, if it reflects 'on a body, class, or sect,' it immediately tend to produce tumult and disorder: Stark. on Slander, 744, 6th ed.; although the contrary was formerly held. Thus an information was granted for a libel, containing an account of a murder of a child (and, perhaps, a woman) by certain Jews lately arrived from Portugal; and the affidavits set forth that certain persons in different parts of the city had been attacked by the mob, and barbarously treated in consequence of the libel. *Osborne,* 2 Barnard. K. B. 138, 166; W. Kelynge, 230 (2nd part); 25 Engl. R. 584, 1732.

'Informations at the suit of public bodies upon the application of certain individuals presiding over them, have been frequently granted' by the K. B. *Campbell* (1808: College of Physicians); *Bell* (1808: Foundling Hospital); Holt on Lib. 240, 2nd ed.; *Williams,* 5 B. & Ald. 595 (1822: Clergy of Durham diocese).

Spouses] A wife could not before the Married Women's Property Acts and cannot now take criminal proceedings against her husband for libel, for proceedings under s. 12 of 45-6 V. 75 must be for 'the protection and security of her own separate *property,*' which 'her fair fame is not': *Lord Mayor of London,* 16 Q. B. D. 772; 55 L. J. M. C. 118; 16 Cox C. C. 81, 1886.

Threats to libel] See *Threats.*

Statutes] By 'L. Campbell's Act,' 6-7 V. 96, s. 4: 'if any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction, for any term not exceeding two years, and to pay such fine as the court shall award.' This s. created 'libel knowing the same, &c.'

S. 5: 'If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.'

Indictment] An indictment bad for mere defamation, still may be good for *obscene* libel, if it charges the unlawful publication of obscene matter. *Barraclough,* 1906, 1 K. B. 201; 75 L. J. K. B. 77; 70 J. P. 14; 22 T. L. R. 41; 21 Cox C. C. 91: C. C. R., whence it seems that the deposits (books, particulars, &c.) are sufficient though not actually handed over with the indictment, if they are already in the custody of the law.

The improved system of pleading dispenses with some cases: cf. *Bradlaugh* v. *R.* It has provided Form 27 (in Stat. R. & O. 1916, p. 131, *cancelling* Form 22 appended to the Indictment Rules, 1915), which includes the *minimum* of requisite particulars, viz.: the actual passages impugned.

On an indictment for publishing a defamatory libel, 'knowing the same to be false,' there may be a conviction of merely publishing a defamatory libel, both being misdemeanours (and on the analogy of assault causing bodily harm and a common assault). *Boaler* v.

R., 21 Q. B. D. 284; 57 L. J. M. C. 85; 16 Cox C. C. 488, 1888: Q. B. D.

For further pleadings, see after *Justification*.

Prosecutor's particular capacity] When a libel is directed against the prosecutor in a particular character, it must be proved that the prosecutor bore that character. But in general, where the character is a public one, it will be sufficient if it appear that the prosecutor has acted in it, and it will not be necessary to give strict evidence of his appointment. See *Conduct* under *Best Evidence*, and *Berryman* v. *Wise*, *ib.*; Stark. on Slander, 423-4, 6th ed. 'Where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation, trade, or business is, of course, the only evidence which the fact admits of.' *Ib.* 434.

It was decided that to support an averment that plaintiff is a physician, it is necessary to give regular evidence, not only that he practised, but that he possessed lawful authority to do so. *Collins* v. *Carnegie*, 1 A. & E. 695; 3 Nev. & M. 710, 1834.

In order to prove the defendant to be an attorney, an examined *copy* of the roll of attorneys, signed by him, is sufficient. So the books from the master's office containing these names copied from the original roll, produced by the officer in whose custody it is kept, is good evidence. It seems that after admission proof of the right to practise is unnecessary. *Crossley*, 2 Esp. 526, 1797; *Lewis* v. *Walter*, 3 B. & C. 138, 1822; 4 B. & Ald. 605, 1821; *Jones* v. *Stevens*, 11 Price 235, 1822. The stamp-office certificate, countersigned by the master of the K. B., is sufficient *primâ facie* evidence of being an attorney of that court. *Sparling* v. *Haddon*, 9 Bing. 11, 1832. The matter is now regulated by 23-4 V. 127, 22, by which the *Law List* is *primâ facie* evidence.

When the libel itself is an admission of the particular character, further proof thereof is unnecessary. Thus, where in an action for words spoken of an attorney they contained a threat to have the plaintiff struck off the roll of attorneys, it was held unnecessary to give any proof that plaintiff was an attorney. *Berryman* v. *Wise*. So where the words were, 'He is a pettifogging, blood-sucking attorney.' *Armstrong* v. *Jordan*, 1826; 2 Stark. on Slander, 11 *n.*, 2nd ed. Cf. *Bagnall* v. *Underwood*, 11 Price 621, 1823.

Foreign language] The libel must be set out both in the original and in a translation, and the translation must be proved to be correct. In *Peltier*, 28 St. Tr. 561, an interpreter being called, swore that he understood French, and that the translation was correct, and then read aloud the whole of that which was charged to be a libel, in the original, and then the translation was read by the clerk at *nisi prius*. Selw. N. P. 991 and 996, 13th ed. See *Goldstein*, 1822.

Publication—in general] 'All persons concerned in the publication or circulation of a defamatory libel or in causing or procuring its publication are liable as principals, unless the part taken by them was lawful or innocent or purely accidental.' 1 Russ. Cri. 1034; Bac. Abr. Libel (B.) 1, 2; but the writing or composing of a libel without a publication of it is not an offence; if one confine it to his own closet, and neither circulate nor read it to others, it is not punishable. *Paine*, 5 Mod. 165, 167, 1695, as interpreted by Russ.

1033; but the court distinctly said (167), 'The making a libel is an offence though never published; and if one dictate and another write, both are guilty of making it.' On the principle that 'an act done' *plus* 'a criminal intention' 'are sufficient to constitute a crime,' Mr. Greaves agreed that 'writing a libel with intent to defame is a crime,' but the learned editors rightly submit that the dicta on which this is founded 'should be limited to 'composing' treasonable, seditious or blasphemous writings,' it may be added, at most.

It was said by Fortescue J. to have been ruled that the finding a libel on a bookseller's shelf was a publication of it by the bookseller. *Dodd*, 2 Sess. Ca. 33, 1724; cf. *Almon* and *Nutt*. The reading of a libel in the presence of another, without knowing it before to be a libel, does not amount to a publication. 5 Bac. Ab. Libel, B. 2. But, it is said, if a person who has either read a libel himself, or heard it read by another, afterwards maliciously reads or repeats any part of it in the presence of others, or lend or show it to another, he is guilty of an unlawful publication of it. Hawk. P. C. 1, 73, 10, following 9 R. 59 *b*, below. See below, and *Burdett*, 1820, where a headnote is: '*Qu.* whether the writing and composing of a libel with intent to publish but not followed by publication be an offence.'

A delivery of a newspaper (containing a libel) to the officer of the stamp-office, has been held a publication, such delivery being directed by statute (rpd.), for the officer at all events had an opportunity of reading it. *Amphlit*, 4 B. & C. 35, 1825; cf. *Cook* v. *Ward*, 6 Bing. 409, 1830. If a libellous letter is produced with the postmark on it and the seal broken, that is *primâ facie* evidence of its having reached the addressee and been published to him. *Warren* v. *Warren*, 1 C. M. & R. 360; 4 Tyr. 850, 1834; *Shipley* v. *Todhunter*, 7 C. & P. 680, 1836; *Lamb* v. *Marche*, 9 R. 59 *b*; Fr. Moore 813, 1611: Star Ch. A libel copied out by a clerk in the ordinary course of business is a publication to him. *Pullman* v. *Hill*, 1891, 1 Q. B. 524: C. A. See under *Defence*, below, *Ignorance, &c.*

Jury] 'The question of publication is ordinarily one of mere fact, to be decided by the jury; but this, like all other legal and technical terms, involves law as well as fact; and it is a question for the court in doubtful cases whether the facts, when proved, would constitute a publication in point of law.' Stark. on Slander, 809, 6th ed. 'All other questions' [of fact] than 'whether the words are reasonably capable of being an actionable disparagement' 'are for the jury.' *Odgers*, Libel, p. 93; so of criminal disparagement: see 32 G. 3, 60, below. See *Holbrook*, 1877; *Warnsborough*, and *Trueman*, 1913.

Handwriting—printing] Production of a libel, and proof that it is in the handwriting of the defendant, afford a strong presumption that he published it, if 'the author of it is not known; he is taken in the mainer [= *manu opere, mainœuvre*, i.e. 'redhanded'], and that throws the proof upon him . . . if he cannot produce the composer': *per* Holt C.J., *Beare*. So if the manuscript of a libel be proved to be in the handwriting of the defendant, and to have been printed and published, this is evidence to go to a jury that it was published by him, although there be no evidence that the printing and publication were by his direction. *Lovett*, 1839. But he may show that the publication was without his authority or knowledge. So '*printing* a libel may be an innocent act; but, unless qualified by circumstances, shall, *primâ facie*, be understood to be a *publishing*. It must be delivered to the

compositor and the other subordinate workmen': *per* Ex. Ch., *Baldwin* v. *Elphinston*, 2 W. Bl. 1037, 1775.

To the person defamed] 'Also it hath been resolved that the sending of a letter full of provoking language to another without publishing it, is highly punishable; and if the bare making of a libel be an offence, whether it be published or not, as it seemeth to be holden in some books, surely the sending of it to the party reflected upon must be a much greater crime, inasmuch as it so manifestly tends to a disturbance of the peace.' Hawk. *ib.* s. 11. For instance, see *Wegener*, 2 Stark. N. P. C. 245, 1817. It is generally agreed that such publication is enough for criminal (though not for civil) libel. *Adams*, 1888; cf. *M'Dougall* v. *Claridge*.

Copies] A printed copy of a libel may be read without notice to produce. *Watson*, 1817. Where a libel is printed the sale of each copy is a distinct publication, and a fresh offence; and a conviction or acquittal for publishing one copy will be no bar to a trial for another. *Carlile*, 1 Chitty 451, 1819; Stark. on Slander, 732, 6th ed., where there were informations by the attorney-general and indictments by a private prosecutor for different *copies*.

Admission of defendant] On an information for a blasphemous libel, the witness who produced it stated, that he showed it to defendant, who admitted that he was the author of the book. It was objected that this evidence did not entitle the crown to read the book, the admission not being absolute, there being errors in printing, &c.; but Pratt C.J. allowed it to be read, and said he would put it upon defendant to prove material variances. *Hall*, 1 Str. 416, 1721. An admission of the signature to a libel is no admission of its having been published, 'still less' of its publication, by the signer, in a particular county. *Case of the Seven Bishops*, 12 St. Tr. 183, 1688, at 309, 319; Stark. on Slander, 811, 6th ed. An admission of being the editor of a periodical cannot be extended beyond the date of such admission. *M'Leod* v. *Wakley*, 3 C. & P. 311, 1828: *per* L. Tenterden C.J., doubted by *Odgers* on Libel, 677, 5th ed.

Constructive publication] It was well established at common law that, in order to render a person guilty of publishing a libel, it was not necessary that he should be the actual publisher of it, or that he should even have a knowledge of its contents; not only was a person who procured another to publish a libel himself guilty of the offence, Hawk. P. C. 1, 73, 10, but a bookseller or publisher, whose servant published a libel, was criminally answerable for that act, though it was done without his knowledge. *Almon*, 5 Burr. 2686, 1771; cf. *Dodd*, 1724, and *Nutt*, Fitzg. 47; 1 Barnard. K. B. 306, 1728.

L. Campbell's A. 1843] In this state of the common law, 6-7 V. 96, was passed. By s. 7: 'Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his autho-

rity, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.'

On the trial of an information for a libel published in a newspaper, it was proved that each defendant managed a different department, but that the editing was left by them entirely to G., whom they had appointed, as he deposed. A libel was inserted by G. without the express 'authority, consent, or knowledge' of the defendants. Two judges held that it was a question for the jury, the libel being published without the defendants' 'authority, consent, or knowledge,' on a true construction of s. 7, whether the publication arose from any 'want of due care or caution' on their part. Cockburn C.J. (and Lush J.) said that s. 7 was intended to meet the anomaly of holding a man criminally responsible for something in which he had taken no part, and of which, in fact, he was not even cognisant. Mellor J. dissented, holding that the defendants having, for their own benefit, employed an editor to manage a particular department, and given him full discretion of the articles to be inserted, must be taken to have consented to the publication of the libel by him, and that s. 7 had no application to the facts proved, and that the jury were rightly directed to convict. *Holbrook,* 3 Q. B. D. 60; 47 L. J. Q. B. 35; 13 Cox C. C. 650; 42 J. P. 53, 1877. There was a new trial (at which also the editor was a witness) and again a conviction, and on a motion for a second new trial, on the grounds of verdict against evidence and misdirection, it was held, the same judges being divided as before, that the general authority given to the editor was not *per se* evidence within s. 7, that the defendants had authorised or consented to the libel, and another new trial was ordered. 4 Q. B. D. 42; 48 L. J. Q. B. 113; 14 Cox C. C. 185; 43 J. P. 38, 1878.

Booksellers, publishers, &c.] Where the libel is published by an agent of defendant, the authority of that agent must be strictly proved. In the case of booksellers and publishers, proof that the person actually selling the libel was a servant in the ordinary way of business, is sufficient; for in such case an authority to sell will be implied, but it is not so with regard to other persons. Thus, where defendant's daughter, who was usually employed by him to write his letters of business, inserted a libel in one of them, but there was no evidence that he had authorised her to write the *libel,* there was held to be no evidence of publication against him. *Harding* v. *Greening,* 8 Taunt. 42, 1817. See further under *Agency.*

Innuendos] Where, in order to bring out the libellous sense of the words, innuendos, *i.e.* averments of the construction put by the prosecution, when it thinks them necessary, on words, &c., alleged, are inserted in the indictment, they must, if material, be proved by witnesses acquainted with the persons and the circumstances. It is sufficient if such witnesses speak in the first instance of their *belief* with regard to the intended meaning without giving reasons; the grounds of such belief may be inquired into on cross-examination. Stark. on Slander, 464, 6th ed. If the witness derives his conclusion from the terms of another libel, with the publication of which defendant is not connected, this ought to be 'laid out of the case.' *Bourke* v. *Warren,* 2 C. & P. 307, 1826. If a good innuendo, ascribing a particular meaning to certain words, is not supported in evidence, it will not be permitted to ascribe another meaning to those words. *Williams* v. *Stott;* cf. *Archbishop of Tuam* v. *Robeson,* 5 Bing. 17,

1828; but see *Harvey* v. *French*, 1 Crom. & M. 11, 1832. Thus, where the words in fact imputed either a fraud or a felony, but according to the innuendo, the latter, L. Ellenborough ruled that plaintiff must prove that they were spoken in the latter sense. *Smith* v. *Carey*, 3 Campb. 461, 1813. If a libel contains blanks, the jury ought to acquit, unless they 'are satisfied that the blanks are filled up in the information according to the *true* sense and meaning of the writer': *per* L. Mansfield, *Almon*. It is said by Tindal C.J. that where words spoken import in themselves a criminal charge, and the innuendo introduces matter which is merely useless, it may be rejected as surplusage. *Day* v. *Robinson*, 1 A. & E. 554, 1834; see also *Williams* v. *Gardiner*, Tyr. & G. 578; 1 M. & W. 245, 1836; *West* v. *Smith*, Tyr. & G. 825, 1836. And see *Hoare* v. *Silverlocke*, 12 Q. B. 624, 1836.

A form (No. 27) for pleading innuendos will be found 1 Stat. R. & O. 1916, p. 131; see p. 934.

Evidence] The declarations of spectators [explained T. s. 576, as 'the natural or inseparable concomitants of the principal fact in controversy'; cf. *ib.* s. 579], while viewing a picture publicly exhibited, alleged to be libellous, were admitted by L. Ellenborough as evidence to show that the figures pourtrayed were meant to represent the persons alleged to be libelled. *Dubost* v. *Beresford*, 2 Camp. 511, 1810—an action for the destruction of the picture.

Defendant, the publisher (apparently) of the *Nottingham Review*, in 1811-12 inserted a letter from 'General Ludd' referring to the frame-breaking by Luddites (with obvious approval). On an information by the A.-G. for seditious libel, the Prince Regent's proclamation stating that certain 'acts of outrage' had been committed was admitted in evidence, because the information alleged 'acts of outrage,' and the proclamation was an 'act of state' showing that the government had acted on the facts alleged in the information: *Sutton*, 4 M. & S. 532, 1816.

To show that defendant had caused a libel to be inserted in the *Observer*, a reporter was called, who proved that he had given a written statement to the editor, the contents of which he had taken down from the defendant, at his request, for publication; that the newspaper produced was exactly the same (with irrelevant exceptions). Abbott C.J. held that what the reporter published in consequence of what passed with the defendant might be considered as published by defendant, but that the newspaper could not be read in evidence without producing the written statement—the only proof of identity. *Adams* v. *Kelly*, Ry. & Moo. 157, 1824; and see *Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206; 1 Cox C. C. 266, 1846; and *Fryer* v. *Gathercole*, 4 Ex. R. 262; 18 L. J. Ex. 389, 1849.

Malice—intent] See this title generally, which applies to libel, and *Defence*, below. Where a writing is on the face of it libellous, the law presumes that it is published with malicious intention, and it is unnecessary to give evidence of circumstances from which malice may be inferred. Thus it was said by Abbott C.J., in answer to the jury's question whether there *must* be 'malicious intention' in libel, that a person 'who publishes . . . matter in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary.' *Harvey*, 1823 (newspaper alleging insanity of George IV.); cf. *Burdett*, 1820.

Similar publications] It is, however, frequently necessary, where the expressions are ambiguous, or the intentions of defendant doubtful, to show the malice which prompted the publication. Thus, where the occasion of the publication would, *primâ facie,* justify defendant, yet, if the libel be false and malicious, it is an offence; in such case evidence of the malice must be given on the part of the prosecution to rebut the presumed justification. 'Where such a doubt exists, and where the material question is whether the defendant was justified by the occasion, or acted from express malice, it seems, in principle, that any circumstances are admissible which can elucidate the transaction, and enable the jury correctly to conclude whether the defendant acted fairly and honestly according to the occasion, or *malâ fide* and vindictively, for the purpose of causing evil consequences.' Stark. on Slander, 483, 6th ed. On this principle, evidence was allowed of the sale of other numbers of a weekly paper in other weeks, with the same title at the same office, for the purpose of showing that the papers were sold deliberately, and in the regular course of circulation, for public perusal (and not by mistake). *Plunkett* v. *Cobbett.* So where *subsequent* publications by defendant in the same newspaper were tendered to show *quo animo* he published the libel, L. Ellenborough said, 'No doubt they would be admissible in the case of an indictment.' *Stuart* v. *Lovell,* 2 Stark. N. P. C. 93, 1817. Again, in an action against an editor, articles published in a 'monthly' from month to month alluding to the action, and attacking plaintiff, are admissible to show *quo animo* the libel was published, and that defendant considered it as applying to plaintiff. *Chubb* v. *Westley,* 6 C. & P. 436, 1834. In *Barrett* v. *Long,* 3 H. L. Cas. 395, 1851, other publications of defendant, going back more than six years before the libel, were held to be admissible to prove malice. So it was held by L. Ellenborough, that any words or any act of defendant subsequent to the slander are admissible ['as evidence of *actual malice,* or of *deliberate publication,*' T. s. 340], in order to show *quo animo* he spoke the words in issue. *Rustel* v. *Macquister,* 1 Campb. 49, 1807. So either side is entitled to have extracts read from different parts of the same paper or book which contains the libel, relating to the same subject, 'although locally disjoined.' *Lambert* and *Perry,* 1810. Cf. title *Similar Acts.*

Privilege] When the publication is '*primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it or have a right to expect it, malice in fact must be proved': *per* Bayley J., *Bromage* v. *Prosser,* 4 B. & C. 247, 256, 1825; and see *M'Pherson* v. *Daniels,* 10 B. & C. at 272, 1829. 'Where a man has a right to make a communication, you must either show malice intrinsically from the language of the letter, or prove express malice.' *Per* Parke B., *Wright* v. *Woodgate,* Tyr. & G. 12, 1835. See further, *Defence,* below.

Where the indictment alleged a libel with intent to disparage and injure prosecutor *in his profession as solicitor,* it was held that proof of a publication to *him* alone was not enough, but that the *intent* to provoke him to a breach of the peace would have been. *Wegener;* but perhaps now the *tendency* to do so would be enough: *Brooke,* 7 Cox C. C. 251, 1856.

The defence] 'A defendant . . . may give evidence to show that

the alleged libel was privileged by reason of the occasion; and unless such privilege be absolute the prosecutor may rebut this defence by evidence of malice, precisely as in civil cases.

Except in such cases of privilege, it is quite unnecessary to prove malice in a criminal proceeding for a defamatory libel: it is enough that the defendant intended to publish that which the jury have found to be a libel.' *Odgers* on Libel, p. 472, 5th ed., where 'malice' = *express* or *actual* malice: p. 342.

Justification] This is the chief *criminal* incident differing from civil procedure.

L. Campbell's A. 1843] Before 6-7 V. 96, defendant could not, on indictment, give evidence of the *truth* of the libel; but, by s. 6 thereof, 'On the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and to entitle the defendant to give evidence of the truth of such matters charged, as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged, in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and if, after such plea, the defendant shall be convicted on such indictment or information, it shall be competent to the court in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always, that the truth of the matters charged in the alleged libel complained of, by such indictment or information, shall in no case be inquired into without such plea of justification: Provided also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty: Provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel.'

Thus, 'the truth alone is no defence in a criminal case; the defendant must also show that it was for the public benefit that the matters charged should be published. In *Warnsborough*, 4 T. L. R. 520, 1888, Baron Huddleston is reported to have ruled that, while the issue of truth was for the jury, it was for the judge to decide whether the publication was or was not for the public benefit. (*Sed quære:* see the judgment of the same learned judge in *Pankhurst* v. *Sowler*, 1886, 3 T. L. R. 193).' *Odgers* on Libel, 5th ed. p. 731. For an analogous judgment by L. Alverstone C.J. on 'public mischief,' see *Brailsford*, 1905, 2 K. B. 730; 21 T. L. R. 727; 21 Cox C. C. 16; 75 L. J. K. B. 64; 93 L. T. 401; 69 J. P. 370: K. B. D.; criticised 22 L. Q. R. 34 (No. 85).

Where defendant pleads the truth of the libel under this s. he cannot give evidence that the same charges had been previously pub-

lished, and that the prosecutor had not taken proceedings against the publisher. *Newman*, 1852, where it was also held that defendant is bound to prove the truth of all the material allegations contained in such plea, *i.e.* the allegations in a plea of justification are not divisible (see, however, *Labouchere*, 14 Cox C. C. 419, 1880, at 432), and if he fail to do so, it is no ground for a new trial that, in some of the allegations on which the jury found against him, their finding was against the weight of the evidence, for unless the entire plea is sustained there must be judgment for the crown; but the court, in pronouncing sentence, must consider that plea and the evidence on both sides (under the s. above), and form their own conclusion.

In *Duffy*, 2 Cox C. C. 45; 9 Ir. L. Rep. 329, 1846: Q. B. D., it was held that s. 6 has no application to seditious libels; followed in *O'Brien*, 15 Cox C. C. 180, 1883: Ir. Q. B. D.; and L. Coleridge C.J. in *Bradlaugh*, above (at 226), said that there were some sections about which a serious argument might be raised whether they had any application to blasphemous libel.

Where the plea of justification stated that prosecutor had 'earned the reputation of a scandalous friar,' a witness for defendant was allowed to be asked what was prosecutor's moral character. *Newman*, above.

It seems from *Trueman*, 1913, that if there is evidence of justification to go to the jury, it is for them and not for the judge whether a *primâ facie* case of justification has been made.

Pleading] Forms 28 and 29 under the Indictment Rules, 1916, 1 Stat. R. & O. 1916, p. 132, give respectively a plea of justification to an indictment for libel (Form 27) and a replication thereto. The second proviso to s. 6, above, affords an exception to the rule against *double pleading* (which see). Even on the failure of a demurrer (*ib.*), if such were pleaded nowadays, *Odgers*, Libel, p. 725, thinks that pleading over would be allowed.

Proof] Where to a large number of grave allegations no evidence of justification was given, though there was some on lesser charges, the C. C. A. declined to interfere, though it might have been otherwise if important accusations had been justified though the trivial had not: *Studds*, 3 Cr. A. R. 207, 1909.

Replication] filed during trial (not before) was held good: *S. Yousry*, 1914.

These pleas are subject to s. 8 (3) of the Indictments A., *i.e.* they must be expressed clearly but not necessarily in technical language.

Ignorance, inadvertence, &c.] Defendant may show that the publication was merely accidental, and without his knowledge, as where he delivers one paper instead of another, or delivers a letter without knowing its contents. *Topham; Constructive Publication*, above; or inadvertent: *L. Abingdon*, 1 Esp. 225, 1794—peer publishing in newspaper his defamatory speech in House of Lords, below; *Day* v. *Bream*, 2 Moo. & R. 54, 1837, where Patteson J. held that a porter, who in the course of his business delivered parcels containing libellous handbills, was though *primâ facie* liable, if he was shown to be ignorant of the contents, entitled to a verdict.

Privilege] So defendant, under the plea of not guilty, may show

that the libel 'was published on an occasion which the law recognises as constituting either an absolute privilege or excuse, independently of the question of intention; or a conditional privilege, dependent on the actual intention and motive of the defendant.' *Stark.* on Sland. 805, 6th ed. Thus, he may argue (as was done by Pollexfen and Levinz) that the alleged libel was presented *bonâ fide* to the king as a petition for the redress of grievances; *Case of the Seven Bishops*, at 371, 392; or to parliament; Hawk. P. C. 2, 73, 8; or that it was contained 'in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice.' *Ib.* 'It seemeth to have been holden by some, that no want of jurisdiction in the court to which such complaint shall be exhibited will make it a libel, because the mistake of the proper court is not imputable to the party, but to his counsel. Yet if it shall manifestly appear from the whole circumstances of the case, that a prosecution is intirely false, malicious and groundless, and commenced, not with a design to go through with it, but only to expose the defendant's character under the show of a legal proceeding,' it would form 'a good ground of an indictment at the suit of the king, as it makes the malice of their proceeding a good foundation of an action on the case at the suit of the party whether the court had a jurisdiction of the cause or not.' *Ib.*

Though it is a defence to show that the alleged libel was published by a person in a privileged capacity, as by a member of parliament in his place, or by some judicial person, yet if the publication took place by him when not in the privileged capacity, or by a third person, this furnishes no defence. Thus a member of parliament who, after delivering his speech in parliament, publishes it, is criminally responsible for a libel; *L. Abingdon*, above; *Creevey*, 1 M. & S. 273, 1813; though by Act of parliament the members are protected from all proceedings against them 'in any court or place out of Parlyament' for anything said in either house. 1 W. & M. Sess. 2, c. 2, but see below. So it was held by the Q. B. that it is no defence in an action that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the house, and thereon became part of the proceedings of the house, and which was afterwards, by orders of the house, printed and published by the defendants; and that the House of Commons heretofore resolved, declared, and adjudged, 'that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it.' On the demurrer to a plea suggesting such a defence, it was also held that a court of law is competent to determine whether or not the House of Commons has such privileges as will support the plea. *Stockdale* v. *Hansard*, 7 C. & P. 731; 2 Moo. & Rob. 9, 1837; 9 A. & E. 1; 8 Dowl. 148; 2 P. & D. 1; 3 Jur. 905, 1839; but the point was settled by 3-4 V. 9: 11 A. & E. 253, 297; 8 Dowl. 522, 1840. And it has been held that the publication in a newspaper of a faithful report of a debate in either House of Parliament is privileged, so that the publisher is not responsible for defamatory statements made in the course of the debate, and reproduced in such report. Nor is he liable for the publication of fair comments on the debates so reported. *Wason* v. *Walter*, L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 32 J. P. 773; 33 J. P. 149; 17 W. R. 169, 1868. So of reports of proceedings in Courts of Justice, even in parts, *e.g.* the judgment without the evidence. *Macdougall* v. *Knight*, 25 Q. B. D. 1, 1890: C. A.

It will, on the same principle, be a defence that the alleged libel was written *bonâ fide* with the view of investigating a fact in which defendant is interested, *provided* the limits necessary for making such inquiry are not exceeded. *Delany* v. *Jones,* 4 Esp. 190, 1802: advertisement; *Brown* v. *Croome,* 2 Stark. N. P. C. 297, 1817: advertisement to creditors of bankrupt; *Finden* v. *Westlake,* Moo. & Malk. 461, 1829: handbill. So where it was an advertisement for the discovery of the plaintiff, supposed to be an absconding debtor, published at the request of the person who had sued out a *capias,* to enable the sheriff to take him. *Lay* v. *Lawson,* 4 A. & E. 795, 1836. So the showing of a libel to the person reflected on, with the *bonâ fide* intention of giving him an opportunity for making an explanation, or with a friendly intention to enable him to exculpate himself, or seek his legal remedy, is no offence. Stark. on Slander, 845, 6th ed.; B. N. P. 8; *M'Dougall* v. *Claridge,* 1 Campb. 267, 1808, a case of a confidential communication between two interested parties; or a letter of friendly advice: *ib.* Thus a letter to a mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations on the proposed husband, is a privileged communication, unless malice be shown. *Todd* v. *Hawkins,* 2 Moo. & R. 20, 1837. But an unnecessary publicity would render such a communication libellous, 'though the pretence be reformation,' as if the letter were published in a newspaper. *Knight,* 1736, 5 Bac. Ab. Libel, A. 2, 197 (*n*). So a representation made *bonâ fide* by defendant to a public officer respecting the conduct of a subordinate is not *primâ facie* actionable. *Blake* v. *Pilfold,* 1 Moo. & R. 198, 1832. So a letter to the postmaster-general, about a postmaster, is not libellous if it contains a *bonâ fide* complaint. *Woodward* v. *Lander,* 6 C. & P. 548, 1834. See also *Hopwood* v. *Thorn,* 8 C. B. 293, 1849; *Harrison* v. *Bush,* 25 L. J. Q. B. 25, 1855; *Cooke* v. *Wildes,* 1 Jur. N. S. 610, 1855. On the same principle, defendant may show that the supposed libel was written *bonâ fide* for the purpose of giving the character of a servant. *Edmondson* v. *Stephenson,* Bull. N. P. 8, 1786; *Weatherston* v. *Hawkins,* 1 T. R. 110, 1786; *Pattison* v. *Jones,* 8 B. & C. 578. 1828; *Child* v. *Affleck,* 9 B. & C. 403, 1829; *Somervill* v. *Hawkins,* 10 C. B. 583, 1851; *Taylor* v. *Hawkins,* 16 Q. B. 308, 1851; and *Harris* v. *Thompson,* 13 C. B. 333, 1853: secretary of a company.

Where the occasion is privileged, the burden of proof is on (plaintiff or) prosecutor to show that defendant did not honestly believe his own statements to be true. If he did honestly believe them to be true, he can claim the privilege, although he had no reasonable grounds for such belief. *Clark* v. *Molyneux,* 3 Q. B. D. 237; 47 L. J. Q. B. 230, 1877: C. A. So where a wife, being informed that a female assistant of her husband's was dishonest, wrote at his request a letter accusing her of theft, &c., it was held that the occasion was privileged, and that therefore in the absence of malice she was not liable; also that the terms of the letter in the circumstances should not be too nicely criticised. *Perry,* 15 Cox C. C. 169, 1883.

Nearly all the cases cited under this head are *civil,* for the defence of *Privilege* arises very much more often in civil than in criminal cases. They are most conveniently classified by *Odgers* on Libel as follows. The privilege is either (i) absolute or (ii) qualified.

i. includes (1) Parliamentary; (2) judicial proceedings; (3) naval and military affairs, &c.: acts of state.

ii. includes (1) When it is defendant's duty to communicate to another who has an *interest* in or duty connected with the subject-

matter; (2) when defendant has an *interest* in the matter and the recipient is situated as in (1); (3) statements made in self-defence, &c.; (4) fair reports of public sittings; (5) statements made in or copied from Parliamentary or official papers.

(1) is subdivided: (a) statements in answer, or (b) not, to an enquiry; (b) includes cases of confidential relationship between defendant and recipient, casting a *duty* on the former.

Spouse-witnesses] By 51-2 V. 64, 9: 'Every person charged with the offence of libel before any court of criminal jurisdiction, and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge.' See *Spouse-Witnesses.*

Newspapers] besides being subject to the law above, are governed by certain statutes. By the Newspaper Libel and Registration A. 1881, 44-5 V. 60, 1: 'The word 'newspaper' shall mean any paper containing public news, intelligence or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically or in parts or numbers, at intervals not exceeding twenty-six days, between the publication of any two such papers, parts, or numbers. Also any paper printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.'

'The word 'proprietor' shall mean and include as well the sole proprietor of any newspaper as also, in the case of a divided proprietorship, the persons who as partners or otherwise represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.'

By subsequent ss. provision is made for the registration of the names of newspaper proprietors, and by s. 15, official copies of the register are made evidence.

By the Law of Libel Amendment A. 1888, 51-2 V. 64, s. 3: 'A fair and accurate report in any newspaper [as defined in 1881 A.] of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.'

By s. 4: 'A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any Commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police or chief constable of any notice or report issued by them for the information of the public shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter:

Provided also that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication and has refused or neglected to insert the same: Provided further that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

For the purposes of this section 'public meeting' shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern whether the admission thereto be general or restricted.'

By s. 8: '. . . No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at chambers being first had and obtained.

Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against any such application.' There is no appeal from this order. *Ex parte Pulbrook*, 1892, 1 Q. B. 86; 61 L. J. M. C. 91; 17 Cox C. C. 464.

Yates, 11 Q. B. D. 750; 52 L. J. M. C. 778, 1883, where a majority (three against two) were unanimously affirmed on appeal; *Yates* v. *R.*, 14 Q. B. D. 648; 54 L. J. Q. B. D. 258; 49 J. P. 436; 15 Cox C. C. 686, 1885, decided in effect that s. 8 of 51-2 V. 64 does not apply to *criminal informations* for libel filed by the order of the court at the instance of private prosecutors; neither does it apply to *criminal informations* filed by the attorney-general.

'I hereby allow the prosecution of the publisher, proprietor, or editor of the *Freethinker*, or any other person responsible for the publication therein of blasphemous articles between the dates of March 26, and June 11, 1882,' was held by L. Coleridge C.J. (apparently on the authority of a divisional court, 15 Cox C. C. 221-2, viz. Field and Stephen JJ., the *Times*, Nov. 7, 1882) to be a sufficient fiat by the Director of Public Prosecutions within the A., though no one was mentioned by name. *Bradlaugh*. But the exact reverse was held (by three judges to two) in *Allison*, 16 Cox C. C. 559; 53 J. P. 215; 59 L. T. 933 (or *Judd*, 37 W. R. 143), 1888: C. C. R.: c. q. Names must be mentioned. No fiat can authorise the prosecution of the mere printer who has no knowledge of contents. *Ib.*

'*Responsible for the publication*'] 'It is submitted that the printer is included in this phrase, but not the writer and composer of the libel, even though he be a reporter on the staff of the paper': *Odgers* on Libel, p. 716, 5th ed. So *Fraser* on Libel, p. 340, 5th ed.; but see *Allison*, above.

S. 6 (1881 A.): the Vexatious Indictments A. applies.

Evidence] Under the earlier law a certified copy of the affidavit lodged at the stamp-office, and a newspaper corresponding in title, printer, publisher, &c., exactly with those in the affidavit, were sufficient evidence of publication. *Hunt*, 31 St. Tr. 375, 1811; *Mayne* v. *Fletcher*, 9 B. & C. 382, 1829. But where the affidavit and the newspaper varied in the abode of the proprietor, *Murray* v. *Souter*,

1829, cited 6 Bing. 414, or the printing place, *Franceys*, 2 A. & E. 49, 1834, it was held insufficient.

See for sufficient evidence of the identity of the newspaper under s. 8 of rpd. 6-7 W. 4, 76, *Baker* v. *Wilkinson*, Carr. & M. 399, 1842; *Woolmer*, 12 A. & E. 422, 1840; *Duke of Brunswick* v. *Harmer*, 3 C. & K. 10; 14 Q. B. 185; 19 L. J. Q. B. 10, 1850; and *Gathercole* v. *Miall.*

The purchase of a copy at the office eighteen years after the date of the libel was held to be sufficient publication. *Duke of Brunswick* v. *Harmer*, above (Q. B.).

Where the printer swore that a copy produced was part of an issue published in the ordinary way, that copy was given in evidence, though it had not been published, and was unstamped. *Pearce*, 1 Peake 106, 1791.

Interrogatories] S. 19 of 6-7 W. 4, 76 (rpd.), has been embodied in 32-3 V. 24, sched. 2, and is: 'If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made.' [*Slanderous* here seems to refer to *slander* reported in the newspaper.]

Newspaper reports] 'It is now well established,' said Cockburn C.J. (*Wason* v. *Walter* in 1868, and anticipating s. 3, above), 'that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. . . . The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.' Though *ex parte* proceedings had been regarded 'as a probable exception' from the rule, 'Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.' See also *Usill* v. *Hales*, 3 C. P. D. 319; 47 L. J. C. P. 323, 1878.

The publication of a seditious libel will not be privileged on the ground that it is copied from another newspaper, above. It is a question for the jury whether it was so copied as an item of news or for a seditious purpose, and they may consider the surrounding circumstances in order to arrive at the intention of the publisher. *Sullivan* and *Pigott*, 1868, at 46 and 61.

The conduct and management by the clergyman of a parish of a charity, from the benefits of which dissenters are by his sanction excluded, is not the lawful subject of public comment in a newspaper so as to excuse the publication of untrue and injurious matter respecting the clergyman in relation to the charity. *Gathercole* v. *Miall.* It was urged, against a rule for an information for a blasphemous and seditious libel, that it was, in fact, a correct report of a judicial proceeding; yet the court held that if that involved anything blasphemous, indecent, &c., the right had gone. *Mary Carlile,* 3 B. & Ald. 167, 1819. This was not denied in the *Evening News case,* 3 T. L. R. 255, 1886—alleged unnecessary details of a pending divorce suit—but the Court thought the motion should have been made as soon as the reports began. Where a newspaper stated that there was a riot at C., and that a person fired a pistol at an assemblage of persons, and on this imputed neglect of duty (to prevent a riot) to the magistrates, Patteson J. held, that on a criminal trial, defendant's counsel could not, with a view of showing that the libel did not exceed 'the bounds of free discussion,' go into evidence to prove that there was in fact a riot, and a pistol fired. *Brigstock,* 6 C. & P. 184, 1833.

Fox's Act, 1792] By 32 G. 3, 60, reciting that 'doubts have arisen whether, on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the king and the defendant or defendants on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to give their verdict upon the whole matter in issue, [s. 1] on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.' By s. 2: 'On every such trial the court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases.' By s. 3: 'Nothing herein contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict in their discretion, as in other criminal cases.' And by s. 4: 'In case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment on such ground and in such manner as by law he or they might have done before the passing of this Act. . . .'

Venue] The libel must have been published in the county in which the venue is laid. Where the libel is once published, the procurer thereof is guilty of a publication in every county in which it is afterwards published. *Johnson,* 7 East 65, 1805, where the *Case of the Seven Bishops* on this point is explained. Cf. Buller N. P. 6. On an information for a libel, in the county of Leicester, it appeared that it was written in that county, on August 22, and delivered on the 24th by A., who was not called, to B. in Middlesex. It was enclosed in an open envelope, addressed to A. with instructions or a request to forward it to B., and there was no trace of a seal or postmark.

There was no evidence that A. was about that time in Leicestershire. The judge directed the jury, that as B. had it open, they might presume that A. received it open, and that, as the defendant wrote it in the county of Leicester, it must be presumed that A. received it in that county. It was urged, on a motion for a new trial after conviction, that there was no evidence of a publication in Leicestershire; but the K. B. held that the direction of the judge was proper, and that if the delivery open could not be presumed, a delivery sealed, with a view to and for the purpose of publication, was a publication: and they held that there was sufficient to presume some delivery, either open or sealed, in the county of Leicester. *Burdett,* 1820. It was also discussed whether it was essential that the whole offence must have been committed in the venue county. Three judges expressed an opinion that the composing and writing a libel in the county of L., and afterwards publishing it in M., though not in L., gave jurisdiction to a jury of the county of L., as well as to one in M., and that the composing and writing with intent afterwards to publish was a misdemeanour (cf. *Beare; Knell,* 1 Barnard. K. B. 305 in 1729); but Bayley J. (at 155) held that the whole *corpus delicti* must be proved within one county, and that there was no distinction in this respect between felonies and misdemeanours. Abbott C.J. said, 'To write and publish a libel is a misdemeanour compounded of distinct parts, each of which parts (for I am speaking of a published libel) being an act done in prosecution of one and the same criminal intention is a misdemeanour . . . and the whole may be tried in that county wherein any part can be proved to have been done.'

Postmarks (proved) are evidence that the letters on which they are were in the offices named at the times denoted by the marks. *Plumer,* R. & R. 264, 1814. Cf. *Warren* v. *Warren,* and see *Odgers* on Libel, 675, 728, 5th ed.

Sentence] S. 5 of 6-7 V. 96 is not exhaustive of the court's punitive powers; in *Trueman,* 1913, 3 K. B. 164; 9 Cr. A. R. 45; 82 L. J. K. B. 916; 77 J. P. 428; 23 Cox C. C. 550; 29 T. L. R. 599, the maximum term of imprisonment and orders (1) to pay the costs of the prosecution; (2) to enter into a recognisance for good behaviour for twelve months; (3) to find one surety in 50*l.* or a further term of twelve months, were upheld: serious libel on a magistrate who had convicted appellant, aggravated by plea of justification.

Costs] See that title. By 8 E. 7, 15, 6 (2), defamatory libel on a *private* prosecution is one of the offences on acquittal for which a private prosecutor may be ordered to pay the (taxed) costs, in whole or part, of defendant. The wording of that sub-s. disposes of the points in *Steel,* 1 Q. B. D. 482; 45 L. J. Q. B. 391; 13 Cox C. C. 159, 1876; and *Latimer,* 15 Q. B. 1077; 20 L. J. Q. B. 129, 1850.

Corporations] may be indicted and fined: *per* L. Blackburn, *Pharmaceutical Society* v. *London & Provincial Supply Assocn., Ltd.,* 5 App. Cas. at 870; 49 L. J. Q. B. 742; 28 W. R. 960; 43 L. T. 389, 1880.

Quarter sessions] may try *obscene* libels only.

LICENCE ('TICKET OF LEAVE') HOLDERS, OFFENCES BY.

See *Suspects*.

LIMITED COMPANIES, OFFENCES BY.

See *Companies*.

LIVING ON IMMORAL EARNINGS.

See *Procuration, Prostitution,* and *Rogues*.

Males.

Vagrancy A. 1898, 61-2 V. 39] S. 1 (1): 'Every male person who (a) knowingly lives wholly or in part on the earnings of prostitution; or (b) in any public place persistently solicits or importunes for immoral purposes, shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly.

(3) Where a male person is proved to live with or to be habitually in the company of a prostitute, *or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any person or generally,* he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution.' The words in italics are an amendment of 2-3 G. 5, 20, 7 (1).

Crim. L. Am. A. 1912, 2-3 G. 5, c. 20] S. 7 (5): 'A person charged with an offence under the Vagrancy Act, 1898 . . . may, instead of being proceeded against in England as a rogue and vagabond, be proceeded against on indictment, and on conviction' maximum sentence may be two years' imprisonment with hard labour, *plus,* on *subsequent conviction* on indictment, in the case of a male, one private whipping. 'The number of strokes and the instrument . . . shall be specified by the court in the sentence.' But the second conviction need not be the second on indictment: *F. Austin,* 8 Cr. A. R. 169, 1913, where there were three summary convictions before the 1912 A. came into force.

Females.

S. 7 (4): 'Every female who is proved to have for the purposes of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting

or compelling her prostitution with any person or generally, shall be guilty of an offence under the Vagrancy Act, 1898 . . .' and that Act 'as amended and extended by this section shall apply accordingly.'

The prostitute is not necessarily an accomplice of the defendant, but the jury ought to be warned to be cautious in accepting her evidence: *A. King,* 10 Cr. A. R. 117; 24 Cox C. C. 223; 30 T. L. R. 476; 111 L. T. 80, 1914. It must not be assumed: *T. J. Pickford,* 10 Cr. A. R. 269, 1914.

Evidence] Defendant's husband or wife is a competent witness for either side and without the consent of the person charged, but this is not to 'affect a case . . . at common law,' where he or she may be called without the spouse-defendant's consent: 2-3 G. 5, 20, 7 (6).

LOANS TO INFANTS.

See *Borrowing Money.*

LODGERS, OFFENCES BY.

See *Tenants.*

LOTTERIES.

'A lottery is a distribution of prizes by lot or chance: *Taylor* v. *Smetten,* 1883, 11 Q. B. D. 207, 210. To constitute a lottery the matter must depend entirely upon chance. If there is an element of skill, then the scheme is not a lottery, although the result may depend largely on chance.' 9 Halsbury, p. 547, citing many cases, but only three *on indictment,* viz.: *Crawshaw,* 1860, which is dealt with under *Nuisance; Harris,* 10 Cox C. C. 352, 1836, is of little authority; and *Hobbs,* 1898, which see.

'All lotteries are declared by statute (10 W. 3, 23 or 17) to be common and public nuisances, and the persons engaged in keeping them are guilty of misdemeanour, and are punishable on indictment with fine and imprisonment.' *Ib.* Offenders 'are now usually dealt with' under 42 G. 3, 119, 1, 2, Gaming A. 1802: *ib.*—*i.e.* as rogues and vagabonds, which accounts for the rarity of indictments. See *Minty* v. *Sylvester,* 84 L. J. K. B. 1982; 25 Cox C. C. 247; 79 J. P. 543; 31 T. L. R. 589, 1915: K. B. D.; and *Barrett* v. *Flynn,* 1916, 2 Ir. R. 1.

LUNATICS—OFFENCES I. BY, II. AGAINST.

I. See *Mental Unsoundness.*

"'Criminal lunatic' means any of the following persons:—(a) any person for whose safe custody during Her Majesty's pleasure Her Majesty or the Admiralty is authorised to give order; and (b) any prisoner whom a Secretary of State or the Admiralty has, in pursuance of any Act of Parliament, directed to be removed to an asylum or other place for the reception of insane persons': 47-8 V. 64, 16. S. 11 deals with *aiding* their escape.

II. "'Lunatic' means an idiot or person of unsound mind': 53 V. 5, Lunacy A. 1890, 341, which A. does not apply to *criminal lunatics,* 'save as . . . otherwise expressly provided': s. 340 (1), *e.g.* s. 116 (1) (f). The A. adopts the definition above.

53 V. 5, contains regulations for the reception, detention, &c. of lunatics, and makes certain misdemeanours. By s. 38 (7), any person having charge of a lunatic who detains a patient after he knows that the reception order has expired, is so guilty. So any contravention of the regulations contained in s. 40, about mechanical restraint, or of those in s. 44, for the inspection of patients by outside doctors. By s. 177, it is a misdemeanour for a disqualified person to act as a 'visitor.' By ss. 195, 200, concealing any patient on any part of the premises from the authorised visitors; by s. 321, obstructing them in their duties; by s. 317, making wilful mis-statements or (s. 318) false entries in books or returns, are made misdemeanours. So by 54-5 V. 65, 21, is disobedience to the order of the commissioners, by the superintendent of a hospital permitting patients to go outside, &c., without proper control.

By s. 315, it is a misdemeanour to receive or detain two or more lunatics in a house which is not duly licensed or permitted under the A. Under rpd. 8-9 V. 100, 44, it was held that if the persons so received are found by the jury to be lunatic, the offence is made out, notwithstanding that the defendant honestly and reasonably believed that they were not lunatic. *Bishop,* 5 Q. B. D. 259; 49 L. J. M. C. 45; 14 Cox C. C. 404, 1880: C. C. R. By s. 322: 'If any manager, officer, nurse, attendant, servant, or other person employed in an institution for lunatics, or any person having charge of a lunatic, whether by reason of any contract or of any tie of relationship or marriage or otherwise, ill-treats or wilfully neglects a patient, he shall be guilty of a misdemeanour, and on conviction on indictment shall be liable to fine or imprisonment, or to both fine and imprisonment at the discretion of the court. . . .'

A husband having been convicted (under 16-17 V. 96, rpd.), for that he, having 'the care and charge of his' wife, a lunatic, 'did abuse and ill-treat her,' was held not a person having 'the care and charge' of a lunatic within the s., which was not intended to apply where the care, &c. arose from natural duty. *Rundle,* 1 D. & P. C. C. R. 482; 24 L. J. M. C. 129; 6 Cox C. C. 549, 1855: c. q.

But where a man voluntarily took on himself the care and charge of a lunatic brother in his own private house, he was held to be liable under that s. *Porter*, L. & C. 394; 33 L. J. M. C. 126; 9 Cox C. C. 449, 1864; *Smith*, 14 Cox C. C. 398, 1880.

By 53 V. 5, 324: 'If any manager, officer, nurse, attendant, or other person employed in any institution for lunatics (including an asylum for criminal lunatics), or workhouse, or any person having the care or charge of any single patient, or any attendant of any single patient, carnally knows or attempts to have carnal knowledge of any female under care or treatment as a lunatic in the institution, or workhouse, or as a single patient, he shall be guilty of a misdemeanour, and on conviction on indictment shall be liable to be imprisoned with or without hard labour for any term not exceeding two years; and no consent or alleged consent of such female thereto shall be any defence to an indictment or prosecution for such offence.'

Posting] By s. 329: (1) 'Where any person is proceeded against under this Act, on a charge of omitting to transmit or send any copy, list, notice, statement, report or other document required to be transmitted or sent by such person, the burden of proof that the same was transmitted or sent within the time required shall lie upon such person; but if he proves by the testimony of one witness upon oath that the copy, list, notice, statement, report, or document in respect of which the proceeding is taken was properly addressed and put into the post in due time, or (in case of documents required to be sent to the commissioners or a clerk of the peace or a clerk to guardians) left at the office of the commissioners or of the clerk of the peace or clerk to guardians, such proof shall be a bar to all further proceedings in respect of such charge.

(2) In proceedings under this Act, where a question arises whether a house is or is not a licensed house or registered as a hospital, it shall be presumed not to be so licensed or registered unless the licence or certificate of registration is produced, or sufficient evidence is given that a licence or certificate is in force.'

Good faith a bar to any proceedings] By s. 330, anyone acting 'in good faith and with reasonable care' in making certificates, reception orders, &c. is protected.

MACHINERY, INJURING, ETC.

See *Explosives*, *Mines* and *Riots*.

Destroying or damaging machinery] By 24-5 V. 97, 14 (for the first part of which see *Manufactures*): 'Whosoever . . . shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing, or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping.'

By s. 15: 'Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping.'

Ss. 58 and 59 apply.

'*Damage*'] Defendant indicted under 28 G. 3, 55, rpd., for entering a shop by force and maliciously *damaging* a frame for the making of stockings, had unscrewed and carried away (but without injuring) an essential part thereof, called the *half-jack*, without which it is useless, but which can be at once replaced, this was held, by all the judges, a *damaging* within the s. *Tacey*, R. & R. 452, 1821. And where defendant screwed up the working parts of the engine of a threshing machine, and had reversed the plug of the pump which supplied the boiler, and had also stopped up one of the pipes, so that the machine was temporarily useless and could not be again set in motion without great difficulty, and if it had been left in that state the boiler would have burst; it was held to be a damaging with intent to render useless within s. 15, above, and that the damage in such cases need not be of a permanent nature. *Fisher*, L. R. 1 C. C. R. 7; 35 L. J. M. C. 57; 10 Cox C. C. 146, 1865.

Common design] Under s. 15 there could be a conviction of one who did not actually strike a blow. *Ashdown,* 1916.

Under that A. even a dislocation or displacement might be 'damage.' *A. Foster,* 6 Cox C. C. 25, 1852. The intent to destroy or render useless may be inferred by the jury from the damage: *ib.*

Taking to pieces] Even where the machine at the time it is broken has been taken to pieces and is in different places, so long as it is capable of being fitted together again, an offence against 7-8 G. 4, 30, rpd., was committed by damaging any part. *Mackerel,* 4 C. & P. 448, 1831. So where the machine was taken to pieces, which were removed a quarter of a mile, leaving only the water-wheel and its axis standing, and the wheel was destroyed by defendants. *Fidler,* 4 C. & P. 449, 1831. Where certain sideboards were wanting to a machine at the time it was destroyed—which did not prevent it altogether from working, but from working so effectually—it was still held to be a machine within the A. *Bartlett,* 2 Deac. Dig. C. L. 1517, 1831. So where the owner removed a wooden stage belonging to the machine, on which the man who fed the machine was accustomed to stand, and had also taken away the legs, so that though the machine could not be conveniently worked without some such stage, yet a chair or table would do nearly as well, and it could also be worked without the legs, it was held to be an entire machine within that A. *Chubb, ib.,* 1831. But where the owner had not only taken the machine to pieces, but broken the wheel, for fear of its being set on fire, and without the wheel the engine could not be worked, this was held not to be within that statute, as the rest did not constitute a threshing machine. *West, ib.* 1518, 1831. All these cases were tried by a Special Commission.

Triable at Q..S.

MAILS, OFFENCES RELATING TO.

See *Post-Office.*

MAIMING, MAYHEM.

See *Assault* (*Self Defence*) and *Cattle.*

MAINTENANCE, &c.

'Maintenance is commonly taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right.' Hawk. P. C. 1, 83, 1. A man can assist 'another in his pretensions to certain lands by taking or holding' them for him 'by force or subtlety,' or may stir up 'quarrels and suits in . . . matters wherein he is in no way concerned,' or may 'officiously intermeddle in a suit depending . . . which no way belongs to him, by assisting either party with money or otherwise. . . .' *Ib.* ss. 2, 3. It is an indictable offence 'against public justice,' punishable at common law with fine and imprisonment, *ib.* s. 38, and is forbidden by various statutes. 1 E. 3, st. 2, c. 14, 1326-7; 1 R. 2, c. 4, 1377, both confirmed 7 R. 2, 15, 1383; 32 H. 8, 9, 3, 1540, amended 1-2 G. 5, 6, 17. These Acts, however, are only declaratory of the common law, with additional penalties. *Pechell* v. *Watson,* 8 M. & W., at 700, 1841.

According to the old authorities, whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bears him out in the whole or any part of his suit, or by his friendship or interest saves him that expense which he might be otherwise put to, or opens the evidence to the jury, or gives evidence 'officiously' without being called on to do so, or speaks in another's cause 'as one of counsel with the party,' or retains an attorney for him, or being 'of great power and interest, says publicly that he will spend twenty pounds on one side or . . . to labour the jury, whether in truth he spend one penny or not,' or stand by the party at the bar while his cause is tried—this is maintenance, for it discourages the other party from going on in his cause and intimidates juries. Hawk. P. C. 1, 83, 4, 5, 6, 7. It may be doubted, however, whether, at the present day, some of these acts would be held to be indictable, unless they were plainly accompanied with a corrupt motive. 'A bare promise to maintain another is not in itself maintenance, unless it be either in respect of the public manner in which, or the power of the person by whom it is made.' *Ib.* s. 8. So the mere giving of 'friendly advice what action is proper . . . to bring for the recovery of a certain debt,' is not maintenance. *Ib.* s. 11. The result of the cases was thus summed up: 'to bind oneself after the commencement of a suit to pay the expenses of another in that suit, more especially if that other be a person himself of no means, and the suit be one which he cannot bring, is still, as it always was, maintenance. . . . It is said, however, that this general statement requires two qualifications: first, that the acts of the maintainer must be immoral, and that the maintainer must have been actuated by a bad motive; next, that if he has, or believes himself to have, a common interest with the plaintiff in the result of the suit, his acts, which would otherwise be maintenance, cease to be so': *per* L. Coleridge C.J. in *Bradlaugh* v. *Newdegate,* 11 Q. B. D. 9; 52 L. J. Q. B. 454, 1883.

In order to justify maintenance of a suit there must either be a common interest recognised by the law in a matter at issue or the case must fall within one of the specific exceptions established by the authorities. *Alabaster* v. *Harness,* 1894, 2 Q. B. 297; 1895, 1 Q. B. 339; 64 L. J. Q. B. 76: C. A.

Interest] Those who have a certain interest, or an equitable, even a bare contingent interest, in the matter in variance, may maintain another in an action concerning it; as in the case of landlord and tenant, trustee and *cestui que trust*. Hawk. P. C. 1, 83, 17-21. So where A. at the request of B. defended an action for money in which B. claimed an interest, on B.'s indemnifying him from the consequences of such action, this was held not to be maintenance. *Williamson* v. *Henley*, 6 Bing. 299, 1829. So 'wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit relating to the same.' Hawk. P. C. 1, 83, 24; *Bradlaugh* v. *Newdegate*, above.

Master and servant, and vice versâ] A master may go with his servant to retain counsel, or to the trial and stand by him (but ought not to speak for him in the court), or if arrested may assist him with money. Hawk. *ib.*, ss. 31, 32. So a servant *mutatis mutandis*, but he cannot lawfully lay out his own money to assist his master. *Ib.* s. 34.

Relatives, &c.] 'whoever is in any way of kin or affinity to either of the parties . . . may lawfully stand by him at the bar, and counsel and assist him'; but unless he be either father or son, or heir-apparent, or the husband of an heiress, *i.e.* of a party, he cannot justify laying out his own money in the cause. *Ib.* s. 26.

Poor persons] 'Any one may lawfully give money to a poor man to enable him to carry on his suit.' *Ib.* s. 36; *Harris* v. *Briscoe*, 17 Q. B. D. 504, 1886.

Counsel and attorneys] Counsel 'can no more justify giving' a client 'money to maintain his suit' than any one else, but an attorney may lay out his money for his client, to be repaid again. But no counsel or attorney 'can justify the using any deceitful practice in the maintenance of a client's cause, and they are liable to be severely punished for all misdemeanours of this kind.' Hawk. P. C. 1, 83, 38, 39, 41. (These references assume a different professional system from the present one: *e.g.* in s. 40, solicitors are distinguished from attornies.) And by 3 E. 1, Stat. West. 1, c. 29, 1275, 'if any serjeant, pleader, or other, do any manner of disceit or collusion in the king's court, or consent unto it, in disceit of the court, or to beguile the court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man.' Procuring an attorney to appear for a man, and to confess judgment without a warrant, has been held within this statute. *Ib.* s. 46. So bringing 'a *præcipe* [a writ] against a poor man, knowing that he had nothing in the land, on purpose to get possession from the true tenant.' *Ib.* s. 45.

Champerty] from *campi partitio* = division of the soil 'is a species of maintenance . . . being a bargain with a plaintiff or defendant . . . to divide the land or other matter sued for between them, if they prevail at law whereupon the champertor is to carry on the party's suit at his own expense.' 4 Bl. Com. 135. To maintain (not only a plaintiff but) a defendant may be champerty. Hawk. P. C. 1, 84, 8.

By 31 Eliz. 5, 4, rpd., the offence of champerty may be laid in any county at the pleasure of the informer.

Where a bill was filed to set aside an agreement with navy agents made by the legatees of a seaman, for the sale of their chance of getting prize-money in a suit, Sir W. Grant M.R. expressed an opinion that the agreement was void from the beginning, as amounting to champerty, viz. the unlawful maintenance of a suit, in consideration of a bargain for a part of a thing, or some profit out of it. *Stevens* v. *Bagwell,* 15 Ves. 139, 1808. So it has been held, that an agreement to communicate such information as should enable a person to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, on condition of receiving some of the money recovered, was illegal. *Stanley* v. *Jones,* 7 Bingh. 369, 1831; 5 Moore & P. 193, 1831; see *Potts* v. *Sparrow,* 6 C. & P. 749, 1834, and *Bradlaugh* v. *Newdegate,* above.

Embracery] likewise, is another species of maintenance. 'Any attempt whatsoever to corrupt or influence, or instruct a jury, or any way to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence, and the arguments of the counsel in open court at the trial of the cause, is a proper act of embracery, whether the jurors . . . give any verdict or not, or whether the verdict given be true or false.' Hawk. P. C. 1, 85, 1. Giving money to a juror *after* the verdict, without any preceding contract, 'is an offence savouring of' embracery; but it is otherwise of the payment of a juror's reasonable travelling expenses 'which may fairly be expected by them from either side that shall prevail.' *Ib.* s. 3: again referring to a system now obsolete. Embracery is punishable on indictment like any other maintenance by fine and imprisonment. *Ib.* s. 7.

In *Higgins,* 1801, a 'recent' information against *Young* was mentioned (at 14 and 16) 'for attempting to influence a juryman in giving his verdict' by bribery.

Indictment] The names of the jurors to be influenced, &c. must be set out: it is not enough to allege embracery of a jury—otherwise the indictment will be quashed. *Baker,* 113 Cent. Crim. Ct. Sess. Pap. 374, 1891. Whether the means by which they were to be influenced, &c. must be set out was not decided. On a proper indictment there was a conviction. *Ib.* 589.

'MAKING A MARKET.'

See *Conspiracy* and *Trade Offences.*

MALICE,

though not the name of a crime, is a *legal* ingredient of many crimes, but cannot be satisfactorily expressed in a formula covering all of them. That seems to be the net result of innumerable judgments, dicta and texts. Consequently the meaning of the term in specific crimes is best sought under the head of each (and conveniently in the Index, where see also *Mens rea*).

MALICIOUS INJURY TO

I. PERSON.

See under specific titles, *e.g. Wounding.*

II. PROPERTY.

By 24-5 V. 97, 51, as amended by 4-5 G. 5, 58, 14 (2), below, sched. 4, and S. L. R. Acts: 'Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning shall be liable to be kept in penal servitude.' '*Hereinbefore*': see ss. 1-50 in Table of Statutes.

Statutes] Where the act must be done 'unlawfully and maliciously,' it must be done 'wilfully' by an *intentional* act. A man who had been fighting in a crowd threw a stone which broke a window, but he threw it, the jury found, intending to strike the opponents he had been fighting with, or one or more of them with it, but not to break the window: held not guilty. If the jury had found that he was aware that the window was where it was, and that he was likely to break it and was reckless whether he broke it or not, it might have been different. *Pembliton*, L. R. 2 C. C. R. 119; 43 L. J. M. C. 91; 12 Cox C. C. 607, 1874: indictment under s. 51; the jury negatived any intention—actual or constructive—to injure property. Had it been found that he was reckless of the consequences of his act and might reasonably have expected that particular one, that would, it seems from the judgments, have been upheld.

By s. 14 (2) of 4-5 G. 5, 58: 'So much of s. 51 of the Malicious Damage Act, 1861, as limits the cases which may be dealt with under that section to cases where the damage injury or spoil exceeds five pounds shall be repealed, but a court of summary jurisdiction shall not commit any person for trial for an offence under that section unless it is of opinion that the damage injury or spoil exceeds five pounds.' By sub-ss. (1) and (3) of this s., if in the opinion of the court of summary jurisdiction 'the amount' of the damage exceeds five pounds, but *not twenty*, it may or may not commit for trial; if it exceeds twenty, it must.

'Provided that this provision [sub-s. (1)] shall not apply where the alleged offender acted under a fair and reasonable supposition that he had a right to do the act complained of'; in which case the summary *jurisdiction* is totally ousted, but the proviso does not touch the setting up of such a plea (in substance, one of self-defence) at the trial, when

the usual rule of *excess* will apply. See *Clemens,* below, and under *Mines.*

Compensation] to a 'reasonable' amount 'to the party aggrieved' may be imposed as *part* of the sentence by *any* court.

'*The amount*'] When this had to exceed 5*l.* the C. C. R. refused to consider the separate values of a number of articles wantonly cut, &c., and only looked at the total amount: *Thoman,* 12 Cox C. C. 54, 1871. This is to be reckoned without deducting any salvage value: *M. Hewitt,* 7 Cr. A. R. 219; 76 J. P. 360; 28 T. L. R. 378, 1912. If defendants act in concert, the total amount may be charged against them jointly: *Joachim,* 7 Cr. A. R. 222; 28 T. L. R. 380, 1912.

Even before s. 14 expert evidence of the amount was not required: *Beckett,* 8 Cr. A. R. 204; 29 T. L. R. 332, 1913; but since, 'the opinion of the court' is the statutory criterion.

The three following cases are on rpd. s. 52, which, like the *first* passage, rpd., in s. 51, is replaced by s. 14, above. An incorporeal right, such as that to 'herbage,' is not 'real or personal property,' which applies only to tangible property. *Laws* v. *Eltringham,* 8 Q. B. D. 283; 51 L. J. M. C. 13, 1881. There must be proof of actual damage to the realty itself; mere damage to uncultivated roots or plants growing on the realty, *e.g.* mushrooms, is insufficient. *Gardner* v. *Mansbridge,* 19 Q. B. D. 217, 1887. But where damage to the grass to the value of 6*d.* had been done by a trespasser, the conviction was upheld. *Gayford* v. *Chowler,* 1898, 1 Q. B. 316.

The jury, if they are of opinion that the defendants did more damage than was reasonably necessary to assert such right, must convict the defendants of *malicious* damage. *Clemens, &c.,* 1898, 1 Q. B. 556; 19 Cox C. C. 18: C. C. R.

'*Wilfully* or *maliciously*'] in rpd. s. 52 and s. 14 (1) is not the same as '*unlawfully* and *maliciously*' in s. 51, &c. On this *Roper* v. *Knott,* 1898, 1 Q. B. 868; 67 L. J. Q. B. 574; 19 Cox C. C. 69; 62 J. P. 375, turned. There a milkman adulterated his master's milk with water to his own profit and without injury to the master. Seven judges held that the milk was *wilfully,* if not maliciously, damaged, and ordered a conviction; there was 'damage to the property,' though not to the owner. Cf. *Pembliton,* above; *Faulkner,* 1877; and *Martin,* 1881.

Fair and reasonable supposition] If the claim is not reasonable, *e.g.* has no legal existence, there may be a conviction: *Brooks* v. *Hamlyn,* 19 Cox C. C. 231, 1899: case stated; and where the justices had admitted such a claim the case was sent back to them to hear: *Croydon R. D. C.* v. *Crowley,* 22 Cox C. C. 22, 1909: Mitcham Common golf: case stated.

Triable at Q. S.

III. TO BOTH OR TO ONE THROUGH THE OTHER.

The important cases will be found under *Manslaughter* or *Murder.*

MANSLAUGHTER.

'There is no offence known to our law so various in its circumstances and so various in the considerations applicable to it as that of manslaughter': *per* Denman J. in *Towers,* 1874. The law on the subject can necessarily only be fully understood in connection with that of murder. Cases and passages relevant to both are marked *; the corresponding references supplement each other.

* *Murder*] 'Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter . . . the act being imputed to the infirmity of human nature.' East P. C. 218; Foster C. C. 290. See *Hughes,* 1857, below. 'Murder is unlawful homicide with malice aforethought. Manslaughter is unlawful homicide without malice aforethought': *per* Stephen J., *Doherty,* 1887. Blackstone's 'principal' distinction is rather literary than helpful: 'manslaughter (when voluntary) arises from the sudden heat of the passions, murder from the wickedness of the heart': 4 Comm. 190.

* *Year and a day*] *Coke,* 3 Inst. 47 (cf. 53), concludes his definition of murder, 'so as the party wounded or hurt, &c., die of the wound or hurt, &c. within a year and a day after the same,' and he and subsequent authorities *assume* this proviso of manslaughter. *Hale,* however, expressly lays it down, 1 P. C. 428—cited under *Unskilful Treatment**—where 'homicide' = manslaughter: see 424. See 33 H. 8, 12, under *Assault* [statute sometimes limited the period, *e.g.* 2 [or 1] J. 1, 8, rpd., to six months]. The rule was emphatically applied by the C. C. A. in *Dyson,* 1908, which see; there defendant had been convicted of injuring deceased, who died March 5, 1908, in November, 1906, and December, 1907.

Accessories] See that title. It is only in 'voluntary' manslaughter that there cannot be an accessory before the fact: *Kenny,* Outlines, p. 116.

There may be accessories after the fact. East, above.

Where A. was indicted for the wilful murder of B., and C. was indicted for receiving, harbouring, and assisting A., well knowing that he had committed the murder, Tindal C.J. held that if A. was only guilty of manslaughter, C. might, notwithstanding, be found guilty as an accessory after the fact. *Greenacre,* 1857; *Richards,* 1877.

Punishment] By 24-5 V. 100, 5, as amended: 'Whosoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life or to pay such fine as the court shall award, in addition to or without any such other discretionary punishment as aforesaid.'

Venue] See that title.

Indictment] See No. 3, Appendix to Indictments A.

* *Provocation*] 'Whenever death ensues from sudden transport of passion or heat of blood, if upon a reasonable provocation and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder . . . in no instance can the party killing alleviate his case by referring to a previous provocation if it appear by any means that he acted upon express malice.' East P. C. 232, 239. For an application to *culpable* accident, see *Gross*, 1913.

* *Unlawful or negligent act*] See *Undesigned Consequences* for the principle in Foster C. C. 261; 'throwing a stone at another's horse' and thereby killing someone is manslaughter, for the act itself was unlawful: Hale P. C. 39, 475; East P. C. 255, 257. See *Bradshaw*, below, and * *Abortion*.

Thus if one in wantonness or sport throw stones down a coal-pit, large enough to break the scaffolding, whereby, indirectly, a man is killed, this is manslaughter, though the latter was only a trespasser. 'If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter . . . . [Here] the act was one of mere wantonness and sport, but still the act was wrongful, it was a trespass,' *per* Tindal C.J. *Fenton*, 1 Lewin C. C. 179, 1830. So if an improper quantity of spirits was given to a child in brutal sport, and death ensues, it would be manslaughter. *Martin*, 3 C. & P. 211, 1827. See *Errington*, 1838, and *No Design, &c.* under *Murder*. So where a lad, as a frolic, without any intention to do any harm, took the trapstick out of the front part of a cart, in consequence of which it was upset, and the carman was pitched backward and killed, two judges held that he was guilty of manslaughter. *Sullivan*, 7 C. & P. 641, 1836.

A mother, being angry with one of her children, took up a small poker, and threw it after him, but hit another child who happened to be entering at the moment, who was killed; Park J. held this to be manslaughter, although it appeared that the mother *only* intended to frighten the former child; saying, 'If a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful, as an improper mode of correction—and strikes another and kills him, it is manslaughter; and there is no doubt if the child at whom the blow was aimed had been struck and died it would have been manslaughter, and so it is under the present circumstances.' *Conner*, 7 C. & P. 438, 1836. The defendant requested deceased, who had entered his house in his absence, to go, but he refused. On this words arose, and defendant, becoming excited, used force, and, by a kick which he gave him, caused his death. Alderson B. said, 'A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, he is guilty of manslaughter.' *Wild*, 2 Lew. C. C. 214, 1837. One defendant, of whose goods deceased was 'in possession,' assisted by another, plied him with liquor; themselves drinking freely also. When he was very drunk they put him into a cab, and caused him to be driven about the streets;

after about two hours he was found dead. Parke B. told the jury, that if defendant, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. *Packard, &c.*, Carr. & M. 236, 1841.

Defendant having the right to the possession of a gun which had been wrongfully taken by and was in the hands of the deceased, demanded it back, and on being refused attempted to take it away by force, though he knew it to be loaded. In the struggle which ensued the gun went off accidentally and killed the deceased. L. Campbell directed the jury that, though defendant had a right to the possession of the gun, to take it away by force was *unlawful;* and, as the discharge, though accidental, was the result thereof, it was their duty to convict of manslaughter. *Archer,* 1 F. & F. 351, 1857.

Direct result] But the death must be the direct and not the indirect consequence of the unlawful act or omission. Defendant was a maker of fireworks—contrary to the provisions of a rpd. statute—at his own house. During his absence, by the negligence of one of his servants, the fireworks became ignited, by which a neighbouring house was set fire to, and a person therein burnt to death. It was held that defendant was not indictable for manslaughter, as the *death* was caused by the negligence of the servant. *Bennett,* 1 Bell C. C. 1; 28 L. J. M. C. 27; 8 Cox C. C. 74, 1858; cf. *Hilton,* 1838. Where a station-master despatched trains at too short an interval after each other, but a signalman caused the collision by a mistake with the signals, Erle C.J. advised the grand jury to throw out the bill against the station-master, because his negligence was not *the proximate and efficient* cause of the resulting deaths. *Ledger,* 2 F. & F. 858, 1862. A. in unlawfully assaulting B., who at the time had in her arms an infant, so frightened the infant that it died after six weeks; A. is guilty of manslaughter if the jury think that the assault on B. was the direct cause of death: *per* Denman J., *Towers,* 12 Cox C. C. 530, 1874.

Discipline] On a plea of guilty of manslaughter by the captain and the mate of a vessel of one of the crew, *Leggett,* 8 C. & P. 191, 1838, it was admitted that discipline must be 'almost despotic'; but now *quære.* See *Cheeseman,* 1836.

* *Common design*] If A. and B. agree together to assault C. with their fists, and C. receives an 'unlucky' blow of the fists from either of them, causing death, both A. and B. are guilty of manslaughter. But should A., of his own impulse, kill C. with a weapon suddenly caught up, B. would only be liable for acts done in pursuance of the *common* design: *per* Lush J., *Caton,* 12 Cox C. C. 624, 1874.

Sports] A useful rule is: 'All struggles in anger, whether by fighting, or wrestling, or any other mode—all kinds of contests in anger, are unlawful': *per* Patteson J., *Canniff,* 9 C. & P. 359, 1840. Where death ensues from such sports or recreations as are innocent and allowable, it falls within the rules of *Excusable Homicide,* which see, because bodily harm is not the motive on either side. Foster C. C. 259; East P. C. 268. 'Therefore persons playing at cudgels, Comb. 408, or foils or wrestling, *Lane,* 1717, are excusable if death ensue.' East, *ib.* Hale, says Foster, *ib.*, appears to be of a different opinion. He says, 'Regularly he that voluntarily and knowingly

intends hurt to the person of a man, tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder or manslaughter at least; as, if A. intends to beat B. but not to kill him, yet if death ensues, this is not *per infortunium,* but murder or manslaughter, as the circumstances of the case happen. And, therefore, I have known it ruled, that if two men are playing at cudgels together, or wrestling, by consent, if one with a blow or fall kill the other, it is manslaughter, and not *per infortunium,* tho Mr. Dalton, cap. 96 [ch. 148 in edition of 1742] seems to doubt it; and accordingly it was resolved, P. 2 Car. 2, by all the judges, upon a special verdict, from Newgate, where two friends were playing at foils at a fencing school, one casually kild the other; resolved to be manslaughter.' 1 P. C. 472.

The questions in these cases appear to be two, 1st, whether the sport was lawful; and 2nd, whether the parties engaged in it with a friendly mind, or with intent to do each other some bodily harm. The cases mentioned by Hale seem to proceed on the latter supposition, and on this ground they are distinguished by Foster J. (and East), from 'the case of persons who in perfect friendship engage by mutual consent in any of those recreations for a trial of skill or manhood, or for improvement in the use of their weapons.' But if there be dangerous weapons used in such sports, and there be any negligence in the use of them, such negligence may render a death manslaughter. Sir John Chichester, fencing with his servant, made a pass at him with his rapier in its scabbard, the servant parrying, struck off the chape of the scabbard, and he was killed by the point of the rapier. It was held that this was manslaughter, 'because altho the act which occasioned the death intended no harm, nor could it have done harm, if the chape had not been stricken off by the party kild, and tho the parties were in sport, yet the act itself, the thrusting at the servant, was unlawful.' Hale, above, 1671; Aleyn, 12; cf. Keilw. 108, 136. Foster J., *ib.*, puts this decision on another ground, viz. that the defendant 'did not use that degree of caution which common prudence would have suggested; and therefore the fact *so circumstanced* might well amount to manslaughter, though the exercise itself with proper weapons might have been otherwise lawful.'

Death in the course of a friendly contest may also amount to manslaughter if any undue advantage has been taken. Thus, 'if two were engaged to play at cudgels, and the one made a blow at the other likely to hurt, before he was upon his guard, and without warning, from whence death ensued; the want of due and friendly caution would make such act amount to manslaughter'; each party ought 'to start upon equal terms.' East P. C. 269.

Rules of the sport] If death is caused by an injury received in a friendly sparring-match with gloves, which is not a thing likely to cause death, it is not manslaughter, unless the parties fight on until the sport becomes dangerous. *Young and others,* 10 Cox C. C. 371, 1866. But if the combatants met intending to fight for money till one gave in from exhaustion or injury received, the contest would be a prize-fight, although gloves were used. *Orton and others,* 14 Cox C. C. 226; 39 L. T. R. 293, 1878: C. C. R., where pugilists and spectators were convicted of an unlawful assembly. 'Charging' in football, if the manner adopted is likely to produce serious injury to another, and the player is reckless and indifferent of the consequences, would be an unlawful act, and if death is thereby caused, it is manslaughter: no 'Association' or other rules could make an unlawful act lawful,

but 'if a man is playing according to the rules and practice of the game, and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury': *per* Bramwell L.J., *Bradshaw*, 14 Cox C. C. 83, 1878. So of duels, see *Self-Defence*, below.

'Though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and so no danger to be reasonably apprehended, if death casually ensue, it is but misadventure.' East, *ib.* Therefore, 'if a man be shooting at buts, or pricks, and by casualty his hand shakes and the arrow kills a bystander,' or 'if he be cleaving wood, and the axe flies from the helve, and kills another,' it is only misadventure. 1 Hale P. C. 38, 39, 472, citing 21 H. 7 [*i.e.* Year Book, p.] 28 *a*, and 6 E. 4, (p.) 7 *b* [= B]; East, *ib.* But quite otherwise if the sport be unlawful; 'a man at the diversion of cock-throwing at Shrovetide, which hath too long prevailed, missed his aim, and a child looking on received a blow from the staff, of which he soon died, I once in the circuit ruled it manslaughter. It is a barbarous unmanly custom. . . .' Foster, 261. Cf. *Brown*, 1776.

* *Fighting*] See *Affray*.

Prize-fighting] See *Affray*. 'Prize-fighting, and publick boxing-matches, or any other exertions of courage, strength and activity of the like kind, which are exhibited for lucre,' are not lawful sports, for they 'can serve no valuable purpose, but, on the contrary, encourage a spirit of idleness and debauchery.' Foster, 260. 'In such cases, the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained. And again, such meetings have a strong tendency in their nature to a breach of the peace. And, therefore, in *Ward's* case [1789], who was challenged to fight by his adversary, for a public trial of skill in boxing, and were also urged to engage by taunts, although the occasion was sudden, yet, having killed his opponent, he was holden guilty of manslaughter.' East P. C. 270.

* *Spectators*] Indictment for being present, aiding and abetting a murder (in a prize-fight): there had been a fight between the deceased and another person, at which a great number of persons were assembled, by whom, in the course of the fight, the ring was broken in several times: they had sticks which they used with great violence. The deceased died in consequence of blows (but whether in the fight or from the sticks does not appear). The evidence was contradictory whether defendant acted as second; his witnesses swore he did nothing and said nothing. Littledale J. said 'I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter if they encouraged it by their presence; I mean if they remained present during the fight. If they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything. . . . . If the death occurred from the fight itself, all persons encouraging it by their presence are guilty of manslaughter; but if the death ensued from violence unconnected with the fight itself, that is, by blows given not by the other combatants, . . . but by persons breaking in the ring, and striking with their sticks, those who were merely present

are not, by being present, guilty of manslaughter. . . . The case is at most one of manslaughter only, and the charge of murder is not at all supported.' *Murphy,* 6 C. & P. 103, 1833: guilty. It has been ruled, however, that persons present at a fatal prize-fight are not such accomplices as that their evidence requires confirmation. *Hargrave,* 5 C. & P. 170, 1831. The summing up in *Murphy* was considered by a majority of the C. for C. C. R. to be misleading, because it led to the inference as *a matter of law* that mere presence at a fight renders the spectator guilty of an assault in aiding, &c., in such fight, and the jury, as they expressly said, only found *Coney, &c.* 'guilty' on account of this direction (taken from *Murphy*), believing that in fact defendants did *not* aid. The proposition was directly overruled by eight judges to three; the latter, on the other hand, were of opinion that the legal inference to be drawn from mere presence as a voluntary spectator at a prize-fight is, in the absence of rebutting evidence, that he is encouraging, aiding, &c., and, therefore, guilty of assault. *Coney, &c.*, 1882: c. q., where defendants were among a crowd of people surrounding two men, who fought in a ring formed by ropes supported by posts: they took no active part in the management of the fight nor did they say or do anything. The ground of the majority was thus put by Cave J.: 'Where presence may be entirely accidental, it is not even evidence of aiding or abetting. Where presence is *primâ facie* not accidental, it is evidence, but no more than evidence, for the jury.' (Q. B. D. 540.)

* *Ordinary employment—negligence*] Where death ensues in the course of work through a want of due caution, the offence of the negligent person will not be misadventure, but manslaughter. 'A., having deer frequenting his cornfield out of the precinct of any forest or chace, sets himself in the night-time to watch in a hedge, and sets B. his servant to watch in another corner of the field with a gun, charged with bullets, giving him order to shoot when he hears any bustle in the corn by the deer, the master himself improvidently rushes into the corn, the servant, supposing it to be the deer, shoots, and thereby kills his master . . . this is . . . but chance-medley, for the servant was misguided by his master's own direction . . . but it seemed to me that if the master had not given such direction . . . it would have been manslaughter to have shot at a man, tho by mistaking it for a deer, because he did not *adhibere debitam diligentiam* to discover his mark.' 1 Hale P. C. 476, who seems to have tried the case. 'The criterion in such cases is to examine whether social duty would, under the circumstances, have suggested a more circumspect conduct.' East 262.

* *Duty to the public*] An iron founder being employed to make some cannon for a *feu de joie*, after one of them had burst, and had been returned to him in consequence, sent it back in so imperfect a state that, on being fired, it burst again, and killed a man; he was found guilty of manslaughter. *Carr,* 8 C. & P. 163, 1832.

East's rule, above, is founded on the instance of workmen throwing down stones from the top of a house on which they are working, according as they give warning or not or as there is a small probability, or a great (as in populous towns), of persons passing by: following Hale, 472, who cites '21 H. 7, B, *coron.* 59' (*i.e.* Year Book, 21 H. 7, p. 28, and *Brooke's* Abridgement, *corone* 59, fol. 177: in 1586 ed.), and Foster, 262. Cf. *Keite,* 1 L. Raym. at 143, 1697.

Negligent driving] frequently causes death. Holt C.J. and three other judges, in 1704, held running over and killing a woman in a 'highway' to be only misadventure. But by L. Holt, if it had been in a street where people usually passed, this had been manslaughter. . . . It must be taken for granted . . . that the accident happened in an highway *where people did not usually pass;* for otherwise the circumstance of the driver's being in his cart, and going so much faster than is usual for carriages of that construction, savoured much of negligence and impropriety; for it was extremely difficult, if not impossible to stop the course of the [four] horses suddenly in order to avoid any person who could not get out of the way in time. And indeed such conduct in a driver of such heavy carriages might under such circumstances be thought to betoken a want of due care if any though but few persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it to be required; but whoever seeks to excuse himself for having unfortunately occasioned by any act of his own the death of another, ought at least to shew that he took that care to avoid it which persons in similar situations are most accustomed to do.' East P. C. 263. The deceased was walking along the road in a state of intoxication. Defendant was driving a cart with two cantering horses, without reins: he was sitting in front of it. He called to deceased twice to get out of the way, but from the state he was in, and the pace of the horses, he could not do so, and was killed. Found, on direction on the unusually rapid pace, guilty of manslaughter. Garrow B. added, that it is the duty of every man who drives any carriage to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur. *Walker,* 1 C. & P. 320, 1824.

Clearly each case of driving must depend upon its circumstances. Thus, it was ruled that a carter, sitting inside the cart instead of being at the horse's head when it ran over a child, was guilty of manslaughter. *Knight,* 1 Lewin C. C. 168, 1828.

To make the captain of a steam-vessel guilty of manslaughter in causing death by running down a boat, the prosecution must show some act done by the captain, and a mere omission on his part in not doing the whole of his duty is not sufficient. But if there be sufficient light, and the captain is either at the helm or in a position to give the command, and does that which causes the injury, he is guilty. *Green,* 7 C. & P. 156, 1835. There were two omnibuses racing: defendant was driving that on which the deceased sat, and was whipping his horses just before his omnibus upset. Patteson J. said, 'The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could in order to get past the other omnibus? and had he urged his horses to so rapid a pace that he could not control them? If you are of that opinion, you ought to convict him.' *Timmins,* 7 C. & P. 499, 1836.

Defendant's duty was to attend a steam-engine; he stopped it and went away. During his absence someone put it in motion and was unable to stop it again; in consequence whereof the deceased was killed. Alderson B. stopped the trial, observing that the death was the consequence, not of defendant's act, but of the intruder's, and that it was necessary, for manslaughter, that the negligent fatal act should be that of the accused. *Hilton,* 2 Lew. C. C. 214, 1838. Contrast *Lowe,* 1850, and see *Bennett,* 1858.

Error of judgment—rules] A mere mistake, 'intellectual defect,' will not be sufficient. *Elliott,* 16 Cox C. C. 710, 1889, where a guard caused a railway accident without any wilful disobedience to rules. O'Brien J. 'adopted the rule' of Willes J. in *Trainer, &c.,* 4 F. & F. 105, 1864 (railway accident), 'that if the rule with ordinary intelligence were open to mistake, there ought not to be a conviction merely for not adhering to it'—a fair interpretation of what Willes J. said. But 'a wilful and forward confidence in his own opinion which was contrary to all reason and experience' (O'Brien J.) would be criminal. This is borne out by *Gylee,* where a driver, honestly believing (but without justification) that a bicycle was turning to go in a certain direction, ran it down: he ought not to have taken the risk: 'honest negligence' is not a defence.

Evidence] of excessive speed immediately before or after a driving accident not seen by anyone is admissible. *Dalloz,* 1 Cr. A. R. 258, 1908.

* *Dangerous weapons*] See *Firearms.* It is sometimes very difficult to trace the boundaries between manslaughter and misadventure, *e.g.* a man found a pistol in the street which he had good reason to believe was not loaded, he having tried it with the rammer. He carried it home and was showing it to his wife, when it went off and killed her. 'It was holden by us all that this was manslaughter, and not only misadventure.' *Rampton,* Kel. 41, 1664: the marginal note '*quære*' is attributed to Holt by Foster J., 263-5, who says:

Degree of caution] 'Admitting that the judgment was strictly legal, it was, to say no better of it, *summum jus.* . . . I think it was not legal, for the law in these cases doth not require the *utmost* caution that *can be* used; it is sufficient that a reasonable precaution, what is *usual and ordinary* in the like cases, be taken. . . . I once upon the circuit tried a man for the death of his wife by a like accident. . . . A friend had inadvertently loaded his gun, which he had left unloaded; when in due course he handled it, it went off. . . . I did not inquire whether the poor man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury that if *they* were of the same opinion they should acquit him, and he was acquitted.' 'If a man take a gun, not knowing whether it is loaded or unloaded, and using no means to ascertain, and fires it in the direction of any other person, and death ensues, he is guilty of manslaughter,' *per* Keating J. *Campbell,* 11 Cox C. C. 323, 1869. Now, to point a gun in the direction of another, even with most reasonable grounds of a *negative* character for believing it to be unloaded, is only an act of folly, and it is not too much to require that a man should take positive means to ascertain that it is not loaded before he so points it. And see especially * *Weston,* 1879, and cf. *Salmon,* 1880.

Contributory negligence] This is no defence in *criminal* law. Assuming such negligence, if the death was caused also by defendant's negligence he is guilty. *Swindall,* 2 C. & K. 230, 1846, where two men, each furiously driving and urging one another on in separate carts, were convicted, though possibly only one ran over the deceased: cf. *Salmon,* 1880; and it would not have mattered even if the latter 'was deaf or drunk or negligent or in part contributed to his own

death.' Pollock C.B. said, where there is loss of life 'each party is responsible for any blame that may ensue, however large the share [?] may be, and so highly does the law value human life that it admits of no justification wherever life has been lost and the carelessness or negligence of any one person has contributed to the death of another person.' See also *Longbottom*, 3 Cox C. C. 439, 1849, deaf man walking in the middle of a country road at night; *Hutchinson*, 9 Cox C. C. 555, 1864, where a bill against a commanding officer, not personally superintending, one of whose men in firing practice killed a passer-by, was ignored. A man turned out a horse, which he knew to be vicious, on the common, over which he knew people were in the habit of passing, by a *right*, on certain unfenced paths. A child was killed by the horse, either on or very near one of the paths. Held that he was rightly convicted of manslaughter, and some of the judges were disposed to think that it would have made no difference if the child had been on any part of the common on which people were in fact accustomed to go, whether rightfully or not. *Dant*, L. & C. 567; 34 L. J. M. C. 119; 10 Cox C. C. 102, 1865. See also *Benge: Jones*, 11 Cox C. C. 544, 1870, where it was held that if the deceased interfered with the management of the horse, the accused driver, who was drunk at the time, ought to be acquitted, but that he could claim no indulgence because he was drunk: *Kew*, 12 Cox C. C. 355, 1872, where little children on a road in no one's charge were run over; of a person in the cart, a friend of the master of the driver, and indicted with the latter, Byles J. remarked 'a word from him might have prevented the accident,' and let his case go to the jury, holding that contributory negligence either of a child or of an adult was no defence.

In *Gregory*, 2 F. & F. 153, 1860, the death may have been due entirely to the negligence of the deceased, and not to any of defendant. See further *Driving*.

On the other hand, in *Birchall*, 4 F. & F. 1087, 1866, Willes J. said that where the deceased has contributed to his death by his own negligence, although there may have been negligence on defendant's part, the latter cannot be convicted of manslaughter, and until he saw a decision to the contrary he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action. But of this Lush J. said, in *Jones*, above, that it was quite at variance with what he had always heard laid down; and in *Shaw*, 1868, he had already ruled that at all events a child could not be guilty of such contributory negligence as to exonerate a defendant, who had negligently run over it (8th ed. of this work). In *S. Stubbs*, 1913, sentence was reduced in view of deceased's negligence.

Joint negligence] It has been distinctly ruled in several cases that it is no defence that the death was partly caused by the negligence of others, for they may all be jointly guilty: *Ledger; Haines*, 2 C. & K. 368, 1847; *Barrett, ib.* 343, 1846, where others *could have* done the duty neglected; *Benge*, 4 F. & F. 504, 1865: railway accident through negligence of several. See *Swindall*, above.

Surgeons, doctors, &c.] Where a person, acting as a medical man, &c., whether licensed or unlicensed, is guilty of gross negligence, or criminal inattention (in which there are no degrees), so as to cause death, it is manslaughter, but if there is no gross negligence it is not. * Cases of great difficulty have arisen where medicines have been carelessly or unskilfully administered by incompetent persons. The

law is thus laid down by Hale: 'If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a chirurgeon. [*Fitzherbert's* Abridgement, f. 214 b] 3 E. 3 Coron. 163. And I hold their opinion to be erroneous that think, if he be no licensed chirurgeon or physician that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgeons; and therefore, if they be not licensed according to the statute of 3 H. 8 cap. 11 [in force] or 14 H. 8 cap. 5 [rpd.], they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter.' 1 Hale P. C. 429. Blackstone concurs with Hale, saying, 'but it hath been holden that if it be not a *regular* physician or surgeon who administers the medicine or performs the operation it is manslaughter at the least. Yet Sir M. Hale very justly questions the law of this determination.' 4 Bl. Com. 197. The correctness of Hale's opinion has been often recognised. Thus, in *Van Butchell*, Hullock B. ruled that it made no difference whether the operator was a regular or an irregular surgeon; 'indeed, in remote parts of the country many persons would be left to die, if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where from the manner of the operation even malice might be inferred.' So Park J. observed, that whether the person was licensed or unlicensed, is of no consequence (except that he may be subject to penalties for contravening Acts of Parliament, &c.). *Long*, 4 C. & P. 398, 1830, first case.

Unskilful treatment] But whether he be licensed or unlicensed, if he display gross ignorance, or gross inattention, or gross rashness, in his treatment, he is criminally responsible. Where a person who, though not educated as an accoucheur, had been in the habit of acting as a man-midwife, and had unskilfully treated a woman who died in childbirth, was indicted for the murder, L. Ellenborough said that there was no evidence of murder, but the jury might convict of manslaughter. 'To substantiate that charge the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the [most?] criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct which is essential to make out a case of manslaughter.' *Williamson*, 3 C. & P. 635, 1807, cited with approbation and repeated in *Long*, above. Darling J. in *Burdee* doubted whether the bracketed word was used. In *Long*, a case was cited by counsel where a man who was drunk delivered a woman, who, by his mismanagement, died, and he was sentenced to six months' imprisonment. And where a person grossly ignorant, undertook to deliver a woman and killed the child in the course of the delivery, a conviction of manslaughter was upheld. *Senior*, 1 Moo. C. C. 346, 1832. The rule is thus laid down by Bayley J.: 'It matters not whether a man has received a medical education or not. The thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying that if a man be guilty of gross negligence in attending to his

patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter.' *Long*, 4 C. & P. 423, 1831, second case. A sailor had been discharged from an infirmary as cured, after undergoing salivation, and went for an emetic, 'to get the mercury out of his bones,' to defendant, an old woman who occasionally dealt in medicines. She gave him a solution of corrosive sublimate, which she declared she had got from some one else, one dose of which caused his death. Bayley J. said, 'I take it to be perfectly clear, that if a person, not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one, but he has no right to hazard the consequence in a case where medical assistance may be obtained. If he does so, it is at his own peril. It is immaterial whether the person administering the medicine prepares it, or gets it from another.' *Simpson*, 4 C. & P. 407 *n.*; 1 Lew. C. C. 172, 1829. These cases were closely followed in *Catherine Spiller*, 5 C. & P. 333, 1832, and that in *Burdee*. Where a surgeon and accoucheur was convicted of neglecting to take due care of a woman after her delivery, Tindal C.J. said: 'You are to say, whether in the execution of that duty which the prisoner had undertaken to perform he is proved to have shewn such a *gross* want of care, or such a *gross* and *culpable* want of skill, as any person undertaking such a charge ought not to be guilty of; and that the death was caused thereby.' *Ferguson*, 1 Lew. C. C. 181, 1830: six months' imprisonment. So L. Lyndhurst C.B. where a publican with the best intentions had administered quack pills (for which he was agent) to a sufferer from small-pox: 'In these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without a licence. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine, takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. . . .

Acceleration of death] I shall leave it to the jury to say whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicines, he acted either with a criminal intention, or from any gross ignorance.' In answer to the contention that death was due to small-pox, and that the pills alone could not have caused it (on which the medical witnesses offered no opinion), L. Lyndhurst said it was enough if they accelerated the death. *J. Webb*, 1 Moo. & R. 405; 2 Lew. C. C. 196, 1834: guilty; cf. *Morby*. See also *Markuss*, 4 F. & F. 356, 1864: 'herbalist's' case; *Burdee*, 86 L. J. K. B. 871; 12 Cr. A. R. 153; 115 L. T. 904, 1916: a 'quack' cure (by fasting and cold water internal and external) in the case of a 'bad life.'

A properly qualified accoucheur, of great experience and repute, used, according to medical evidence, a dangerous instrument at an improper time, and with great want of skill, whereby death ensued.

Coleridge J. told the jury that the questions for them to decide were, whether the instrument had caused the death of the deceased, and whether it had been used by defendant with proper skill and caution, or with *gross* want of either: guilty: six months' imprisonment. *Spilling*, 2 Moo. & R. 107, 1838. The apprentice to a chemist who, by mistake, delivered laudanum to a customer, who asked for paregoric, the laudanum having caused the death of the child who took it, was indicted for manslaughter; Bayley J. directed the jury that if they thought him guilty of negligence, they should find him guilty; which they did, and he was fined five pounds. *Tessymond*, 1 Lew. C. C. 169, 1828.

* *Neglect of duty*] A person 'may, by a neglect of duty, render himself liable to be convicted of manslaughter or even of murder,' *per* L. Campbell C.J. where an engineer, who left the engine to draw up miners from a coal-pit in charge of a boy who, he knew, was incapable of managing it, as it required some skill, was convicted of manslaughter when one of the miners was killed. *Lowe*, 3 C. & K. 123, 1850. For a somewhat rare instance, see *Kempson*. Contrast *Hilton*, 1838.

Trustees for the repair of roads are not chargeable with manslaughter if a person is accidentally killed in consequence of such a road being out of repair through their neglect. *Pocock*, 17 Q. B. 34; 5 Cox C. C. 172, 1851, where an inquisition convicting trustees was quashed, and L. Campbell said he had passed 'a severe sentence' in *Lowe*, above.

Defendant's duty was to stage a shaft; he failed to do so; a truck of bricks fell through and killed a miner. *Hughes*, D. & B. C. C. 248; 26 L. J. M. C. 202; 7 Cox C. C. 301, 1857: manslaughter. L. Campbell C.J. said, 'What constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence.'

Paupers] See *Overseers* under *Office-holders*.

Where one *voluntarily* undertakes the charge of an infant, or any other helpless human being, he must execute such charge 'without (at all events) *wicked* negligence,' said Brett J. 'Mere negligence will not do, there must be . . . negligence so great' as to show 'a wicked mind,' *i.e.* recklessness whether death occurred or not. *Nicholls*, 13 Cox C. C. 75, 1874. A very old woman maintained her niece; no one else lived with them; the latter, when the former fell ill, neglected her and did not provide proper food or call in a doctor (though there was abundant means, food, &c.), and undoubtedly accelerated her death. As there was a clear common law duty on the niece, she was rightly convicted of manslaughter. *Instan*, 1893, 1 Q. B. 450; 62 L. J. M. C. 86; 17 Cox C. C. 602: C. C. R. See *Marriott*,* 1838. *Tonks* shows that a summary conviction for neglect, &c. may not be a bar to indictment for manslaughter.

One of the sect of 'peculiar people' was indicted for the manslaughter of his child by neglecting to call in medical advice. The child died after being ill and wasting for eight months. The father only called in women friends and the elders of his church to pray over the child; he also consulted one of them about the proper treatment, but neither of them had any medical skill. They thought the child was teething, and gave it the diet they thought suitable. Defendant had sufficient means and ample opportunity to procure medical

advice. It was found that he wilfully neglected to provide medical aid when it was reasonable so to do, and he had the ability, and that death was caused by such neglect—and that he honestly believed that it was unnecessary and wrong to call in medical aid; it was held that he was properly convicted of manslaughter, on the ground that 31-2 V. 122, 37, rpd., imposed a positive duty (and a punishment on summary conviction) to provide medical aid when necessary, and that death was due to that duty having been wilfully neglected. *Downes,* 1 Q. B. D. 25; 45 L. J. M. C. 8; 13 Cox C. C. 111, 1875; C. C. R. Confirmed in *Senior,* 1899, 1 Q. B. 283; 68 L. J. Q. B. 175; 63 J. P. 8; 79 L. T. 562; 19 Cox C. C. 219: C. C. R., under 57-8 V. 41, 1, rpd., where it was also held that withholding medical aid to a sick child is indictable at common law.

But there must be positive evidence (*J. Webb,* 1834) that the death was caused or accelerated by the neglect of duty. Where in another 'peculiar people' case the medical evidence only went to show that proper medical aid, &c., *might* have saved or prolonged the child's life, and would have increased its chance of recovery, but that it might have been of no avail, c. q., although there was a neglect of duty (under s. 37, above), the judge should not have left the jury to find (as they did) what the skilled witness could not, viz. that life was *in fact* shortened. *Morby,* 8 Q. B. D. 571; 51 L. J. M. C. 85; 15 Cox C. C. 35, 1882; C. C. R.

Poor law relief] Martin B., after consulting Erle C.J., held that if parents have not the means of providing food, &c., for their infants it is their duty to apply for poor law relief, and that if their children die through the wilful neglect of that duty, lasting, at any rate, for four or five days, they are guilty. They also held that there was not 'a particle of evidence' against the husband though there was no doubt he was 'morally guilty; as he was spending the money 'he earned' on himself.' *Mabbett and wife,* 5 Cox C. C. 339, 1851. Cf. *Chandler,* 1855.

Evidence of means to provide food and medicine for a child at a date before the neglect or death may be given, and the jury may infer means at the date. *Jones,* 19 Cox C. C. 678, 1901.

Nurses, &c.] See under *Children.*

Servants] See that title.

No legal duty] But where there is no legal duty to give that assistance which would have saved life, withholding it appears not to be criminal. So where a girl of eighteen was taken in labour in the house of her stepfather *during his absence,* and her mother omitted to procure the assistance of a midwife in consequence of which the girl died, and there was no evidence that the mother had the means to pay for the midwife, though she could have got one *gratis,* a conviction for manslaughter was quashed. *Shepherd,* L. & C. 147; 31 L. J. M. C. 102; 9 Cox C. C. 123, 1862. It is, perhaps, the duty of a husband to supply his wife, though living apart, with shelter, if he knows that the want of it is likely even to accelerate her death. *Plummer,* 1844.

Failure of a woman to have assistance at her confinement, whereby the child dies, is not manslaughter; there must be neglect after the birth. *Izod,* 20 Cox C. C. 690, 1904.

No violence— terrorising*] If an illegal act, *e.g.* a threat of violence, accelerates death, even if deceased was abnormally unhealthy, and whether defendant knew it or not, there may be a conviction. *Hayward*, 21 Cox C. C. 692, 1908. A woman, to avoid violence, jumped through a window and was killed: the C. C. A. thought this might have amounted to murder. *Curley*, 2 Cr. A. R. 96, 109, 1909. See *Halliday*, 1889.

* *Discipline*] 'Parents, masters, and other persons having authority *in foro domestico* may give reasonable correction to those under their care, and if death ensueth without their fault it will be no more than accidental death. But if the correction exceedeth the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter according to the circumstances. If with a cudgel or other thing not likely to kill, though improper for the purpose of correction, manslaughter. If with a dangerous weapon likely to kill or maim, due regard being always had to the age and strength of the party, murder.' Foster C. C. 262, after 1 Hale, 454.

* *Self defence*] The *principles* are the same as in *Assault, Grievous Bodily Harm, Malicious Injury,* and *Murder*, and see under *Game*. 'A man may repel force by force, in defence of his person, habitation, or property, against one who manifestly intends or endeavours by *violence or surprise* to commit a *known felony,* such as murder, rape, robbery, arson, burglary, and the like upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing it is justifiable self-defence; as, on the other hand, the killing by such felons of any person so lawfully defending himself will be murder. But a bare fear of any of these offences, however well grounded; as that another lies in wait to take away the party's life, unaccompanied with any overt act, indicative of such an intention; will not warrant him in killing that other by way of prevention; there must be an actual danger at the time.' East P. C. 271-2, after 1 Hale, 478 and foll. Not only is the assailed himself justified in thus resisting, but 'In all cases where a felonious attack is made a servant or any other person present may lawfully interpose to prevent the mischief intended; and if death ensue, the party so interposing will be justified. Thus, in the instances of arson and burglary, a lodger may lawfully kill the assailant in the same manner as the owner himself might do . . . subject, however, to the same limitations. . . . In this respect I see no difference between the case of the person assaulted, and those who come in aid against such felons. And the legislature itself seems to have considered them on the same foot; for in the case of the Marquis de Guiscard, who [in 1711] stabbed Mr. Harley sitting in council, they discharged the party who gave the mortal wound from all manner of prosecution on that account; and declared the killing to be a *lawful and necessary action*.' East, 289; Foster, 273-5, referring to 9 An. 16, rpd., which 'saved harmless' *Wilcocks*, the queen's messenger, who had been returned by the coroner's inquisition for the *murder* of Guiscard, and all who had assisted in Harley's defence. A prisoner within 'the Rules' of the K. B., a mere lodger or sojourner, in repelling an invasion of the house, is not guilty, if he kill the assailant: *Cooper*, Cro. Car. 544, 1639.

It is only 'such felonies as are attended with force or any extraordinary degree of atrocity which in their nature betoken such urgent necessity, as will not allow of any delay,' that the rule extends to. Of this sort are what are called '*known*' felonies, in contradistinction to 'secret felonies,' *i.e.* such as may be committed without violence or resistance by the felon, *e.g.* picking the pocket, &c. Where an open attempt is made to murder, ravish, or commit other felonies, 'attended with force or surprize,' the attacked may lawfully kill, but it must 'not be left in doubt.' East, 273; Foster, 274.

The rule extends to *felonies* only. Thus, 'if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet if he kill him, it is manslaughter.' East, 272.

It is enough if the felony is reasonably suspected as imminent. Levett being in bed, his servant, whom Freeman had helped in her work, went about midnight to let her out, and thought she heard thieves about to break in. On this she awakened L., telling him her fears. He took a drawn rapier, and the girl fearing that Freeman would be seen, hid her in the buttery. Mrs. L. seeing her there, and not knowing her, thought *she* was the thief, and called to her husband, who entering in the dark, and thrusting with his rapier killed Freeman. This was ruled to be misadventure only. *Levett*, Cro. Car. 538, 1639; 1 Hale P. C. 42, 474. 'Possibly,' says Foster J., 299, 'it might have been better ruled manslaughter at common law [than—as it was—'chance-medley'], due circumspection not having been used.'

Where there is an actual assault, the extent of allowable violence in resistance must depend on its nature, and the circumstances generally. Sometimes a man may reasonably apprehend death or great violence, as, *e.g.*, Ford having a room at a tavern, several persons persisted in turning him out, but he refused to submit, when they drew their swords on Ford and his company, and Ford, drawing his, killed one of them; it was held *justifiable* homicide. Both Kelynge and Foster seem to doubt this decision. But East observes that [even] 'though the assailants waited till Mr. Ford had drawn his sword, which does by no means appear, yet if more than one attacked him at the same time (and as he was the only one of his party who seems to have resisted, it is probable enough that such was the case) . . . the determination seems to be maintainable.' East, 243; *Ford*, Kel. 51 (between 1627 and 1631). So in *Mawgridge* great violence was held justifiable in the case of a common assault. 'Mawgridge, upon words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword. Mr. Cope returned a bottle at the head of Mawgridge, which it was lawful for him to do in his own defence, and wounded him; whereupon Mawgridge stabbed Cope, which was ruled to be murder. For Mawgridge, in throwing the bottle, shewed an intention to do some great mischief, and his drawing immediately shewed that he intended to follow up his blow.' East, *ib.* Cf. 2 L. Raym. 1489; Foster, 274, 295. 'The words previously spoken by Mr. Cope could be no justification for Mawgridge; and it was reasonable for the former to suppose his life in danger when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life; and this at a time when he was off his guard, and without any warning. This latter circumstance forms a main distinction between this case and the case of death ensuing from a combat where both parties engage upon equal terms; for there, if upon a sudden quarrel, and before any

dangerous blow given or aimed at either of the parties, the one who first has recourse to a deadly weapon suspend his arm till he has warned the other, and given him time to put himself upon his guard; and afterwards they engage on equal terms; in such case it is plain that the design of the person making such assault is not so much to destroy his adversary at all events, as to combat with him, and to run the hazard of his own life at the same time. And that would fall within the same common principle which governs the case of a sudden combat upon heat of blood. But if several attack a person at once with deadly weapons, as may be supposed to have happened in Ford's case; though they wait till he be upon his guard; yet it seems (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence; because so unequal an attack resembles more a desire of assassination than of combat.' East, 276.

Assault only] An assault with intent to *chastise*, though without any legal right, will not justify the assaulted in *killing*. Defendant (indicted for the murder of his brother) came home drunk. His father ordered him to bed, but he refused, on which a scuffle ensued between them. The deceased, hearing the disturbance, got up from his bed, threw defendant on the ground, and beat him, &c., the latter not being able to avoid his blows, or to escape. As they were struggling, defendant gave him a mortal wound with a penknife. This was unanimously held to be manslaughter, 'for there did not appear to be any *inevitable necessity* so as to excuse the killing *in that manner*. The deceased did not appear to have aimed at the prisoner's life, but only to chastise him for his misbehaviour to his father.' *Nailor*, 1704, East, 277. At the conference in this case, 'Powell J. put the case:—If A. strike B. *without any weapon*, and B. retreat to a wall, and there stab A., that will be manslaughter; which Holt C.J. said was the same as the principal case; and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking, *without any dangerous weapon*, that the intent of the aggressor rose so high as the death of the party stricken; and without there be a plain manifestation of a felonious intent, no assault, however violent, will *justify* killing the assailant under the plea of necessity.' *Ib.* Similarly:—Defendant and his brother were fighting, on which prosecutor laid and kept hold of the former to prevent him from hurting his brother, but did not strike him; defendant stabbed him with a knife. Parke J. said: 'The prosecutor states that he was merely restraining the prisoner from beating his brother, which was proper on his part. . . . If you are of opinion that the prosecutor did nothing more than was necessary to prevent the prisoner from beating his brother, the crime of the prisoner, if death had ensued, would not have been reduced to manslaughter; but if you think that the prosecutor did more than was necessary to prevent the prisoner from beating his brother, or that he struck any blows, then I think that it would. You will therefore consider whether anything was done by the prosecutor more than was necessary, or whether he gave any blows before he was cut.' *Bourne*, 5 C. & P. 120, 1831. As has been said, the killing must appear to be done from 'urgent necessity,' and to avoide *immediate* injury. 'He therefore who, in the case of a mutual conflict, would excuse himself upon the foot of self-defence, must shew that before a mortal stroke given, he had declined any farther combat, and retreated as far as he could with safety; and also that he killed his adversary through mere necessity,

and to avoid immediate death. If he faileth in either of these circumstances, he will incur the penalties of manslaughter.' Foster, 277.

'Neither shall a man in any case justify the killing another by a pretence of necessity unless he were himself wholly without a fault in bringing that necessity upon himself; for if a man in defence of an injury done by himself kill any person whatsoever, he is guilty of manslaughter at the least.' Hawk. P. C. 1, 28, 22. Therefore, 'where A., with many others, had, on pretence of title, forcibly ejected B. from his house; and B. on the third night returned with several persons with intent to re-enter; and one of B.'s friends attempted to fire the house; whereupon one of A.'s party killed one of B.'s with a gun; held manslaughter in A.; because the entry and holding with force was illegal.' East, 277-8.

Killing in defence of the person will amount either to justifiable or *excusable homicide* or *chance-medley*, as the latter is termed, according to the circumstances. 'Self-defence upon chance-medley,' implies 'that the person, when engaged in a sudden affray, quitted the combat before a mortal wound given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life. This case bordereth very nearly upon manslaughter, and in fact and experience the boundaries are in some instances scarcely perceivable, but in consideration of law they have been fixed. In both cases it is supposed that passion hath kindled on each side, and blows have passed between the parties; but in the case of manslaughter it is either presumed that the combat on both sides hath continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death.' Foster, 276-7. 'The true criterion' between manslaughter and excusable homicide, or chance-medley in self-defence, 'seems to be this: when both parties are actually combating at the time the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer hath not begun to fight, or (having begun) endeavours to decline any farther struggle, and, afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide, excusable by self-defence.' 4 Bl. Com. 184. In all the cases, says East, 282, of excusable self-defence, 'it must be taken that the attack was made upon a sudden occasion, and not premeditated or with malice. For if one attacked another with a dangerous weapon, unprepared, with intent to murder him, that would stand upon a different foot, and in that case, if the person whose life was sought killed the other, that would be in self-defence, properly so-called, which does not induce any forfeiture. But if the first assault be *upon malice*, and the flight be feigned as a pretence for carrying that malice into execution, it would undoubtedly be murder; for then the flight rather aggravates the crime, as it shews more deliberation.'

The deceased and his servant insisted on placing corn in defendant's barn, which she refused to allow; they exerted force, a scuffle ensued, in which she received a blow on the breast: whereupon she threw a stone at the deceased, upon which he fell down, and died. Holroyd J. directed an acquittal: 'The case fails on two accounts: it is not proved that the death was caused by the blow, and if it had been it appears that the deceased received it in an attempt to invade her barn against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose, and she is

not answerable for any unfortunate accident that may have happened in so doing.' *Hinchcliffe,* 1 Lew. C. C. 161, 1823.

Where a person is set to watch premises in the night, and shoots at and kills an intruder, the nature of the offence will depend on the *reasonable* grounds of suspicion. 'Any person, set by his master to watch a garden or yard, is not at all justified in shooting at or injuring in any way, persons who may come into those premises even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he has done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he will be guilty of manslaughter,' *per* Garrow B. *Scully,* 1 C. & P. 319, 1824, where the deceased had undoubtedly come to steal.

Several persons tried to break open the door of a house in which defendant lodged. He, after remonstrating with them, opened the door, and he and they began to fight outside. He was pushed into the house again by another lodger, but the men outside broke open the door in order to get at him, and a scuffle again ensued, in which the deceased, who with others had attacked him fiercely, was killed by him with iron tongs. There was a back door through which defendant might have escaped, had he known it. He was acquitted on Bayley J.'s direction: 'If you are of opinion that the prisoner used no more violence than was necessary to defend himself from the attack made upon him, you will acquit him. The law says a man must not make an attack upon others unless he can justify a full conviction in his own mind that, if he does not do so, his own life will be in more danger. If the prisoner had known of the back way, it would have been his duty to go out backwards, in order to avoid the conflict.' *Dakin,* 1 Lew. C. C. 166, 1828.

* *Direction*] A judge is entitled not to put a defence of manslaughter on a trial for murder to the jury, or to withdraw it, if it is set up. *Fairbrother,* 1 Cr. A. R. 233, 1908; *Foy,* 2 Cr. A. R. 121, 1909; *Rubens, ib.* 163; *Scholey; Fitzgibbons; T. Fletcher,* 1913; *T. Alexander,* 23 Cox C. C. 654; 109 L. T. 745; 9 Cr. A. R. 139, 1913; *Gorges,* 1915; *T. Clinton,* 1917. But where manslaughter ought to have been suggested to the jury the C. C. A. substituted that verdict for murder: *Hopper,* 1915; *Letenock,* 12 Cr. A. R. 221, 1917.

Verdict] In *F. Smith,* Sess. Pap. 1803-4, 101; 4 Bl. Comm. 201 *n.* (ed. 1844); Ann. Reg. 1804, Jan. 13, where a man masquerading as 'a ghost' infested Hammersmith and was shot (unintentionally, the defendant urged), Macdonald C.B. refused to accept a finding of manslaughter and insisted on one of murder: sentence commuted to a year's imprisonment.

* On a verdict of not guilty of murder, recommended by the judge, who has suggested a finding of manslaughter, the jury may be asked whether they so find: *J. Baxter,* 1913.

* Autrefois acquit, *&c.*] See that title.

MANUFACTURES, INJURIES TO, ETC.

By 24-5 V. 97, 14: 'Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking hose or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or to render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material or . . .' For continuation, see *Machinery;* and see s. 15, *ib.*

Stealing] By 6-7 G. 5, 50, 9: 'Every person who steals to the value of ten shillings any woollen, linen, hempen or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field, or other place, shall be guilty of felony, and on conviction thereof liable to penal servitude for any term not exceeding fourteen years.'

It has been decided that goods remain in a 'stage, process or progress of manufacture,' within 7-8 G. 4, 30, 3, rpd., though the texture be complete, if they are not yet brought into a condition for sale. *Woodhead,* 1 Moo. & R. 549, 1836.

MARKETS, OFFENCES CONNECTED WITH.

For 'making a market,' see *Conspiracy* and *Trade Offences.* For *Nuisances,* see that title.

MARRIAGE, OFFENCES AT THE SOLEMNISATION OF.

See *Clergymen, False Declarations,* and *Registration.*

By 6 E. 7, 40, 2, it is a misdemeanour punishable by a fine of 100*l.*, or imprisonment for one year (maximum), to act in contravention of or not to comply with the Order in Council, regulating the marriage of a foreigner 'subject to the marriage law' of *his* or *her* country with a British subject in the United Kingdom: but this does not apply to a Jewish marriage between Jews according to the usages of 'British Jews.'

MARRIED WOMEN, OFFENCES I. BY. II. AGAINST.

I. See *Coercion* in Part III.

Conspiracy] A married couple cannot be guilty (only) with each other: cf. *Cope*, 1719.

Accessory after the fact] A woman cannot be guilty in her husband's felony, nor in

Receiving stolen goods] from him.

II. For acts which are not crimes if done by the *husband*, see Index, *Husband and Wife*.

MASTERS, OFFENCES I. BY, II. AGAINST.

I. See *Agency* in Appendix (for liability for servant's acts), *Apprentices* and *Servants;* and cf. *Assault in defence* of latter.

II. See *Embezzlement* and *Larceny*. For ship-masters, see *Seamen* and *Ships*.

MEASURES, FALSE.

See *Cheating*.

MEDICAL MEN, ETC., OFFENCES BY.

A medical practitioner, apothecary or dentist who has been convicted of felony or misdemeanour may be removed from the register: 21-2 V. 90, 29; 37-8 V. 34, 4, am. 7 E. 7, xxii. 6; 41-2 V. 33, 13; so of veterinary surgeons, 44-5 V. 62, 6.

MEETING, UNLAWFUL.

See *Unlawful Assembly*.

MENACES.

See *Threats*.

MERCHANDISE MARKS, OFFENCES IN RESPECT OF,

viz. chiefly forgeries, see Index.

Statute] The governing A. is the Merchandise Marks A. 1887, 50-1 V. 28, as amended.

2.—(1) Every person who—

(*a*) forges any trade mark; or

(*b*) falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(*c*) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark; or

(*d*) applies any false trade description to goods; or

(*e*) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark; or

(*f*) causes any of the things above in this section mentioned to be done,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(*a*) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*b*) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(*c*) That otherwise he had acted innocently;

be guilty of an offence against this Act.

(3) Every person guilty of an offence against this Act shall be liable—

(i) on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and

(ii) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and

(iii) in any case, to forfeit to Her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

(4) The court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the court thinks fit.

(5) If any person feels aggrieved by any conviction made by a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions.

(6) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited, in manner provided by the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section before a court of summary jurisdiction shall, on appearing before the court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly.

3.—(1) For the purposes of this Act—

The expression 'trade mark' means a trade mark registered in the register of trade marks kept under the Patents, Designs, and Trade Marks Act, 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the one hundred and third section of the Patents, Designs, and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable:

The expression 'trade description' means any description, statement, or other indication, direct or indirect,

(*a*) as to the number, quantity, measure, gauge, or weight of any goods, or

(*b*) as to the place or country in which any goods were made or produced, or

(*c*) as to the mode of manufacturing or producing any goods, or

(*d*) as to the material of which any goods are composed, or

(*e*) as to any goods being the subject of an existing patent, privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act:

The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act:

The expression 'goods' means anything which is the subject of trade, manufacture, or merchandise:

The expressions 'person,' 'manufacturer, dealer, or trader,' and 'proprietor' include any body of persons corporate or unincorporate:

The expression 'name' includes any abbreviation of a name.

(2) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

(3) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression, false name or initials means as applied to any goods, any name or initials of a person which—

(*a*) are not a trade mark or part of a trade mark, and

(*b*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials, and

(*c*) are either those of a fictitious person or of some person not bonâ fide carrying on business in connexion with such goods.

4. A person shall be deemed to forge a trade mark who either—

(*a*) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or

(*b*) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise;

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

5.—(1) A person shall be deemed to apply a trade mark or mark or trade description to goods who—

(*a*) applies it to the goods themselves; or

(*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(*c*) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(*d*) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connexion with which it is used are designated or described by that trade mark or mark or trade description.

(2) The expression 'covering' includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression 'label' includes any band or ticket.

A trade mark, or mark, or trade description, shall be deemed to be applied whether it is woven, impressed, or otherwise worked into,

or annexed, or affixed to the goods, or to any covering, label, reel, or other thing.

(3) A person shall be deemed to falsely apply to goods a trade mark or mark, who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods the burden of proving the assent of the proprietor shall lie on the defendant.

6. Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

(*a*) That in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) That he took reasonable precautions against committing the offence charged; and

(*c*) That he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*d*) That he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

7. Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall *primâ facie* be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for or having in possession for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly, and for the purposes of this section the expression 'watch' means all that portion of a watch which is not the watch case.

8.—(1) Every person who after the date fixed by Order in Council sends or brings a watch case, whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch case made in the United Kingdom) and in such a mode as may be from time to time directed by Order in Council.

(2) The declaration may be made before an officer of an assay office, appointed in that behalf by the office (which officer is hereby authorised to administer such a declaration), or before a justice of the peace, or a commissioner having power to administer oaths in a Supreme Court of Judicature in England or Ireland, or in the Court of Session in Scotland, and shall be in such form as may be from time to time directed by Order in Council.

(3) Every person who makes a false declaration for the purposes of this section shall be liable on summary conviction to a fine not exceeding twenty pounds for each offence.

9. In any indictment, pleading, proceeding, or document, in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.

10. In any prosecution for an offence against this Act,—

(1) A defendant, and his wife or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness.

(2) In the case of imported goods, evidence of the port of shipment shall be *primâ facie* evidence of the place or country in which the goods were made or produced.

11. Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission, without the United Kingdom, of any act, which, if committed in the United Kingdom, would under this Act be a misdemeanour, shall be guilty of that misdemeanour as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom in which he may be, as if the misdemeanour had been there committed.

12.—(3) Any goods or things forfeited under this section, or under any other provision of this Act, may be destroyed or otherwise disposed of, in such manner as the court by which the same are forfeited may direct, and the court may, out of any proceeds which may be realised by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods.

13. The Vexatious Indictments A. applies.

15. No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens.

16. Whereas it is expedient to make further provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under this Act; be it therefore enacted as follows:

(1) All such goods, and also all goods of foreign manufacture bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom, unless such name or trade mark is accompanied by a definite indication of the country in which the goods were made or produced, are hereby prohibited to be imported into the United Kingdom, and, subject to the provisions of this section, shall be included among goods prohibited to be imported as if they were specified in section forty-two of the Customs Consolidation Act, 1876.

(2) Before detaining any such goods, or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs may require the regulations under this section, whether as to information, security, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the goods are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs may from time to time make, revoke and vary, regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) Where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom, that name, unless accompanied by the name of the country in which such place is situate, shall be treated for the purposes of this section as if it were the name of a place in the United Kingdom.

(5) Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

(6) The Commissioners of Customs, in making and in administering the regulations, and generally in the administration of this section, whether in the exercise of any discretion or opinion, or otherwise, shall act under the control of the Commissioners of Her Majesty's Treasury.

(7) The regulations may provide for the informant reimbursing the Commissioners of Customs all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(8) All regulations under this section shall be published in the 'London Gazette' and in the 'Board of Trade Journal.'

(9) This section shall have effect as if it were part of the Customs Consolidation Act, 1876, and shall accordingly apply to the Isle of Man as if it were part of the United Kingdom.

[By 1-2 G. 5, 31, a Customs and Excise officer may demand information of the origin of imported goods bearing fraudulent marks, and may communicate such information to the aggrieved trader.]

17. On the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

18. Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with

respect to false trade descriptions shall not apply to such trade description when so applied: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.

19.—(1) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom who *bonâ fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

20. Any person who falsely represents that any goods are made by a person holding a Royal Warrant, or for the service of Her Majesty, or any of the Royal Family, or any Government department, shall be liable, on summary conviction, to a penalty not exceeding twenty pounds.

Customs entry] 'relating to imported goods shall for the purposes of this,' the above A., 'be deemed to be a trade description applied to the goods': 54 V. 15, 1. By s. 2, the Board of Trade may undertake prosecutions; and by 57-8 V. 19, so may the Board of Agriculture in cases of 'agricultural or horticultural produce'; and by 3 E. 7, 31, 1 (8), of 'the produce of any fishing industry.'

Wine] By 5-6 G. 5, 1, 'port' applied to any liquor other than 'the produce of Portugal,' or 'madeira' to any other than that of Madeira, is a 'false trade description' within the above A., unless such liquor 'is intended solely for exportation from the United Kingdom.'

By 6-7 G. 5, 39, the same enactment and proviso are made about ''port' applied to wine the produce of Portugal imported into the United Kingdom' if it is 'not accompanied by a certificate issued by the competent Portuguese authorities to the effect that it was a wine to which by the law of Portugal the description 'port' may be applied.'

British-made cigars, largely of Havana tobacco, were 'got up,' as were the boxes they were in, to look like Spanish-made, with Spanish (and no English) words and nothing to indicate British manufacture; they had been so sold before the A. [1887]; defendant received them in that state and did not apply 'the trade description': conviction under 50-1 V. 28, 2 (2) affirmed: *Butcher*, 1 Cr. A. R. 54; 72 J. P. 454; 24 T. L. R. 797; 99 L. T. 622, 1908.

In *Phillips, &c.*, 2 Cr. A. R. 295; 73 J. P. 458; 25 T. L. R. 764, 1909, the facts were similar to those in *Butcher*, except that here the boxes were all (but some faintly) stamped 'Guaranteed British made,'

and the Spanish picture, inside and out, was defendants' registered trade-mark since 1883. A conviction for 'a false trade description' was upheld, because whether the 'get up' amounts to that or not is for the jury, and the *onus* is on the defence to show that 'otherwise he acted innocently'; the C. C. A. thought there might be a 'get up' which would be innocent.

Recent cases are *Fowler* v. *Cripps*, 21 Cox C. C. 52, 1905; *Holmes* v. *Piper*, 1914, 1 K. B. 57; 78 J. P. 37; 23 Cox C. C. 689; *Lemy* v. *Watson*, 1915, 3 K. B. 731; 84 L. J. K. B. 1999; 80 J. P. 17; 25 Cox C. C. 232.

Triable at Q. S.

MILITARY OFFENCES.

See *Mutiny.*

MILITARY AND NAVAL STORES, LARCENY, ETC. OF.

See *Stores.*

MINES, OFFENCES IN CONNECTION WITH.

See *Arson* and *Riot*.

By 24-5 V. 97, 28: 'Whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up or obstruct, or damage with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level or shaft, of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years or to be imprisoned, and if a male under the age of sixteen years, with or without whipping; provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.'

By s. 29: 'Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or render useless, any steam engine or other engine, for sinking, draining, ventilating or working, or for in anywise assisting in sinking, draining, ventilating or working any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals, from any mine, whether such engine, staith, building, erection, bridge, waggonway, or trunk, be completed, or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, or shall unlawfully and maliciously wholly or partially cut through, sever, break or unfasten, or damage with intent to destroy or render useless any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever, in anywise belonging to or appertaining to or connected with, or employed in any mine or the working or business thereof, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years or to be imprisoned, and if a male under the age of sixteen years, with or without whipping.'

Larceny] By 6-7 G. 5, 50, 11: 'Every person who steals, or severs with intent to steal, the ore of any metal or any lapis calaminaris, manganese, mundick, wad, black cawke, black lead, coal or cannel coal, from any mine, bed, or vein thereof, shall be guilty of felony, and on conviction thereof liable to imprisonment for any term not exceeding two years, with or without hard labour.'

Miners fraudulently removing ore] By 24-5 V. 96, 39: 'Whosoever, being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.'

Intent] See 24-5 V. 97, 60, and *Matthews,* below.

Indictment] The mine may be laid as the property of the person in possession and working it, though only an agent. *Jones,* 2 Moo. C. C. 293, 1843, under 7-8 G. 4, 30, 6, rpd., almost identical with s. 28, above.

Bonâ fide *claim of right*] Ss. 28, 29, above, do not render a person criminally liable for acts causing such damage, if done in *bonâ fide* exercise of a supposed right, and without a wicked mind. *Matthews,* 14 Cox C. C. 5, 1876. Where A. and B. were the owners of adjoining collieries, and A., asserting that a certain airway belonged to him, directed his workmen to stop it up, and they, acting *bonâ fide,* and believing that A. had a right to give such an order, did so, L. Abinger C.B. held they were not guilty of felony under s. 6, above. *James,* 8 C. & P. 131, 1837. But if they knew that the stopping up was a malicious act of their master, they would be guilty. *Ib.* See *Clemens,* 1898, and *Order of Superiors* under *Murder.*

MISAPPROPRIATION.

See Index, especially *Embezzlement.*

MISDESCRIPTION IN TRADE.

See *Trade Offences.*

MISPRISION OF I. FELONY.

See *Compounding* and Index, and cf. *Coney*, 1882.

II. TREASON.

This is a common law misdemeanour and 'consists in the bare knowledge and concealment of high treason without any degree of assent thereto.' The punishment is imprisonment for life, with forfeiture of goods and of the profits of lands for life: 1 Hale, 371; 374; Hawk. 1, 20, 2; 2, 48, 10. 'The Forfeiture A. 1870, s. 1, appears not to apply to this offence, which is neither treason nor felony.' 9 Halsbury, 503. This definition is that of 1-2 P. & M. 10, 8. See the charge of Abbott C.J. to the grand jury in *Thistlewood*, 33 St. Tr. 690, 1820.

Not triable at Q. S.

MISREPRESENTATION.

See *False Pretences, passim, Fraud* and *Moneylenders.*

MONEYLENDERS, OFFENCES BY.

By 63-4 V. 51 (Money-lenders A. 1900, am. by 1-2 G. 5, 38, M. A. 1911), 4: 'If any money-lender, or any manager, agent, or clerk of a money-lender, or of any person, being a director, manager, or other officer of any corporation carrying on the business of a money-lender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of a misdemeanour, and shall be liable on indictment to imprisonment with or without hard labour for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both.' By s. 6, 'money-lender' in this A. includes 'every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business,' but not pawnbrokers, friendly societies, &c., certain corporations, bankers, insurance offices, &c.

Triable at Q. S.

MONEY ORDERS, OFFENCES RELATING TO.

See under *Post-Office.*

MOTHERS, OFFENCES BY.

See *Children* and cases on s. 6 of 48-9 V. 69.

MOTORS, OFFENCES IN USING.

See *Furious Driving* and the cases under *Manslaughter*.

MUNICIPAL ELECTIONS, BRIBERY, CORRUPTION, ETC. IN.

See those titles and *Elections*.

MURDER.

See the preliminary remarks under *Manslaughter*. Cases and passages relevant to both titles are marked.*

By 24-5 V. 100, 1: 'Whosoever shall be convicted of murder, shall suffer death as a felon.' (Offences Against the Person A. 1861.)

Indictment] There is a form, No. 1, in the Appendix to the Indictments A.

Petit treason abolished] By s. 8: 'Every offence which before' 9 G. 4, 31, rpd., 'would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder.' The offences were the killing by a servant of his master, by a wife of her husband, by an ecclesiastical person of his superior, 'being considered a violation of private allegiance' (*Sweet*, Law Dict.).

Venue] See under that title, *Homicide* (twice).

Proof] That homicide has been committed by some one, is essentially necessary to be proved; and Hale, cited under *Presumptions*, advises that in no case should there be a conviction where the dead body has not been found, *i.e.* when there is no direct testimony; cf. 3 Inst. 232. Where the body is seen to disappear, this does not apply: *e.g. Hindmarsh*, 1792; *Armstrong*, 1875. 'Upon charges of homicide,'

says Starkie,* 'it is an established rule that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body. . . . The . . . principle requires that upon a charge of homicide, even when the body has been found, and although indications of a violent death be manifest, that it shall still be fully and satisfactorily proved that the death was neither occasioned by natural causes (see *Spencer Cowper*, 13 St. Tr. 1105, 1699), by accident, nor by the act of the deceased himself. In considering the probability of the latter supposition, it is to be recollected that it is by no means improbable that a person bent on self-destruction would use precautions to protect his memory from the ignominy, and his property from the forfeiture, consequent on a verdict of *felo de se*.' Evidence, 4th ed. (1853) 862. *Spencer Cowper's case*, where the question was whether a body found in the water had come there by suicide or murder, is discussed by *Macaulay*, History, ch. 25.

A girl on her way to Llandogo was seen near Tintern with a child sixteen days old in her arms, at six o'clock; she arrived at Llandogo between eight and nine without the child. The body of a child, which appeared not to be hers, was afterwards found in the Wye, near Tintern. L. Abinger C.B. held that she must be acquitted, and that she could not by law either be called on to account for her child, or to say where it was, unless there was evidence to show that it was actually dead. *Hopkins*, 8 C. & P. 591, 1838.

En ventre sa mère, *&c.*] A child in the womb is considered *pars viscerum matris*, and not possessing an individual existence, and cannot therefore be the subject of murder; see *Abortion*. Thus, if a woman with child take, or another give her, a potion to procure abortion, or strike her, 'whereby the child within her is killed,' it is neither murder nor manslaughter. 1 Hale P. C. 433. But there may be an incitement to murder an unborn child, who is a 'person' within 24-5 V. 100, 4. *P. P. Shepard*, 14 Cr. A. R. 26, 1919: child born alive.

Separate existence] Whether or not a child was born alive, is a question for medical men. Where their opinion was that a child had breathed, but they could not take on themselves to say whether it was wholly born alive, as breathing may take place *during the birth*, Littledale J. said, 'being born must mean that the whole body is brought into the world, and it is not sufficient that the child respires in the progress of its birth': the jury found that the child was not born alive. *Poulton*, 5 C. & P. 329, 1832. This authority was recognised by Park J. who added, 'but if' the child 'has been wholly born, and is alive it is not essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time after their birth.' *Brain*, 6 C. & P. 349, 1834. In another case, J. Parke J. ruled the same way, saying that a child might breathe before it was born, 'but its having breathed is not sufficiently life to make the . . . killing murder,' and 'there must

* In this connection Starkie speaks of *corpus delicti*, which has now gone out of use. It was used by L. Kenyon, 4 Term R. 289, 1791, and by L. Ellenborough, 3 East, 163, 1802, and by T. 127B and 868, in the sense given by Austin, Jurispr. I. 24, 479: 'a collective name for the sum or aggregate of the various ingredients which make a given fact a breach of a given law.'

have been an independent circulation in the child, or the child cannot be considered as alive for this purpose.' *Pulley*, 5 C. & P. 539, 1833, below. So *Wright*, 1841. So, Coltman J. held that the jury must be satisfied that the entire child was actually born into the world in a living state, and that the fact of its having breathed was not a decisive proof that it was born alive, as it might have breathed and yet died before birth. *Sellis*, 7 C. & P. 850, 1837. Parke B. held that, in order to convict on an indictment charging giving birth to a live child and strangling it after birth, the jury must be satisfied that the whole body of the child had come forth when it was strangled, adding, that if the jury 'should be of opinion that the child was strangled intentionally, while it was connected with the umbilical cord to the mother, and after it was wholly produced,' he should direct them to convict, and would reserve the point, his impression being that it would be murder. *Crutchley*, 7 C. & P. 814, 1837. See *Senior*, 1832; also also *Reeves*, 9 Carr. & P. 25, 1839. In *Trilloes*, 2 Moo. C. C. 260, 1842, it was finally held that murder may be committed on a child still attached to the mother by the navel string.

If the child 'were born alive and baptized, and after die of the stroke given to the mother [before the birth], this is not homicide.' 1 Hale P. C. 433. And see *Staundforde*, Pleas of the Crown, 21*a*. But Coke, on the contrary, says that if the child be born alive, and die 'of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature *in rerum natura* when it is born alive.' 3 Inst. 50. The latter is generally regarded as the better opinion, and has been followed by text writers. Hawk. P. C. 1, 31, 16; 4 Bl. Com. 198; note to *Pulley*, above; and *Senior*, 1832. Cf. *West*, 1848.

If the child has not been named the best course is to describe it as 'a certain male (or female) child then lately born of the body of A. B. and not named.' See *Hogg*, 1841; *Willis*, 1 Den. C. C. R. 80, 1845.

Circumstantial evidence] Where the case was 'made up of circumstances entirely, and contained no one fact which taken alone amounted to a presumption of guilt,' Alderson B. told the jury, that before they could convict defendant of murder, they must be satisfied 'not only that those circumstances were consistent with *his* having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that' he 'was the guilty person.' *Hodge*, 2 Lew. C. C. 227, 1838.

For instances of this class of cases dealt with by the C. C. A., see *W. Davis*, 2 Cr. A. R. 263, 1909; *J. Jones*, 3 Cr. A. R. 163, 1909; *M. A. Nash*, 6 Cr. A. R. 225, 1911; *F. A. Robertson*, 9 Cr. A. R. 189, 1913; *G. J. Smith*, 1915. In *Nash* and *Robertson* the condition of the bodies was consistent with a natural death. In *G. J. Smith* the evidence of the similar facts admitted, viz. the deaths of two other wives of defendant, was not confined to the bare facts, but included the surrounding circumstances, *e.g.* their dying in their baths and defendant's pecuniary advantage from their deaths. The limit apparently is fixed at the point where such evidence ceases to 'assist' the enquiry. In *Robertson* the court remarked that the only possible alternative (to defendant's guilt) was 'a series of coincidences' which might have been said with greater force in *Smith*. The test in *W. Davis*, *per* L. Alverstone, was, how would an innocent man have acted in the circumstances?

Aiders, &c.] See that title. In order to convict of murder it is not necessary to prove that the fatal blow was given by defendant's hand. An indictment for the murder of A. B. by poison is supported by proof that defendant gave the poison to C. D. to administer (as a medicine) to A. B., but C. D. not intending and failing to do so, it was accidentally given to A. B. by a child; defendant's intention throughout being to murder, it was as if she had actually done it with her own hand. *Michael*, 2 Moo. C. C. 120; 9 C. & P. 356, 1840. Cf. 1 Hale P. C. 616, and *Accessories*, below.

Standing by] 'If A. happeneth to be present at a murder and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory.' Foster C. C. 358. But 'in the case of assassinations done in private . . . the circumstances' last supposed 'may be made use of against A., as evidence of consent and concurrence on his part, and in that light should be left to the jury, if he be put upon his trial.' *Ib.* Where the crime appears to have been committed in defendant's presence by a third person, the indictment may be sustained. Thus, where a child had been strangled, and the question was whether it had been done in defendant's presence by third persons; J. Parke J. said, 'If you are satisfied that this child came by her death by . . . strangulation, it is not necessary that the prisoner should have done it with her own hands; for if it was done by any other person in her presence, *she being privy to it*, and so near as to be able to assist,' she is guilty; there was 'much circumstantial evidence' of her guilt. *Culkin*, 5 C. & P. 121, 1832: not guilty.

* *Common design*] See *Jackson*, 1675; *Willoughby*, 1791; *Macklin*, 1838, below, under *Murder, Attempted;* and various instances in Index, title *Aiders, &c.* If several go out with a common intent to commit a felony, and death ensues by the act of one of the party, the rest will not necessarily be guilty of murder. 'If three persons,' says Park J., 'go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of another kind, such as murder, the two who did not concur in this second felony, will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out.' *Duffey*, 1 Lew. C. C. 194, 1830. 'Three soldiers went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand. The owner's son, coming by, collared the man at the gate, and asked him what business he had there, whereupon the soldier stabbed him. It was ruled by Holt [1697], to be murder in him; but that those on the tree were innocent. They came to commit a small inconsiderable trespass, and the man was killed upon a sudden affray without their knowledge. 'It would,' said he, 'have been otherwise if they had all come thither *with a general resolution against all opposers.*' [So Hawk. P. C. 2, 29, 8.] This circumstance, I think, would have shown that the murder was committed in prosecution of their original purpose; but that not appearing to have been the case, those on the tree were to be considered as mere trespassers; their offence could not be connected with that of him who committed the murder.' Foster 353. A great number of persons assembled in a house and committed a great riot,

&c. on the possessors of a wood adjacent. Only one of their names, viz. A., was known; a warrant was obtained to apprehend him and 'divers other persons unknown.' The constable, with about sixteen or twenty assistants, came with the warrant, demanded entrance, and acquainted some of those within that he was the constable, and had a warrant, and demanded A. and the others; one from within came and read the warrant, but refused admission or the delivery of A. or any one else; the constable and his men went away, but about five rod from the door about fourteen of the band came after them; the constable 'commanded the peace,' but they attacked and killed one and wounded others; A. and G., who had read the warrant, remained in the house. They were all indicted of murder and tried in the K. B., where 'these points were unanimously agreed: 1. That altho the indictment were that B. gave the stroke, and the rest were present aiding and assisting, tho in truth C. gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that evidence was sufficient to maintain the indictment, for in law it was the stroke of all that party, according to the resolution in *Mackally's case*. 2. That, in this case all that were present and assisting to the rioters were guilty of the death of the party slain, tho they did not all actually strike him or any of the constable's company. 3. That those within the house, if they abetted or counselled this riot, were in law present, aiding and assisting, and principals, as well as those that issued out and actually committed the assault, for it was but within five rod of the house, and in view thereof, and all done as it were at the same instant: *vide lord Dacre's case* before [439; in 1541]. 4. That here was sufficient notice that it was the constable, before the man was killed, 1. Because he was the constable of the same vill; 2. Because he notified his business at the door before the assault, *viz.* that he came with the justice's warrant; 3. Because, after his retreat, and before the man slain, the constable commanded the peace, and, notwithstanding it, the rioters fell on and killed the party. 5. It was resolved that the killing of the assistant of the constable was murder, as well as the killing of the constable himself. 6. That those that came in the assistance of the constable, tho not specially called thereunto, are under the same protection as they that are called to his assistance by name. 7. That altho the constable retired with his company upon the not delivering up of A., yet the killing of the assistant in that retreat was murder: 1. Because it was one continued act in the pursuance of his office, his retiring was as necessary, when he could not attain the effect of his warrant, and was in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. 2. Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace and is all one with *Yonge's case* [4 Co. R. 40 *b*, 1586] . . . in the conclusion the jury found nine of them guilty, and acquitted those within, not because they were absent, but because there was no clear evidence that they consented to the assault, as the jury thought.' *Sissinghurst-house case* in 1674, 1 Hale P. C. 462-4.

Coercion] Thom, who was insane, collected a number of persons together with the common purpose of resisting the police, &c., he having declared that he would cut down any constables who came against him. In the presence of the two defendants, who afterwards helped him to maltreat the deceased, he afterwards shot an assistant

of a constable who came to apprehend him, under a warrant. It was held by L. Denman C.J. that the two were guilty of murder as principals in the first degree, and that any apprehension that they had of personal danger to themselves from Thom, was no defence for continuing with him after they knew his purpose, and such fear never is for any illegal act [see *Superior Orders*, below]; nor was it any defence, that Thom and his party had no distinct or particular object in view when they assembled together and armed themselves. *Tyler and another*, 8 C. & P. 616, 1838.

Constructive homicide—not from misdemeanour] But, in the absence of a common design to be carried out at all hazards, constructive homicide only applies to felonies, not to misdemeanours, *e.g.* poaching at night. Hence while defendant, who had a gun, was guilty of manslaughter, even if it went off by accident in a scuffle with a keeper who had a right to seize it (and of murder, had he fired it), it was neither in the others, merely because there was homicide in the course of poaching. *Skeet and others*, 4 F. & F. 931, 1866. Cf. under *Game*.

Presence without common design] If it is uncertain which is guilty all must be acquitted: *Ipswich case:* five indicted for murder; special verdict—murder in one, but which uncertain: cited in *Richardson*, 1 Lea. 387, 1785: robbery, where a similar acquittal was directed. So in *Bird and wife*, 5 Cox C. C. 1, 1850; and *Price, &c.*, 8 Cox C. C. 96, 1858: six men assaulted, and one of them killed, by stabbing, the deceased. Hale, 1 P. C. 442 (probably) means that the jury should take pains to discover the actual striker (*not* that all should be convicted).

The act of killing] The killing may be by any of the thousand 'forms of death by which human nature may be overcome.' 4 Bl. Com. 196.

* *Terrorising—bullying*] But there must be an 'external act of violence' 'whereof the common law can take notice'; and therefore, 'if a man, either by working upon the fancy of another, or possibly by harsh or unkind usage, puts another into such passion of grief or fear as that the party either dies suddenly or contracts some disease, whereof he dies' this is no felony. 1 Hale P. C. 429. This view is put strongly by Byles J. in *Murton* (who, however, admits 'negative' corporal injury, *e.g.* deprivation of necessaries, as enough).

Mental suffering] But, on the other hand, Dr. Kenny says (Outlines, ch. 9), 'It used formerly to be thought that killing by a *mental* shock would not be murder; but, in the clearer light of modern medical science, the present tendency of legal opinion is to regard such a cause of death as not too remote for the law to trace,' citing *Hayward*, 1908. Forcing—(it has, perhaps, therefore been said in the earlier editions of this work)—a person to do an act which is likely to produce and does produce death, is murder; and threats may constitute such force. (The authority, however, on which this rests, seems to be Blackstone, who says, 'If a man does such an act of which the probable consequence may be, and eventually is, death, such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended,' 4 Comm. 197.) Defendant was charged with

killing his wife (1) by beating; (2) by throwing her out of the window; (3) and (4) that he beat her and threatened to throw her out of the window and to murder her; and that by such threats she was so terrified that she threw herself out of the window, &c., and died. There was strong evidence that her death was occasioned by the blows she received before her fall, but three judges 'were of opinion, that if her death was occasioned partly by the blows, and partly by the fall, yet, if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner, however, was acquitted, the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats.' *Evans,* 1812; 1 Russ. Cri. 666; see also *Pitts,* Carr. & M. 284, 1842. See under *Grievous Bodily Harm.*

Indirect causation] If a man has a beast which is used to do mischief, and he, knowing this, 'purposely lets it loose . . . (1) tho only to fright people, and make sport,' and death ensues, 'it is murder' as much 'as if he had incited a bear or a dog to worry them,' and if he (2) '*suffers* it to go abroad, and it kills a man, even this is manslaughter.' 1 Hale P. C. 430; 4 Bl. Com. 197. A park-keeper, finding a boy spoiling trees, tied him to a horse's tail and began to beat him; the horse was frightened, ran away, and dragged the boy and killed him; held, on special verdict, murder. *Halloway,* Cro. Car. 131; Palmer 545; 1 W. Jones (198), 4 Bl. Com. 198, 199, 1628. Contrast *Dant,* 1865.

Perjury] Whether or not giving false evidence against another on a capital charge, with the result that he is executed, will amount to murder appears to be doubtful. There are not wanting old authorities that such an offence amounts to wilful murder. Mirrour of Justices, b. 1, c. 9 (which, however, 'as an authority' on criminal law, 'is worthless,' 2 Pollock and Maitland, Hist., Bk. 2, ch. 8, s. 2, *note*); Britton, b. 1, ch. 6 (or 5), f. 14, s. 1; *Bract. de legibus* l. 3, tract. 2, c. 4, f. 121 (who, however, only speaks of homicide 'by the tongue,' *in a different sense*); see also Hawk. P. C. 1, 31, 7. But Coke, citing this passage from Britt., says, 'which is not holden for murder at this day.' 3 Inst. 48.

The point arose in *McDaniel and Berry,* 1 Lea. 44; 19 St. Tr. 810, June, 1756; they were convicted 'for murder upon a conspiracy,' and a special verdict (apparently) was found, but as the point of law was not argued, they were discharged: Foster 131, who is against holding the offence to be murder, though he admits that there are strong passages in the ancient writers the other way. 'But,' he says, 'those writers must always be read with great caution upon the subject of homicide,' and 'The practice of many ages backwards doth by no means countenance their opinion,' and he alludes to the prosecutions against Titus Oates [10 St. Tr. 1079, 1227 in 1685], as showing that at that day the offence could not have been considered as murder, otherwise Oates would undoubtedly have been so charged. Blackstone, however, states that though the attorney-general [Sir Robert Henley] declined, in *McDaniel,* to argue the point of law, yet he has 'good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons.'

4 Com. 196 (*n.*): he was at the bar in 1756. And East says that he has heard L. Mansfield say that 'the opinions of several of the judges at that time, and his own, were strongly in support of the indictment.' P. C. 333 (*n.*). Blackstone implies what the law was, by observing that 'the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their lives) has not yet punished the offence as murder.' 4 Com. 197.

* *Unskilful treatment—doctors, &c.*] Doubts occasionally arise whether the death has been occasioned by the wound or by the unskilful and improper treatment of it. The law is thus laid down by Hale. 'If a man give another a stroke, which, it may be, is not in itself so mortal but that with good care he might be cured, yet if he die of this wound within the year and day,* it is a homicide or murder as the case is, and so it hath been always ruled.

But if the wound or hurt be not mortal, but with ill applications by the party or those about him of unwholesome salves or medicines the party dies, if it can clearly appear that this medicine and not the wound was the cause of his death, it seems it is not homicide; but then that must appear clearly and certainly to be so.

But if a man receives a wound which is not in itself mortal, but either for want of helpful applications or neglect thereof, it turns to a gangrene or fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound, for that wound, tho it were not the immediate cause of his death, yet if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati.*' 1 P. C. 428. 'Disorder' or neglect by the victim of his wound will not excuse the offender. If the former 'doth not keep that rule which a person wounded should do; yet if he die it is murder or manslaughter, because, if the wounds had not been, the man had not died.' *Rew, J.*, Kel. 26, 1663. So Maule J. held that an inflicter of a wound which ultimately caused death, was guilty of murder, though life might have been preserved if the deceased had not refused to submit to an operation. *Holland,* 2 Moo. & R. 351, 1841, where deceased had refused to have a finger amputated, *in time,* and lockjaw came on and caused death.

Abortion] If a reasonable person must have known that death or grievous bodily harm would result, and the former does, it is murder; if not, it is manslaughter: *per* Avory J., *Lumley,* 22 Cox C. C. 635; 76 J. P. 208, 1911.

* *Unhealthy condition—intoxication of deceased one cause of death*] Defendant and the deceased had been fighting. A surgeon stated that a blow on the stomach in the state in which the deceased was, 'arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober.' Hullock B. directed an acquittal, observing that 'where the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible so to apportion the operations of the several causes, as to be able to say with certainty that the death was immediately occasioned by any one of them in particular'; he cited from his notes, *Brown,* 1824: 'Indictment charged with killing by *striking.* The jury found that the death was occasioned by over-exertion in the fight. The judges held that

the prisoner was entitled to an acquittal.' *Johnson,* 1 Lew. C. C. 164, 1827. It may be doubted how far this (1827) ruling was correct; for if by defendant's act the death was *accelerated,* he would be guilty of the felony: *per* Stephen J. in 7th edn. of this work, approved by Mr. Greaves, who says that the ruling 'is contrary to the other authorities upon this point': 1 Russ. Cri. 692 *p:* 'the felony' now would be manslaughter.

* *Accelerating death*] Although intoxication might produce greater liability to suffer from the blows, yet it is difficult to say that the intoxication was the *cause* of death any more than the infirmity of age or sickness, which could not, it is quite clear, be so esteemed.

Where the deceased, at the time of a blow, was—it was urged for the defence—in an infirm state of health, Parke J. remarked, 'that is perfectly immaterial, as, if the prisoner was so unfortunate as to *accelerate* her death, he must answer for it.' *Martin,* 5 C. & P. 128, 1832. See also *Murton,* 3 F. & F. 492, 1862, where the question was whether a treatment of a woman diseased and given to drink, had shortened her life by its shock to her nervous system: conviction of manslaughter.

Where the deceased was in an unhealthy condition (which possibly would have caused death) and lived three months after defendant's violence to her, the C. C. A. refused to disturb a verdict of murder: *J. Edmunds,* 2 Cr. A. R. 257; 25 T. L. R. 658, 1909.

Malice aforethought] 'is the grand criterion which now distinguishes murder from other killing; and this malice prepense, *malitia præcogitata,* is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart . . . and it may be either *express* or *implied* in law. Express malice is when one, with a sedate deliberate mind and formed design, doth kill another . . . if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia.* As when [*Halloway* is here cited] . . . a master corrected his servant with an iron bar and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. . . . Also, in many cases where no malice is expressed, the law will imply it, as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause.' 4 Bl. Com. 199-200. See *per* Holt C.J. in *Mawgridge,* 1706; and also *per* Stephen J. in *Doherty,* 1887. In *Campbell,* 1869, it was laid down 'from the intention to kill the malice aforethought is implied in law.'

Onus] 'Where it appears that one person's death has been occasioned by the hand of another, it behoves that other to shew from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to murder.'

This principle is 'perfectly clear': *per* Tindal C.J., *Greenacre,* 1837. 'Justification, excuse or alleviation' are for the defence 'to make out': 4 Bl. Com. 201. See further under *Presumptions.*

Ill-will—evidence] 'Former grudges and antecedent menaces are evidence of the prisoner's malice against the deceased,' 1 Phill. Ev. 514, because 'his state of mind . . . with reference to the transaction is material.' *Phips.* 130. So *T. Mason,* 8 Cr. A. R. 121, 1912, though defendant was intoxicated.

Undesigned consequences of unlawful or negligent act—probability] 'If an action, unlawful in itself, be done deliberately and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue, against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful.' Foster 261. Thus, where an 'injury intended to A., be it by poison, blow, or any other means of death, would have amounted to murder, supposing *him* to have been killed by it, it will amount to the same offence, if B. happeneth to fall by the same means,' because 'the party is answerable for all the consequences of the action'; the more modern doctrine has it 'the *probable* consequences.' See *W. Davies,* 1913.

But 'on the other hand, if the blow intended against A., and lighting on B., arose from a sudden transport of passion, which, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if B. should happen to fall by it.' *Ib.;* cf. 1 Hale P. C. 442. See *Hunt,* 1825, and *Latimer,* 1886. This deduction was made by Darling J. in *Gross,* 23 Cox C. C. 455; 77 J. P. 352, 1913, where a wife, struck by her husband, fired a revolver at him, intending to kill him, but killed his mistress who was living with him; the provocation would have reduced the crime to manslaughter if the husband had been killed, and if the woman's death was accidental defendant should not be in a worse position.

So where a stranger comes between duellists to part them, and is killed by one of them, it is murder in the latter. Hale, *ib.* So of a wife who mixed ratsbane in a potion sent by the apothecary to her husband, which did not kill him, but killed the apothecary, who, to vindicate his reputation, had tasted it himself. *Agnes Gore,* 1612, 9 Co. 81*a;* Hawk. P. C. 1, 31, 45. Cf. *Saunders,* 1573, and *Smith,* 1855.

Death consequent on felony] It has been said that whenever death is caused, even unintentionally, by a *felony,* the crime is murder; *e.g.* Foster says, 258, 'A. shooteth at the poultry of B. and by accident killeth a man, if his intention was to steal the poultry, which must be collected from circumstances, it will be murder, by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter,' because mere intent 'to commit a bare trespass' cannot be more; 'though I confess, L. Coke seemeth to think otherwise': 3 Inst. 56 (where, *perhaps, with intent to steal* is meant).

In *Horsey,* 3 F. & F. 287, 1862, a man set fire to a stack, and

burned a person sleeping by it to death. Bramwell B. accepted the rule laid down by Foster, though it 'may appear unreasonable'; but he suggested to the jury that if they were not satisfied that the deceased was in the barn at the time when the stack was fired, but came in afterwards, they might acquit him, on the ground that the death was not the *natural and probable consequence* of his act. This, however, is virtually to repeal the rule laid down by Foster, which, in its full extent, cannot be taken as correct at the present day.

Modern test] The question now is—was the felony likely or unlikely to cause death? The acquittal of *Serné* (who certainly did not intend to kill), below, a case similar to *Horsey*, above, 'seems to have been due,' says Dr. Kenny, Outlines, c. 9 (where the present state of opinion is well summarised), 'simply to the jury's dislike of the doctrine of a 'constructive' malice. . . . Yet, if guilty of arson [of which he was convicted], he undoubtedly was legally guilty of murder.' See *per* Blackburn J. in *Pembliton*, who denies Coke's 'ruling' even in the case of *intent to steal* at the present day; and *per* Stephen J. in *Serné*, 16 Cox C. C. 311, 1887, who considered that a better rule would be 'any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder.' Deceased, being in liquor, went at night into a glasshouse, and went to sleep; defendants covered him with straw, and threw hot cinders on him; the straw ignited, and he was burnt to death. There was no evidence of *express* malice on their part, but they showed great recklessness. Patteson J. told the jury that if they believed they really intended to do any serious injury to deceased, although not to kill him, it was murder; but if they believed they intended only to frighten him in sport, it was manslaughter (as they found). *Errington*, 2 Lew. C. C. 217, 1838.

Killing another in attempting suicide is murder: *Hopwood*, 8 Cr. A. R. 143, 1913; *Saunders*, 1909.

* Malum in se] It is not necessary, in order to render the killing murder, that the unlawful act intended would, had it been effected, have been felony; but it must, at any rate, be *malum in se*. Foster, *ib*.

Thus, where a 'potion' was given to a woman (1 Hale P. C. 429), or (*Tinckler*) skewers were put into a woman's womb, in both cases to procure abortion, and the women were killed: 'Such acts are clearly murder; though the original intent, had it succeeded, would not have been so but only a great misdemeanour [but see *Abortion*], for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the person on whom they were practised.' East P. C. 230.

* *Suppressing disorder*] So if in a riot or quarrel, whether 'sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavouring to keep the peace and suppress the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy as to go on in it to the hazard of the lives of those who no otherwise offend him but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems, in

this respect, equally criminal as if his intention had been to commit a felony.' Hawk. P. C. 1, 31, 54. See further *Death during Arrest.*

* *No design against an individual*] If a person rides a horse 'known to be used to kick, amongst a multitude of people,' although he only means 'to divert himself,' and death ensues, he will, it is said, be guilty of murder. Hawk. *ib.* s. 68; ch. 29, s. 12; East P. C. 231. 'So if a man, knowing that people are passing along the street, throw a stone likely to create danger, or shoot over the house or wall, with intent to do hurt to people, and one is thereby slain, it is murder, on account of the previous malice, though not directed against any particular individual; for it is no excuse that the party was bent upon mischief generally. But if the act were done incautiously, without any such intent, which must be collected from the circumstances, it is only manslaughter.' East, *ib.;* after 1 Hale P. C. 475. See *Carelessness.* In all these cases 'the nature of the instrument and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence.' East, *ib.* 257.

* Malum prohibitum] 'If it was barely *malum prohibitum,* as shooting at game by a person not qualified by statute-law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man.' The mere liability to penalties 'will not in a question of this kind enhance the accident beyond it's intrinsick moment.' Foster 259. Thus, shooting deer in one's own park, or throwing a stone at a bird, and accidentally killing some one thereby [without any negligence whatever] is no offence. 1 Hale P. C. 39, 475.

Wilful neglect of duty] In *Hughes,* 1857—cf. *Lowe,* 1850—if the omission had been wilful, it would have been murder. 'It has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty, as of a mother to nourish her infant child, this is' murder: *per* L. Campbell in *Hughes;* cf. *Edwards,* 1838, below.

Dependents] 'Such [murder] was the case [1329] of him who carried his sick father against his will, in a cold frosty season, from one town to another, by reason whereof he died.' Hawk. P. C. 1, 31, 5. Cf. *Stockdale,* 2 Lew. C. C. 220, 1838.

Where a stranger interfered in the affairs of a very old woman, and took her into his house, and took the management of her property into his hands and dealt fraudulently with it, and (according to the medical evidence) she died of starvation, inattention, &c., on an indictment for murder, Patteson J. said, 'If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated [her] death, then he will be guilty of murder. If, however, you think only that he was so careless that death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. . . . It will be for you to say whether, from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty, which she, from age and infirmity, was incapable of doing . . . and though, if he broke that contract, he might not be liable to be indicted during her life, yet if by his negligence her death was

occasioned, then he becomes criminally responsible.' Verdict, manslaughter. *Marriott,* 8 C. & P. 425, 1838.

* *Apprentices, &c.*] Defendant and his wife were indicted for the murder of his apprentice. Both had used him barbarously, and had not provided him with sufficient food, &c.; but the surgeon who opened the body gave his opinion that the boy died from debility and want of proper nourishment, and not from the wounds, &c. he had received. The judge directed that the case against her was defective; but the husband was found guilty and executed. *Squire,* 1799, 1 Russ. Cri. 668; see * *Discipline,* below. See *Accelerating Death,* above.

'But where the death ensued rather from incautious neglect, however culpable, than from any actual malice . . . or obstinate perseverance in doing an act necessarily attended with danger . . . ,' the law is not so severe; 'but the case must be strictly freed from these latter incidents. As in the case of *Self* [1776], who upon his apprentice returning to him from Bridewell, whither he had been sent for bad behaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; the apprentice not having been suffered to be in a bed on account of the vermin, but being made to lie on the boards for some time without any covering, and without common medical care.' Medical men were of opinion that his death 'was most probably occasioned by his ill-treatment in Bridewell, and the want of care when he went home; and they inclined to think that if he had been properly treated when he came home, he might have recovered.' There was no evidence of personal violence or want of sufficient sustenance. It was left to the jury to consider whether the death was occasioned by defendant's ill-treatment, and if so 'whether that ill-treatment amounted to evidence of malice,' in which case it would be murder: 'if they thought otherwise, yet as it appeared that the prisoner's conduct towards the apprentice was highly blameable and improper, they might . . . find him guilty of manslaughter,* which they accordingly did,' and the judges approved of the conviction. East P. C. 226, who comments on the report in 1 Lea. 137.

* *Infants*] Where a married woman was charged with the murder of her illegitimate child, by omitting to supply it with proper food, Alderson B. held that she could not be convicted unless it was shown that her husband supplied her with food to give to the child, and that she wilfully neglected to give it, saying, 'There is no distinction between the case of an apprentice and that of a bastard child, and the wife is only the servant of the husband, and according to' *Squire,* above, 'can only be made criminally responsible by omitting to deliver the food to the child, with which she had been supplied by her husband.' *Saunders,* 7 C. & P. 277, 1836. But a mother would be liable if the death arose from her not suckling an infant when she was capable of doing so: *per* Patteson J., *Edwards,* 8 C. & P. 611, 1838.

Indictment for murder of a niece by beating her and compelling her to work for unreasonable hours, &c. The girl was about fifteen, in ill-health, and under defendant's care. She employed her in sewing for fourteen or fifteen hours a day, and when she did not do the required quantity severely beat her with a cane, using very threatening language. The surgeon who examined the body stated that, in his opinion, she died from consumption, but that her death was hastened by the alleged treatment. Defendant, when she beat the deceased,

always said she was sure that she was acting the hypocrite, and shamming illness, and that she had a very strong constitution. She pleaded guilty to the manslaughter, and Vaughan B. thought 'there was not proof of malice sufficient to constitute' murder. *Cheeseman,* 7 C. & P. 455, 1836.

Neglect by a father living with a child, even if he provides sufficient funds for maintenance, may amount to murder, as well as by the woman living with the man: *Walter Gibbins* and *Edith Proctor,* 13 Cr. A. R. 134, 1918.

Defendant left a stage-waggon, and overtook it at Ledbury: she had been delivered of a child after leaving it, before she got to Ledbury, and had carried it about a mile to the place where it was found dead at the road-side. The road was much frequented about the time when the child was left. A waggoner, passing along, heard the child cry, but went on and told some other persons, who went and found the child, which was quite naked, and dead from exhaustion. Defendant had arranged with a woman to be confined at her house, and to pay her 3*s.* 6*d.* a week for taking care of the child. Coltman J. on the trial for murder, said, 'Suppose a person leaves a child at the door of a gentleman, where it is likely to be taken into the house almost immediately, it would be too much to say, that if death ensued it would be murder; the probability there would be so great, almost amounting to a certainty, that the child would be found and taken care of. If, on the other hand, it were left on an unfrequented place, a barren heath, for instance, what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case . . . therefore consider whether' she 'had reasonable grounds for believing that the child would be found and preserved.' Verdict, manslaughter. *Walters,* Carr. & M. 164, 1841.

Prisoners] Huggins, the warden of the Fleet, appointed G. his deputy; he had a servant, Barnes, whose duty it was to take care of the prisoners, and particularly of one Arne. B. put him into a newly-built room, over a common sewer, the walls of which were damp and unwholesome, and kept him there forty-four days without fire, and other necessaries. B. knew the state of the room, and for fifteen days at least before the death of Arne, so did H., having once seen Arne there. Arne died. During the time G. was deputy, H. sometimes acted as warden. The K. B. were clearly of opinion that B. was guilty of murder, but H. not guilty. It could not be inferred from his bare seeing of the deceased once that he knew his condition was due to improper treatment, or that he consented to the continuance of it. They said it was material that the duress by which the deceased came by his death could not be known 'by a bare looking in upon him.' H. could not, from that, know the circumstances; it was material that no application had been made to him, which, perhaps, might have altered the case. Besides, the verdict found that B. was the servant of G., and G. had the actual management of the prison, and the judges seemed to think that the accidental presence of the principal would not amount to a revocation of the deputy's authority. *Huggins and Barnes,* 2 Str. 882; 2 L. Raym. 1574, 1730; Foster C. C. 322; East P. C. 331. If a gaoler confined another prisoner in the same room as one with small-pox, and the former caught it, and died thereof, it would be murder in the gaoler. *Castell* v. *Bambridge,* 2 Str. 854, 1730; Foster 322; East P. C. 331 (appeal of murder).

* *Carelessness in work*] In extreme cases the crime may be murder. The most usual illustration of the text writers is death caused by workmen throwing stones, &c., from a house in the ordinary course of their business. 'If they deliberately saw the danger, or betrayed any consciousness of it, from whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act.' East P. C. 262, after 1 Hale P. C. 472, 475; Foster 262; 'this may be either misadventure, manslaughter or murder; . . . if it were in a country village . . . and he calls out to all people to have a care, it is misadventure only; but if it were in London or other populous town . . . it is manslaughter, though he gives loud warning; and murder if he knows of their passing and gives no warning at all': 4 Bl. Com. 192.

* *Driving*] 'A. drives his cart carelessly, and it runs over a child in the street, if A. have seen the child, and yet drives on upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had run across the way, and the cart run over the child before it was possible for the carter to make a stop, it is *per infortunium*,' and so ruled 'by us . . . in 1672. If a man or boy, riding in the street, whip his horse to put him into speed and run over a child and kill him, this is homicide, and not *per infortunium*, and if he had rid so in a press of people with intent to do hurt, and the horse had kild another, it had been murder in the rider.' 1 Hale P. C. 476. Foster, 263, says the driver is only entirely excused if 'no want of due care could be imputed' to him, *e.g.* not if he *ought* to have seen the child.

* *Discipline*] See *Malice Aforethought*, above. A master finding that his apprentice had disobeyed him, and on his remonstrance was rude, struck him on the head with a bar of iron, which he had in his hand, and killed him; held, 'in strictness of law,' murder; for a bar of iron is not a fit instrument of correction, yet the judge recommended a pardon. *Grey*, Kel. 64, 1666. Where defendant's wife had given clogs to the deceased, a boy, to clean, but he had not cleaned them, and defendant struck him with one of them, and he died; this was held to be only manslaughter, because defendant could not, from the size of the thing, have had any intention to take away the boy's life, and he had a right to correct his servant reasonably. *Turner*, Comb. 407; Ld. Raym. 144, 1498, 1666. Exactly the same direction was given where a butcher, seeing some of his sheep straying, ran towards the boy whose duty it was to tend them, and taking up a stake that was on the ground threw it at him, it hit the boy and fractured his skull, and he soon afterwards died. Verdict, manslaughter. *Wigg*, Lea. 378 *n*. 1784. 'Though the correction exceed the bounds of moderation, the court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied *with a good intent*, and the instrument not such as must, in all probability, occasion death; though the party were hurried to great excess. As was the case of a father,' who had often corrected his son for stealing. 'At length the son, being charged with another theft, and resolutely denying it, though proved against him, the father in a passion beat his son with a rope, by way of chastisement . . . so much that he died.' The father showed great remorse. It was ruled, after consultation, that it was only manslaughter. *Anon.* 1775; East P. C. 261. See *Weapons*.

Where a father whipped a child two years and a half old beneath her clothes with a strap one inch wide and eighteen long, and the child died, it was ruled to be manslaughter. *Griffin,* 1869.

* *Provocation*] in a certain degree may reduce the crime from murder to manslaughter, *i.e.* the jury may find the latter; a rider to 'guilty' that 'the act was unpremeditated and in the past defendant had had continuous and great provocation' does not reduce it: *Fairbrother,* 1908.

'The indulgence shewn to the first transport of passion in these cases is plainly a condescension to the frailty of the human frame, to the *furor brevis,* which, while the frenzy lasteth, rendereth the man deaf to the voice of reason. The provocation therefore which extenuateth in the case of homicide must be something which the man is conscious of, which he feeleth and resenteth at *the instant the fact which he would extenuate is committed;* not what time or accident may afterwards bring to light.' Foster 315. Where the provocation is 'sought for and induced by' any one 'to afford him a pretence for wreaking his malice,' it cannot avail him. Thus 'where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him; on which B. strikes, and A. kills him, this is murder.' East P. C. 239. Richard Mason was convicted of the murder of William, his brother. They and others were drinking, till 'growing warm in liquor,' but not intoxicated, the two began in idle sport to push each other about. They then wrestled one fall, and soon afterwards played at cudgels. All this time they were quite friendly, till Richard gave deceased a smart blow on the temple with a cudgel. Deceased thereupon grew angry, and throwing away his cudgel, closed with defendant, and they fought 'a short space in good earnest'; but they were soon parted. Richard then quitted the room in anger, and was heard to say twice, with an oath, that he would fetch something 'and stick him.' In half an hour he returned with a cudgel, having in the meantime changed a slight for a thicker coat. At the open door deceased invited him in, but he declined, saying, 'Perhaps you will fall on me, and beat me.' Deceased assured him he would not, and invited him to play at cudgels with him. Richard answered, 'I am not afraid to do so, if you will keep off your fists.' Thereupon deceased went towards Richard, who then dropped the cudgel. Deceased took it up, and with it gave him two blows. The latter immediately drew out the blade of a 'tuck-sword,' crying, 'Damn you, stand off, or I'll stab you!' and *simultaneously* made a pass at him with the sword, but missed him. Then shortening the sword in his hand, he leaped forward and stabbed his brother, who was retreating, so that he instantly died. The judges unanimously agreed, 'that there are in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence cannot be less than wilful murder.' *Mason,* East, *ib.;* Foster, 132, 1756. A. and B. having a difference, 'A. bids B. take a pin out of the sleeve of A., intending thereby to take an occasion to strike or wound B., which B. doth accordingly, and then A. strikes B., whereof he died; this was ruled murder, 1. Because it was no provocation, when he did it by the consent of A.; 2. Because it appeared to be a malicious and deliberate artifice thereby to take occasion to kill B.' 1 Hale P. C. 457; see 456.

*Provocation—words or gestures**] 'No affront by words or gestures

only is a sufficient provocation so as to excuse or extenuate such acts of violence as manifestly endanger the life of another.' 4 Bl. Comm. 200, after Foster, 290; nor will the killer's violent temper excuse: *T. Mason*, 1908. 'This rule will, I conceive, govern every case where the party killing upon such provocation maketh use of a deadly weapon, or otherwise manifesteth an intention to kill or do some great bodily harm; but if he had given the other a box on the ear, or had struck him with a stick or other weapon *not likely to kill, and had unluckily, and against his intention,* killed, it had been but manslaughter.' Where the deceased coming past defendant's shop, 'distorted his mouth and smiled at him,' on which defendant killed him, 'it is murder, for it was no such provocation as would abate the presumption of malice in the party killing.' *Brain*, 1600, 1 Hale P. C. 455. 'If A. be passing the street, and B. meeting him (there being convenient distance between A. and the wall) takes the wall of A., and thereupon A. kills him, this is murder; but if B. had justled A., this justling had been a provocation [assuming 'considerable violence and insult in the jostling.' 3 Russ. Cri. 6th ed. 39 *n.*], and would have made it manslaughter, and so it would be, if A. riding on the road, B. had whipt the horse of A. out of the track, and then A. had alighted and killed B., it had been manslaughter. *Lanure*, 1642.' *Ib.* 'If there be chiding between husband and wife, and the husband strikes his wife thereupon with a pestle, that she dies presently, it is murder, and the chiding will not be a provocation to extenuate it to manslaughter.' *Anon.*, 1601. *Ib.* 'A. sitting drinking in an alehouse, B., a woman, called him a *son of a whore*. A. takes up a broomstaff and, at a distance, throws it at her, which hitting her upon the head, kild her, whether this was murder or manslaughter was the question in' 1671, 'it was propounded to all the judges at Serjeant's Inn. . . . 1, Whether bare words, or words of this nature, would amount to such a provocation as would extenuate the offence into manslaughter? 2, Admitting it would not in case there had been a striking with such an instrument, as necessarily would have caused death, as stabbing with a sword, or pistolling, yet whether this striking, that was so improbable to cause death, will not alter the case; the judges were not unanimous in it,' and a pardon was recommended. *Ib.*

In *L. Morley's case*, 1666, the judges are said by Hale, *ib.*, to have held, 'that words of menace of bodily harm would come within the reason of such a provocation as would make the offense to be but manslaughter,' *i.e.* the House of Lords found *only* manslaughter (*not* murder) in *that* case. The reports, Kel. 55, and 6 St. Tr. 769, show that the judges (with one dissentient) held the reverse: 'No words, be they what they will,' are enough, and Heneage Finch S.G. so argued. East seems to have misunderstood Hale, for he says: 'It seems that' words 'ought at least to be accompanied by some act denoting an immediate intention of following them up by an actual assault.' P. C. 233.

* *Exception—adultery*] Possibly in the case of sudden discovery or confession of feminine conjugal infidelity there *may be* such a provocation *by words as* to be 'at least as great as blows,' and as effective in law: *per* Blackburn J., *Rothwell*, 12 Cox C. C. 145, 1871. Where a man finds another in the act of adultery with his wife, and kills him in the first transport of his passion, this is manslaughter: *Maddy* or *Manning*, Sir T. Raym. 212; 1 Ventr. 158; 2 Keb. 829; Kely. 137, 1672; and that too of 'the lowest degree': 4 Bl. Comm. 192; 'and

therefore' the court directed the executioner to burn him gently in the hand 'because there could not be greater provocation.' But if he had killed the adulterer deliberately, and upon revenge, 'after the fact and sufficient cooling time, the provocation will not avail in alleviation of the guilt.' East P. C. 234, 251. But it is otherwise where the husband only hears from others and vows vengeance: 1 Ventr. 159; and to kill the wife, on suspicion of infidelity, however strong, is murder. *Kelly,* 2 C. & K. 814, 1848. In *Rothwell* defendant on hearing from his wife that she had been and would be unfaithful, struck her on the head with tongs; he was indicted for murder, but manslaughter was found: ten years' p. s.

But this exception is not extended to unmarried persons: *E. H. Palmer,* 1913. 2 K. B. 29; 82 L. J. K. B. 531; 77 J. P. 340; 23 Cox C. C. 377; 29 T. L. R. 349; 8 Cr. A. R. 207; *Greening,* 1913, 3 K. B. 846; 83 L. J. K. B. 195; 23 Cox C. C. 601; 29 T. L. R. 732; 9 Cr. A. R. 105; cf. *I. Alexander,* 1913; *Ellor,* 15 Cr. A. R. 1920.

Rothwell is not to be extended; mere suspicion is not enough. *Birchall,* 23 Cox C. C. 579; 109 L. T. 478; 29 T. L. R. 711; 9 Cr. A. R. 91, 1913, where not the wife but the deceased used words exciting the suspicion (against him and her). The wife's conduct cannot be provocation to attack an innocent third person, *e.g.* her and defendant's child. *W. G. Simpson,* 84 L. J. K. B. 1893; 31 T. L. R. 560; 11 Cr. A. R. 218, 1915.

The exception does not apply to an unfaithful husband, just as, as such, he was not capable of 'petit' treason.

The cases do not distinguish between the wife and her paramour.

By conduct to third person] It was held by Rolfe B. that a blow given to defendant's wife would afford the same provocation as a blow given to himself, so as to reduce to manslaughter. *Rodgers,* 1842 (earlier editions of this work). Cockburn C.J. seems to have approved such reduction where defendant had killed his son-in-law, who was fighting with his wife, defendant's daughter, although not in a manner to endanger life. *Harrington,* 10 Cox C. C. 370, 1866. If a father *see* a person in the act of committing an unnatural offence with his son, and instantly kill him (probably) it is only manslaughter; but if he only *hear* of it, and go in search of the offender—and that with a deadly weapon—and kill him, it will be murder.* *Fisher,* 8 C. & P. 182, 1837; for 'in all cases the party must see the act done': *per* Park J.

Violence and insult] Where the provocation was blows accompanied by words, Pollock C.B. said: 'If there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures, as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only': verdict, murder. *Sherwood,* 1 C. & K. 556, 1844. *Smith,* 4 F. & F. 1066, 1866, was also a case of extreme provocation, where the wife spat at or on defendant. This alone, Byles J. thought, would not have negatived murder, but 'an assault, in itself very slight, may become extremely serious by reason of the circumstances': verdict, manslaughter.

Words accompanied by spitting *may* reduce: *T. Mason,* 1908.

For the effect of *Insanity* or *Intoxication* on provocation, see those titles.

Evidence of provocation] On a trial for wife-murder, evidence that she had on other occasions almost strangled defendant with his neckerchief, was allowed to show the kind of assault he *apprehended*. He was physically very sensitive about the neck, and she on several occasions had caused him very great pain. *Hopkins,* 10 Cox C. C. 229, 1866: verdict, manslaughter—an instance of evidence of *similar acts* (see Index) in defendant's favour. *Phips.* 162.

* *Quarrels with violence or fighting*] 'It must not, however, be understood that every trivial provocation which in point of law amounts to an assault, or even a blow, will, of course, reduce the crime . . . to manslaughter. . . . For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty: it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation. Barbarity, says L. Holt, in *Keat's case,* Comb. 408 [1697], will often make malice.' East P. C. 234. There being an affray in the streets, defendant ran towards the combatants. A woman, a friend of one of them, said to him, 'You will not murder the man, will you?' He replied, 'What is that to you, you bitch?' She then struck him in the face with an iron patten, which drew a great deal of blood; but on the full facts it was held clearly only manslaughter. The case is instructive, because at first the evidence was that she *only* gave him a box on the ear, and then he struck her on the breast with the pummel of his sword; she fled, and he pursued her and stabbed her in the back. Holt C.J. was of opinion that *this* would have been murder, a single box on the ear from a woman not being a sufficient provocation to kill in this manner, especially after he had given her a blow in return. *Stedman,* Foster C. C. 292, 1704. 'The smart of the man's wound and the effusion of blood might possibly keep his indignation boiling to the moment of the fact.'

In an affray between soldiers and boatmen one of the soldiers was very much beaten. Defendant, a comrade, who had before driven the mob away, came to the rescue and used threats but no violence, until, on their pressing him, he struck at them with the flat side of his sword, and as they fled pursued them. His friend in the meantime had got away, and defendant returned and asked whether they had murdered him; but being again several times assaulted by the mob, he brandished his sword, and bade them keep off. In the tumult the deceased, who was dressed as a boatman and was passing by, was killed by a blow from defendant's sword. The judges held it manslaughter; 'it was not murder as the jury had found because there was a previous provocation, and the blood was heated in the contest; nor was it in self-defence, because there was no inevitable necessity to excuse the killing in that manner.' *Brown,* East P. C. 245; 1 Lea. 148, 1776. Both explain that if death from the original blow would only have been *manslaughter,* its falling on another by mistake or accident will not make it murder. Cf. *Towers,* 1874. See *Affray.*

Words arose with an officer at Lutterel's lodgings about *civility*

money which L., arrested for debt, refused; he went upstairs to fetch money to pay the debt. He returned with a brace of loaded pistols, which, at his servant's request, he laid down on the table, saying, 'he did not intend to hurt the officers, but he would not be ill-used.' Another officer arriving, some angry words passed, and L. struck one of them in the face with a walking-cane and drew a little blood, whereupon both of them fell on him, 'one stabbed him *in nine places, he all the while on the ground begging for mercy, and unable to resist them;* and one of them fired one of the pistols at him *while on the ground,* and gave him his death's wound. This is reported to have been holden manslaughter, by *reason of the first assault with* the cane.' So Foster J., who thinks that *Strange's* report shows *murder,* but that in 16 St. Tr. 28, explains the decision. He enumerates the material circumstances, each one of which 'weigheth *something* in the scale of justice' (293-4). '1. Mr. Lutterel had a sword by his side which, after the affray was over, was *found drawn and broken.* How that happened did not appear in evidence . . . nobody spoke to the whole [affray]. 2. When L. laid the pistols on the table, he declared that he brought them down *because he would not be forced out of his lodgings.* 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol-shot (for both the pistols were discharged in the affray), and slightly on the wrist by some sharp-pointed weapon; and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching L.'s begging for mercy was not that he was on the ground *begging for mercy,* but that on the ground he held up his hands *as if he was begging for mercy.* The Chief Justice directed the jury that if they believed L. endeavoured to rescue himself, which he seems to think was the case, and very probably was the case, it would be justifiable homicide in the officers. However, as Mr. L. gave the first blow, *accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings,* which it would have been their duty to have done if the debt had not been paid or bail given, he declared it could be no more *than manslaughter.*' *Reason,* 1722.

There are cases where 'the degree or species of provocation enters not so deeply into the merits of them as in' 'deliberate malice and revenge,' *i.e.* 'where upon words of reproach, or indeed any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being taken or sought on either side; if death ensues, this amounts to manslaughter. And here it matters not what the cause be, whether real or imagined, or who draws or strikes first; provided the occasion be sudden, and not urged as a cloak for pre-existing malice.' 1 East P. C. 241. 'Many who were of opinion [in *L. Morley*] that bare words of slighting, disdain, or contumely would not of themselves make such a provocation as to lessen the crime into manslaughter, yet were [with Hale] of this opinion, that if A. gives indecent language to B., and B. thereupon strikes A., but not mortally, and then A. strikes B. again, and then B. kills A., that this is but manslaughter; for the second stroke made a new provocation, and so it was but a sudden falling out; and tho B. gave the first stroke, and after a blow received from A., B. gives him a mortal stroke, this is but manslaughter according to the proverb, *the second blow makes the affray.*' 1 Hale P. C. 456; Kel. 55. Foster, 295, expounds this, 'they fought upon equal terms, *and in such combats upon sudden quarrels it mattereth not who gave the first blow.* But

if B. had drawn his sword, and made a pass at A., *his sword then undrawn,* and thereupon A. had drawn, and a combat had ensued, in which A. had been killed, this would have been murder; for B., by making his pass, *his adversary's sword undrawn,* showed that he sought his blood, and A.'s endeavour to defend himself, *which he had a right to do,* will not excuse B.; but if B. had first drawn, and forborne till his adversary had drawn too, it had been no more than manslaughter.' So 1 East P. C. 242. Both emphasise 'no undue advantage being sought or taken on either side.'

Snow was convicted of the murder of P. S., 'much in liquor,' had a quarrel with P., and after high words they were going to fight, but were prevented by the latter's mother, who hit S. in the face, and threw water over him. S. went away, but in a few minutes sat down on a bench before his own gate, with a shoemaker's knife, mending a shoe, that being his trade. P., passing, taunted him, and S. retorted, on which P. took him by the collar, and they both rolled into the road. While they were struggling, S. underneath, deceased cried out, 'What do you do with that knife in your hand?' but could not get it nor could he free himself; at last he received a mortal wound. The judges thought that there was not sufficient evidence that S. lay in wait with a design to provoke P., 'and under that colour to revenge his former quarrel by stabbing him, which would have made it murder.' The circumstances pointed the other way; deceased in his passion did not perceive the knife till they were both down. 'And though defendant was not justified in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, they thought it only amounted to manslaughter.' *Snow,* East P. C. 244, 245; Lea. 151, 1776.

Two soldiers, having, without authority, enlisted a recruit, who afterwards wished to go away, one of them stationed himself at the door of the room in an inn where he was, with his sword drawn to prevent ingress or egress, and a person wishing, apparently, to rescue the recruit, was resisted by the soldier, whereupon a struggle ensuing with the recruit and his friends, the other soldier struck one of them in the back with his bayonet. The judges held a conviction for stabbing with intent to murder right, the soldiers having no authority to enlist; and that it would have been murder if death had ensued. *Longden,* R. & R. 228, 1812. So *Mead,* 1817.

Defendant and L. quarrelled, and went out to fight. Very soon L. was found to be stabbed in a great many places, and dying. Defendant had a knife before the affray. Bayley J. told the jury that if he used the knife privately from the beginning, or if, before they fought, he placed it ready so that he might and did use it, it was murder, but that if he used it after the fight began, and without having so placed it, it was only manslaughter: verdict, murder. *Anderson,* 1 Russ. Cri. 715, 1816. After a quarrel, prosecutor struck defendant, whom he had overtaken, both being drunk. They fought for a few minutes, when defendant ran back a short distance, but prosecutor overtook him. Defendant, who had taken out his knife, gave prosecutor a cut. On an indictment for cutting with intent to murder, Parke J. left it to the jury whether defendant retreated 'with a malicious intention of getting out his knife to inflict an injury . . . and so gain an advantage . . . ; for, if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow,' he thought that, 'if death had ensued, the crime . . . would have been murder'; *or* 'whether he

bonâ fide ran away . . . with intent to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself; as in this latter case, if the prosecutor had been killed,' it would have been manslaughter only. Verdict, not guilty. *Kessal,* 1 C. & P. 437, 1824.

* *Nature of the fight*] The combat itself may be of such a nature as to make it murder if death ensue. Defendant and deceased were 'fighting up and down,' a brutal and savage practice in the north of England [as late as 1835]. Bayley J. said, '*Fighting up and down* is calculated to produce death, and the foot is an instrument likely to produce death. If death happens in a fight of this description it is murder, and not manslaughter,' and thought there might have been a charge of murder. *Thorpe,* 1 Lew. C. C. 171, 1829: conviction of manslaughter. Cf. *per eundem:* 'if a party enters into a contest dangerously armed, and fights under an *unfair advantage,* though mutual blows pass, it is not manslaughter, but murder.' *Whiteley,* 1 Lew. C. C. 173, 1829.

Where defendant levelled a gun at D., the deceased (with whose wife he had improper relations), to frighten him (as he said), D. having often threatened both of them very determinedly, and it was a question whether the gun went off accidentally (partly owing to D.'s action) or not, Cockburn C.J. left the following questions to the jury:—'1. Was the discharge of the gun intentional or accidental? (*a*) If intentional, was it from ill-feeling to D., or desire to get rid of him on account of his wife? in which case it would be murder. (*b*) If it was not so done, was it done by the prisoner in self-defence, and to protect himself from death or serious bodily injury intended towards him by the deceased; or (*c*) from the reasonable apprehension of it induced by the words and conduct of the deceased, though the latter may not, in fact, have intended death or serious injury? (*d*) If not so, was it done after an assault made by the deceased on the prisoner, though short of an assault calculated to kill or cause serious bodily injury? or (*e*) Was it done under such a degree of alarm and bewilderment of mind, caused by the conduct of the deceased, as to deprive the prisoner for the time of his reason and power of self-control? or (*f*) Was the effect of the language and conduct of the deceased such as to provoke the angry passions of the prisoner so as to deprive him of his reason and power of self-control? 2. If the discharge of the gun was accidental—in which case the prisoner cannot be convicted of murder, but may be of manslaughter —(*a*) Was the gun levelled by the prisoner at the deceased in self-defence against an attack of the deceased, endangering life or limb, or reasonably apprehended by the prisoner as likely to do so? in either of which cases the prisoner would be entitled to acquittal; or (*b*) Was the gun levelled by the prisoner at the deceased unnecessarily under the circumstances, but without the intention of discharging it? in which case it would be manslaughter.' The jury found: That the gun was levelled at the deceased unnecessarily under the circumstances, but without any intention of discharging it, and that it went off accidentally: held, manslaughter.* *Weston,* 1879.

* *Weapon used*] Especial attention is to be paid to the *kind* of lethal weapon. Was it one likely or not to produce that result? Perhaps it is rather on the mode of use than on the *kind* that the

issue depends. In one instance, Foster J., 294, takes a nice distinction about the size of a cudgel. In *Royley*, Cro. Jac. 296; 12 Rep. 87, 1612; 1 Hale P. C. 453, defendant's 'son fights with another boy and is beaten; he runs home to his father all bloody, the father takes a staff, runs three-quarters of a mile, and beats the other boy, who dieth of this beating. This is said to have been ruled manslaughter, *because done in sudden heat and passion.* Surely the provocation was not very grievous: the boy had fought with one who happened to be an overmatch for him and was worsted; a disaster slight enough and very frequent among boys. If, upon this provocation, the father, after running three-quarters of a mile, had set his strength against the child, had dispatched him with a hedgestake, or any other deadly weapon, or by repeated blows with his cudgel, it must, in my opinion, have been murder; since any of these circumstances would have been a plain indication of the *malitia*. . . . Croke setteth the case in a much clearer light. . . . His words are:—'Royley struck the child with a small cudgel (Godbolt 182 calleth it a rod), of which stroke he afterwards died.' I think, it may be fairly collected from Croke's manner of speaking [and Godbolt's] . . . that the accident happened by a *single stroke* with a cudgel *not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import the *malitia*.' And so L. Raymond, 1498, emphasises *that the stroke was with a little cudgel not likely to kill*.' See *Turner*, 1666; *Wigg*, 1784, and other cases. 'A. finding a trespasser on his land, in the first transport of his passion beateth him, and unluckily happeneth to kill; this hath been holden to be manslaughter. [1 Hale P. C. 473, is cited, but there the trespasser does mischief.] But it must be understood that he beat him not with a mischievous intention, but merely to chastise . . . and to deter him . . . ; for if he had knocked his brains out with a bill or hedgestake, or had given him an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, whereof he had died, it had been murder.' Foster 291.

An apprentice by order endeavoured to prevent defendant, a boy of twelve, taking chips from his master's shop after he had been forbidden to take them; defendant seized a long knife, threw it at him and killed him; he was indicted for manslaughter. Hullock B. thought that it amounted to murder. *Langstaffe*, 1 Lew. C. C. 162, 1827. See also *Discipline*.

Interval since provocation] Provocation must be recent; for in every case of homicide, 'how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such homicide will be murder.' Foster 296. 'It is much easier to lay down rules for determining what cases are without the limits than how far exactly those limits extend . . . in these cases the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to . . . the mortal stroke; for if from any circumstances whatever it appear that the party reflected, deliberated, or cooled, any time before' that 'or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder; as being attributable to malice and revenge rather than to human frailty. . . . [2 Ld. Raym. 1496, cited]. Thus, if between the provocation received and the stroke given, he fall into other discourse, or diversions, and continue so engaged a reasonable time for cooling; or if he take up and pursue

any other business or design not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his intention was once called off from the subject of the provocation [the excuse is gone]. Again, if it appear that he meditated upon his revenge, or used any trick or circumvention to effect it; for that shews *deliberation* which is inconsistent with the excuse of *sudden passion,* and is the strongest evidence of malice. . . . In proportion to the lapse' of time, 'less allowance ought to be made for any excess of retaliation, either in the instrument or the manner of it . . . The mere length of time intervening . . . aids very much the presumption of malice in law, for that is in some cases evidence in itself of deliberation.' East P. C. 251-2. So *Albis,* 9 Cr. A. R. 158, 1913. Defendant was playing at hazard with the deceased and three others, when one of them asked if any one would 'set' him three half-crowns, whereon the deceased, jocularly, laid down three half-pence, and defendant 'set' three half-crowns and lost them; immediately after which he angrily said to the deceased, *it was an impertinent thing to set half-pence, and he was an impertinent puppy for so doing,* to which deceased answered, *whoever called him so was a rascal.* On this defendant took up a bottle, and with great force threw it at deceased's head, but did not hit him. Deceased immediately tossed a candlestick or bottle back, but also missed; on which both rose to fetch their swords, which hung in the room; deceased drew, but defendant was prevented from drawing by the company, who made deceased throw away his sword; both sat down again. After an hour deceased said to defendant, 'We have had hot words, but you were the aggressor; but I think we may pass it over,' and at the same time offered his hand. But defendant replied, 'No, damn you, I will have your blood!' All except him then went away, but he called to deceased, 'Young man, come back, I have something to say to you,' on which deceased came back. The door was immediately closed, and the rest of the company excluded, but they heard a clashing of swords, and deceased was found to have received a mortal wound. It was also found that at the breaking up of the company defendant had his great-coat thrown over his shoulders, and that he received three slight wounds in the fight, and deceased being asked on his death-bed whether he received his wound in 'fair fight,' answered, 'I think I did.' It was found that from the throwing of the bottle *there was no reconciliation between* the two. On these facts the judges were unanimous that defendant was guilty of murder, he having acted on malice and deliberation, and not from sudden passion. *Oneby,* 2 Str. 766; 2 Ld. Raym. 1485; 17 St. Tr. 30, 1727. 'It must, I think,' says East, P. C. 254, 'be taken . . . that after the door had been shut the parties were upon an equal footing, in point of preparation before the fight began. . . . The main point then' on which the judgment expressly turned 'was the evidence of *express malice,* after the interposition of the company, and the parties had all sat down again for an hour. . . . The court were of opinion that the prisoner had had *reasonable time for cooling;* after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression that *he would have his blood.* And again, the prisoner remaining in the room,' &c. 'altogether shewed such strong proof of deliberation and coolness, as precluded the presumption of passion being continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under

these circumstances, for it must have been implied, according to Mawgridge's case, that he acted upon malice; having in the first instance, before any provocation received, and without warning or giving time for preparation' by deceased, 'made a deadly assault upon him.'

Deceased was requested by his mother to turn defendant out of her house, in doing which he gave defendant a kick. On leaving the house, defendant said to the deceased, 'he would make him remember it,' and instantly went home hard by, and then returned hastily to the street. Meanwhile, deceased had followed him to give him his hat, which he had left behind, and they met, and for a short time were heard talking together, but without any words of anger, deceased desiring him not to come down to his mother's house that night, and defendant insisting that he would. Then deceased gave him his hat, when the latter exclaimed that he would have his rights, and instantly stabbed the deceased with some sharp instrument in two places, saying he had served him right, and then ran away home. No knife was found on him, and the several knives appeared the next morning in their usual places in his (butcher's) shop. Tindal C.J. told the jury that the principal question for them was, 'whether the mortal wound was given by the prisoner, while smarting under a provocation so recent and so strong, that' he 'might not be considered at the moment the master of his own understanding: in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; or whether there had been time for the blood to cool, and for reason to resume its seat . . . in which case the crime would amount to wilful murder. . . . The most favourable circumstance for the prisoner was the shortness of time which elapsed between the original quarrel and the stabbing'; 'but on the other side . . . the weapon which inflicted the fatal wound was not at hand when the quarrel took place, but was' fetched by defendant. It was for the jury to say 'whether the prisoner had shewn thought, contrivance, and design, in' getting the weapon, and 'again replacing it immediately after . . . for the exercise of contrivance and design denoted rather the presence of judgment and reason than of violent and ungovernable passion.' Verdict, murder. *Hayward*, 1833.

'If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things: first . . . that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation': *per* Parke B., *Thomas*, 1837, who also held, that, if from the circumstances it appeared that defendant, before any provocation given, intended to use a deadly weapon towards any one who might assault him, this would shew that a fatal blow given afterwards to a person who struck him ought not to be attributed to the provocation, and the crime would therefore be murder.

One Chorlton, stated, 'On entering prisoner's house I saw prisoner and his son on the floor, the son was uppermost, and they were wrestling together. I asked the (son) deceased to get up; he did so, and went to the door. Prisoner then took up a coal-pick. . . . Prisoner threw the coal-pick at his son, which struck him on the back. Deceased said it hurt him, and prisoner said he would have

his revenge. The coal-pick flew into the street, and deceased fetched it, and tossed it into the house, but not at prisoner. Deceased stood at the door . . . when prisoner took a knife off the table, and jobbed deceased with it on the left side. Deceased said, 'Father, you have killed me!' and retreated a few paces into the street. . . . I told prisoner he had stabbed his son. He said, '. . . I will have my revenge.' Deceased came into the house again, and prisoner stabbed deceased again in the left side. Deceased died at seven o'clock the same morning.' There was evidence of fearful threats by defendant, when drunk. Coleridge J. said, 'I will suppose that all was purely unpremeditated till Chorlton came, and then the case will stand thus—the father and son have a quarrel, the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if, when he got up, and threw the pick at the deceased, he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question (the son having given no further provocation), whether in truth that which was in the first instance sufficient provocation, was so recent to the actual deadly blow, that it excused the act that was done; and whether the father was acting under the recent sting, or had had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent, and he acted on its sting, and the blood remained hot, but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows, because though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions.' Verdict, manslaughter. *Kirkham,* 8 C. & P. 115, 1837.

After a tavern brawl and an apparent reconciliation, deceased deliberately followed defendant and attacked his party and him—all of whom were in drink—perhaps with a bayonet he had picked up. With this deceased was ultimately killed. Bosanquet J. said, 'Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? for if he did, it will amount to murder; but if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him? if he did, then it will be manslaughter. But there is another question, did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he will be justified.' Verdict, manslaughter, with a recommendation to mercy. *Smith,* 8 C. & P. 160, 1837.

Judge or jury?] In *Fisher,* 1837, Park J. ruled that whether the blood has had time to cool or not is a question for the judge, and not for the jury; but it is for them to find how long had elapsed between the provocation and the act. It is, however, submitted that the whole question is for the jury. Here two days had elapsed, but the jury found manslaughter.

Drunkenness] See *Intoxication.*

Pregnancy does not reduce the crime: *A. Smith,* 11 Cr. A. R. 36, 1914.

Express malice] If this exists at the time of the act committed, the provocation will not reduce the offence to manslaughter: *e.g.* see above.

Duelling] 'Wherever two persons,' says Hawkins, 1, 31, 21, 'in cool blood meet, and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alledging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon by his importunity; or that it was his intent only to vindicate his reputation; or that he meant not to kill, but only to disarm his adversary; for . . . he must at his peril abide the consequences of defiance of the law.' 'Deliberate duelling, if death ensues, is, in the eye of the law, murder; for duels are generally fought in deep revenge, and though a person should be drawn into a duel, not upon a motive so criminal, but merely upon the punctilio of what the *swordsmen falsely call honour*, that will not excuse; . . . It will be murder if they appoint to fight the next day, or even upon the same day, at such an interval as that the passion might have subsided; or if from any circumstances attending the case it may be reasonably concluded that their judgment had actually controuled the first transports of passion before they engaged.' Foster, 297. This is founded on Hale, 1 P. C. 443, 452, 479, who cites *Dalton* [c. 145, p. 330, ed. 1742]. But yet, *quære*, he adds (452), 'whether if B. [one duellist] had really and truly declined the fight, ran away as far as he could (suppose it half a mile), offerd to yield, and yet A. [another], refusing to decline it, had attempted his death, and B. after all this kills A. in his own defense, whether it excuseth him from murder; but if the running away were only a pretense to save his own life, but was really designed to draw out A. to kill him, it were murder.' The point is no longer of practical importance; it is argued by East P. C. 282-5; and by Black. 4 Comm. 185. So Hawkins, 'if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder in respect of his first intent.' P. C. 1, 31, 26.

Seconds] Where death ensues from a duel, not only is the actual killer guilty of murder, but also his second, and it has even been doubted whether the other second is not also guilty, 'because it is a compact.' Hale cites *Fitzherbert's* Abridgement, Pt. 1, f. 217, *Corone* 262 (22 E. 3); but he thinks 'the law was strained too far in that case,' and that though 'a great misdemeanour,' it is not murder in the second of the one killed: *ib.* 443. But that doctrine was flatly denied by Williams J. and, apparently, Rolfe B. in *Cuddy,* 1 C. & K. 210, 1843, who asserted that all who aid and abet such a duel are guilty of murder.

* *Spectators*] Neither defendant acted as a second when Mirfin was killed in a duel by Elliott, but they and others went to the ground with Elliott. Vaughan B. said, 'Mere presence alone will not be sufficient to make a party an aider and abettor, but it is essential that he should, by his countenance in conduct . . . being present, aid

and assist the principals . . . the seconds also are equally guilty,' *sc.* with the principal: '. . . neither was called upon to act as a second. If, however, either of them sustained the principal by his advice or presence; or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say or do anything, yet if he was present and was assisting, and encouraging at the moment when the pistol was fired, he will be guilty of the offence': verdict, guilty. *Young and another,* 8 C. & P. 644, 1838.

* *Death during lawful arrest*] See *Suppressing Disorder,* above. There are two main rules which are important here: 1. If the person apprehended resist with violence, and in so doing kill the apprehender, it is murder or manslaughter; 2. If the apprehender in repelling the violence of the apprehended *necessarily* kill him, it is excusable.

Police officer] 'Ministers of justice' are protected not only 'at the instant the officer is upon the spot and at the scene of action,' but 'he is under the same protection of the law, *eundo, morando, et redeundo;* and, therefore, if he cometh to do his office, and meeting with great opposition retireth, and in the retreat he is killed, this will amount to murder. . . . Upon the same principle, if he meeteth with opposition by the way, and is killed before he cometh to the place, *such opposition being intended to prevent his doing his duty, which is a fact to be collected from circumstances appearing in evidence,* this likewise will amount to murder.' Foster 308-9, after Hale, the *Sissinghurst case,* above.

A mere assistant legally called on there and then to arrest is entitled to the same protection. *Porter,* 12 Cox C. C. 444, 1873. *A fortiori,* special constables formally appointed: *Porter,* 9 C. & P. 778, 1841.

Legality] The authority of a constable, &c. ceases with the limits of his district, and if he attempts to execute process out of the jurisdiction of the court whence it issues, and is killed, it is only manslaughter, as in the case of void process. 1 Hale P. C. 458; East P. C. 314. So where a bailiff attempted to execute an informal writ, he was held a trespasser, and defendant, who was indicted for cutting with intent to murder, was acquitted. *Mead,* 2 Stark. N. P. C. 205, 1817, below; so *Longden,* above.

But the attack must be in resisting arrest: see *Sattler,* where there was no warrant and the custody was illegal: see *No Warrant.* In *Serva's* case the decision that the Admiralty had no jurisdiction seems to imply that the arrest and custody in that case was illegal.

'But if the process be directed to a particular constable by name, or even by his name of office, and he execute it within the jurisdiction of the court or magistrate issuing the same, although it be out of the constable's vill, that will be sufficient.' East P. C. 314; Hawk. P. C. 2, 13, 27, 30.

Where a constable having a warrant to arrest a man gave it to his son, who attempted to execute it, the constable then being in sight, but too far off to assist, Parke B. held that the arrest was illegal, and that violence at most would have amounted to manslaughter (there being no premeditation). *Patience,* 7 C. & P. 775, 1837.

A warrant directed 'To the constable of G.,' under 11-12 V. 43, 23.

is directed to the *parish* constable of G.; c. for violence on its execution by a county policeman q. *Sanders*, L. R. 1 C. C. R. 75; 36 L. J. M. C. 87; 10 Cox C. C. 445, 1867.

Warrant] A warrant must show an information on oath on which it issues: *Caudle* v. *Seymour*, 1 Q. B. 889, 1841.

It is sufficient, on an indictment for murder, to produce the warrant or writ on which a constable, &c. has acted, without proving the judgment or decree upon which it is founded. Foster 311, 312; East P. C. 310. But the writ to the sheriff must be proved as well as the warrant to the bailiff. *Mead*, above; Stark. Ev. 437, 4th ed.

In several instances there have been acquittals on a charge of murder for want of evidence of authority under the Articles of War. 2 Stark. Ev. 519, 2nd ed., for it may be a 'material question . . . how far the prisoner was to be obedient to his' officer, *per* Buller J., *Withers*, 1784.

Process] The process must be legal. But by this it is only to be understood that 'the process, be it by writ or warrant, be not defective in the frame of it, and issue in the ordinary course of justice, from a court or magistrate having jurisdiction in the case. There may have been error or irregularity in the proceeding previous to the issuing of the process; but if the sheriff or other minister of justice be killed in the execution of it; this will be murder: for the officer to whom it is directed must, at his peril, pay obedience to it.' *Rogers,* Foster 312, 1735, where 'an injunction for delivering possession' was set at defiance, and in enforcing it three of the sheriff's posse were killed. So even if the warrant is obtained from a magistrate (having jurisdiction) by 'gross imposition, and false information,' yet killing the bearer may be murder. *Curtis*, 1756, Foster 135, 312. 'And altho the warrant . . . be not in strictness lawful, as if it express not the cause particularly enough, yet if the matter be within his jurisdiction as justice of the peace, the killing of such officer in the execution of his warrant is murder; for in such case he cannot dispute the validity of the warrant, if it be under seal of the justice.' 1 Hale P. C. 460. See *Allen and others*, 1867. 'In all kinds of process, both civil and criminal, the falsity of the charge contained in such process, that is, the real injustice of the demand in one case, or the party's innocence in the other, will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice.' East P. C. 310, on Hale P. C. 457, cf. 458.

Illegality] 'But if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person . . . or if the name of such person or of the officer be inserted without authority, and after the issuing of the process, or the officer exceed the limits of his authority, and be killed,' this is only *manslaughter '*in the person whose liberty is invaded.*' Foster 312; *Reynolds*, 1821. A man, who had been arrested and rescued, declared that if W., the officer, attempted to arrest him again, he would shoot him. A writ of rescue was made out, on which the warrant was then issued against S. on a blank piece of paper, as usual, and delivered to W., who inserted therein the names of his two assistants. W., in getting into the house to assist those two, was shot by S. The judges certified that the offence in law amounted only to manslaughter, as the warrant was illegal. *Stockley,* East P. C. 310, 1772. So where the name of

another sheriff's officer was inserted in a sheriff's warrant, after it had been signed and sealed, and directed to A. by name and all the other sheriff's officers, the arrest by the substituted officer was held illegal; 3 Russ. Cri. 6th ed. 102, and so *Stevenson*, 19 St. Tr. 846, 1759, where the warrant was filled up after it had been sealed. But otherwise, apparently, if the name be inserted before the sealed warrant leaves the office. *Harris*, 3 Russ. Cri. 6th ed. 102, 1801. Where a magistrate kept by him blank warrants ready signed, and filled up one of them, and delivered it to an officer, who in attempting to make the arrest was killed, it was held that this was murder: *per* L. Kenyon, *Winwick, Inhabs. of*, 8 T. R. 454, 1800. Where a county court clerk made out an attachment in his own suit, all the judges held this was legal, as it was a purely ministerial act. *Baker*, 1775. Cf. *Sanders*, 1867.

Statutes] The statutes now regulating warrants are: 11-12 V. c. 42, c. 43; 14-15 V. 55, 18 (backing); 14-15 V. 93, 27-31 (am.), 41 (backing); 20-1 V. 72, 11; 30-1 V. 19 (backing); 31-2 V. 107 (backing); 40-1 V. 56, 77 (backing); 44-5 V. 24; 61-2 V. 37, 26, 41; 8 E. 7, 65, 25 (backing); 4-5 G. 5, 58, 27, 40 (2). See further under *Apprehension*.

Sunday] Warrants in treason, felony, and breach of the peace may be executed on Sunday, but no other process, by 29 C. 2, 7, 6, but justices may issue search-warrants or those to arrest for any indictable offence on Sunday, by 11-12 V. 42, 4.

Illegal arrest—rescue] 'The question in a legal form is reduceable to this, How far the mere view of a person under arrest or about to be arrested, supposing it to be illegal, is *of itself* such a provocation to a bystander as will extenuate his guilt in killing the officer, in order to set the party free . . . or prevent the arrest . . .?' East P. C. 325. B., a parish constable, came 'where he was no constable, and consequently had no authority,' and without warrant took up a woman on suspicion of being disorderly, but who, it was found, had not misbehaved herself. . . . Defendants, strangers to her, meeting her in custody, drew their swords, and assaulted B. to rescue her; but on his showing his staff, and declaring he was about the queen's business, they put up their swords, and he' took her to a station. Soon afterwards they again drew, and assaulted B. in order to get her discharged. Whereon he called D. to his assistance, to keep the woman and to defend himself from them. Then one of them, before any stroke received, gave D. a mortal wound. All the judges, except one, agreed that B. acted without any authority; but that one thought showing his staff was sufficient, and that, with respect to the two men, he was to be considered as constable *de facto*. But the main point on which they differed was, whether the *illegal* imprisonment of a stranger was, in the circumstances, a sufficient provocation to bystanders; or in the language of 'L.' Bridgeman in *Hugget*, Kel. 60, 'a provocation to all the subjects of England.' Five judges held it to be murder, and thought that it would have been a sufficient provocation to a relation or friend, but not to a stranger. The other seven, who held it to be manslaughter,* thought that there was no ground for making such a distinction, and that it was a provocation to all, whether strangers or others, so as to reduce the offence to manslaughter, 'it being a sudden action, &c. . . . only to rescue one who was unlawfully restrained of her liberty.' *Tooley*, 2 L. Raym. 1296, 1709;

East, *ib.;* Holt 485 ('The Case of the Reforming Constables'); 11 Mod. 242. The judgment of the majority is severely criticised on the facts by Foster 312-5, who points out that defendants, when they first saw the constable, drew their swords, though he was unarmed, but then put them up, appearing to have reflected and be pacified. Later the deceased met his death, before any blow given or offered by him or his party. There was no pretence of a rescue; for, before the second encounter, the woman had been locked up, which defendants could not hope to force; so that the second assault seemed rather to be grounded on resentment for what had passed, than any hope of rescue. He thinks that the doctrine advanced in this case 'is utterly inconsistent with the known rules of law touching a sudden provocation in the case of homicide,' and carries favour to private persons '*officiously* interposing' beyond what is reasonable. East, above. On *Tooley* being cited, Alderson J. observed, apparently with the concurrence of all the judges, that it had been overruled (referring, perhaps, to Foster's criticism). *Warner*, 1 Moo. C. C. 380, 1833. *Tooley* is still constantly cited.

The majority in *Tooley* grounded their opinion on (*a*) *Ferrers* and (*b*) *Hugget*. (*a*) Sir H. Ferrers being arrested on an informal warrant, his servant, in attempting to rescue him after he was locked up, killed the officer; Ferrers was indicted for aiding, &c. the murder, but the K. B. held that it could not be murder, as it was 'an ill warrant,' and he was acquitted on the *facts* of both murder and manslaughter: this was not a case of rescue at all. Foster 138, 313. The servant was held not guilty of murder; he may have been found guilty of manslaughter (2 L. Raym. 1302). *Ferrers*, Cro. Car. 371; W. Jones 346, 1635. (*b*) Berry pressed a man, who submitted, for war without authority. *Hugget*, with three others, required to see the warrant; Berry showed them a paper, which they said was no warrant, and immediately drew their swords for a rescue and thrust at Berry. A fight ensued, in which Hugget killed Berry. *Hugget*, Kel. 59, 137, 1666. Hale, 1 P. C. 465, reports the case somewhat differently (contrasting it with *Jackson*, 1675, where the attempt to arrest was perfectly legal). Four judges held that it was murder, eight that it was manslaughter: *ib.;* Foster 314, who is inclined to rest this case on the ground of 'a sudden quarrel and affray, and a combat between' defendant 'and an assistant of the press-master upon some rudeness' of his (so Hale); and he observes that Hale, who, at the conference, was one who held it to be manslaughter only, says 'nothing touching the provocation which an act of oppression towards individuals might be supposed to give to the bystanders.' The report in Kel. clearly turns on 'the illegality of the impress, and the provocation such an act of oppression may be presumed to give to every man, be he stranger or friend, out of mere compassion, to *endeavour a rescue*.'

A constable's assistant had come to press F., with whom defendant cohabited; F. was certainly not within the A. (for pressing) supposed to apply. *He* made no resistance, but defendant, on the assistant's order to F., stabbed him. Hotham B. said it was a very different case from the blow being given by F. himself. 'If he, when the constables entered the room with an insufficient warrant, had immediately, in his own defence . . . done the deed . . .' it would have been manslaughter. The offence also might have been different if defendant had been his wife; but she was to be considered 'an absolute stranger' to him, and guilty of murder. He

distinguished *Hugget* and *Tooley*, above. Gould and Ashurst JJ. concurred; but, *in view of Foster's opinion above*, the jury were asked to find a special verdict. The case was subsequently argued before ten of the judges, but no judgment was given. 'It is said that the judges held it to be manslaughter only.'* *Adey*, Lea. 206, 1779; East P. C. 329, *n*.

After *Allen and others*, 1867: Manchester Special Commission, convicted of murder for shooting a police officer, in an attempt to rescue prisoners, the law was stated by Blackburn J. (and Mellor J.), after consulting the other judges, thus:—

'When a constable, or other person properly authorised, acts in the execution of his duty, the law casts a peculiar protection around him, and consequently, if he is killed in the execution of his duty, it is in general murder, even though there be such circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. But where the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and consequently the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation.

The cases . . . cited [mostly those above] are authorities . . . where the affray is sudden and not premeditated . . . the mere fact that the arrest was not warranted may be a sufficient provocation. . . . In the present case the form of warrants adopted . . . probably might on application to the Court for a writ of *habeas*, have entitled the prisoners to be discharged from custody . . . [Here] however, it was clearly proved that there was on the part of the convicts a deliberate, pre-arranged conspiracy to attack the police with fire-arms and shoot them, if necessary, for the purpose of rescuing the two prisoners . . . it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it would justify the slaughter of an officer . . . or reduce such slaughter to . . . manslaughter.' Stephen's Dig. of Cr. Law, 421, 5th ed., who adds, *ib.* p. 189, 'it would have made no difference if they had known of the irregularity of the warrant'; they did not in fact know it.

Interest of the third person] Although a distinction may exist 'between the cases of servants and friends, and that of a mere stranger, yet . . . the limits between both are nowhere accurately defined. And, after all, the nearer or more remote connexion of the parties with each other seems more' to affect the '*force* of the provocation, and the motive of' the interference, than to furnish 'any precise rule of law, grounded on such a distinction.' East P. C. 292.

* *No warrant*] See *Sattler* and *per* Blackburn J. above. In *Sherriff*, 1903, it was doubtful whether arrest without even a search-warrant, under 24-5 V. 96, 103, was legal; verdict, manslaughter.

Police, &c. must be known as such] 'With regard to such ministers of justice who, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots or affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties concerned should have some notice with what intent they interpose; otherwise the persons engaged may, in the heat and bustle of an affray, imagine that they came to take a part in it.

But, in these cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer in any other manner declare with what intent he interposeth. Or if the officer be within his proper district, and known or but generally acknowledged to bear the office he assumeth, the law will presume that the party killing had due notice of his intent, especially if it be in the day-time. In the night some farther notification is necessary, and commanding the peace, or using words of the like import notifying his business will be sufficient.' Foster, 310, 320. Cf. *Forbes*, 1865.

A constable, 'sworn in the leet where all resiants [residents] are to attend,' is presumed to be known to all the inhabitants of his district: 1 Hale P. C. 460, 461; and such a constable or bailiff in making the arrest, is not bound to show his warrant (note: *i.e.* his warrant of *appointment*), 'and a private bailiff need not show his warrant upon the arrest till the party arrested demand it.' *Ib.* 458. 'A justice may for a matter within his jurisdiction issue his warrant to a private person, as servant; but then such person must shew his warrant or signify the contents of it. 14 H. 8, 16 *a*.' *ib.* 459. But if 'it be a private bailiff, either the party must know, or there must be some notification thereof,' *Mackalley*. *Ib.* 461. And in the night-time, some notification would be necessary in the case of a leet constable. But whether in the day or night, it is sufficient if he declares himself to be the constable, or commands the peace in the king's name. *Ib.* 461.

In *Curtis*, 1756, where a warrant had been obtained by 'very unwarrantable practice' on the part of one bailiff, and 'perjury' on that of another, and one of their assistants was killed, 'The nine judges were of opinion that no precise form of words was required in a case of this kind. It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority . . . it will be no excuse on his [the resister's] part to say that he did not know or believe that the officer came armed with a proper authority. . . . The [two] judges who differed thought that the officers ought to have declared in an explicit manner what sort of warrant they had. They said that an escape doth not *ex vi termini*, nor in the notion of law, imply any degree of force or breach of the peace; and consequently the prisoner had not due notice that they came under the authority of a warrant grounded on a breach of the peace; and for want of this due notice the officers are not to be considered as acting in discharge of their duty, but as mere trespassers.' Foster, 137.

For special constables and bystanders aiding, see above.

Killing in arrest] 'If a person having actually committed a felony will not suffer himself to be arrested, but stand on his own defence, or flies, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them.' Hawk. P. C. 1, 28, 11.

Actual felony] 'Where a felony [but not in any other case] is committed, and the felon fleeth from justice, or a dangerous wound is given, it is the duty of every man to use his best endeavours for preventing an escape; and if, in the pursuit, the party fleeing is killed, *where he cannot be otherwise overtaken*,' it is 'justifiable homicide.' Foster, 271, after 1 Hale P. C. 481.

* *Suspicion*] 'If an innocent person be indicted of a felony, where, in truth, no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose, he may be lawfully killed by him, if he cannot otherwise be taken; for there is a charge against him upon record, to which at his peril he is bound to answer.' Hawk. *ib.* s. 12. In this respect an officer *without a warrant* is in a different position to that of a private man, to whom 'the law does not hold out the same indemnity.' East P. C. 300.

Bare suspicion of guilt, though a felony has actually been committed, will not warrant killing in arrest, nor even breaking open the outward door of a house by a peace officer *without a warrant*. Foster, 136-7, 318, 320-1. However, according to Hale, an officer would be justified in killing the suspected person if he fly. 2 Hale P. C. 84, 85. Cf. *Dadson,* 1850; and for private persons (gamekeepers) arresting, cf. *Ball,* 1832.

Civil process—misdemeanours] Arrests for misdemeanours and in civil proceedings are on the same footing, in that the rule is not so severe. Foster, 271, following 1 Hale P. C. 481, but amending ('if the officer pursues, and kills, it is murder').—'Rather . . . it will be murder or manslaughter, as circumstances may vary the case; for if the officer, in the heat of the pursuit, and merely in order to overtake the defendant ['a lawful prey'], should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon *not likely to kill,* and death should unhappily ensue, I cannot think that this will amount to more than manslaughter, if in some cases even to that offence. . . . But had he made use of a deadly weapon, it would have amounted to murder.' Foster, *ib.*

Riots] See that title. 'If those who are engaged in a riot, or a forcible entry, or detainer, stand in their defence, and continue the force in opposition to the command of a justice of peace, &c., or resist such justice endeavouring to arrest them, the killing of them may be justified; and so perhaps may the killing of dangerous rioters by any private persons, who cannot otherwise suppress them or defend themselves from them.' Hawk. P. C. 1, 28, 14.

Retreat—police—others] 'Regularly' to excuse killing in self-defence, the killer must 'fly as far as he may to avoid the violence of the assault before he turn upon his assailant'; but a gaoler, 'sheriff or his minister,' constable or watchman, if assaulted in the execution of his office, 'is not bound to give back to the wall; but if he kills the assailant, it is in law adjudged *se defendendo*.' But *unnecessary* violence may amount to murder. 1 Hale P. C. 481. So in civil process. Hawk. P. C. 1, 28, ss. 17, 18, as above. 'But though it be not necessary that the officer should retreat at all, yet he ought not to come to extremities' if he can avoid it. A collector, distraining, laid hold of a maidservant who purposely obstructed him, and beat her so that she died; the court held her opposition to be a sufficient provocation to extenuate the homicide; but they were clear that he was guilty of manslaughter in so far exceeding the necessity. East P. C. 297, citing *Gosse,* Ventr. 216, 1673.

Breaking in] There must always be 'notification, demand, and refusal' first. Foster, 320; Hawk. P. C. 2, 14, 1.

Where one known to have actually committed a felony, or given a dangerous wound is pursued, any one may break in, even without a

warrant; it seems that mere suspicion of felony when there is no indictment will not justify this. Foster, 321; Hawk. *ib.;* but there was an opinion 'by the book of 13 E. 4, 9 *a*,' that mere suspicion justified this course by a constable without a warrant after refusal to open: 1 Hale P. C. 583; 2 *Ib.* 92.

An authorised person is justified in breaking in on a *capias*, grounded on an indictment for any crime whatever, or on one to compel one to find sureties for the peace (apparently) by whomever issued. Hawk. P. C. 2, 14, 3. So on a *capias utlagatum*, or *pro fine*, 'or other process for the king'; 1 Hale P. C. 459; or on an *habere facias possessionem; ib.* 458; or on the warrant of a justice for levying a forfeiture in execution of a judgment or conviction; Hawk. *ib.* ss. 3-5; or on a writ of attachment for contempt of court (of a punitive nature). *Harvey* v. *Harvey*, 26 Ch. D. 664, 1884; but not in a merely civil process. *Ib.*

'If there be an affray in the house where the doors are shut, whereby there is likely to be manslaughter or bloodshed committed, the constable of the vill having notice thereof and demanding entrance, if they *within* refuse to do it, but continue the affray, may break open the doors to keep the peace, and prevent the danger.' 2 Hale P. C. 95. So where he immediately pursues the affrayers, Hawk. P. C. 2, 14, 8; *ib.* 1, 63, 16. And 'if there be disorderly drinking or noise in an house at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder; and this is constantly used in London and Middlesex.' Hale, *ib.;* East P. C. 322. But it has been doubted whether a constable can safely break open doors in such a case without a magistrate's warrant; 'at least, it should seem, there must be some circumstances of extraordinary violence in the affray to justify him in so doing.' 1 Russ. Cri. 6th ed. 590 *n.*

'In civil suits the officer cannot justify the breaking open an outward door or window to execute the process; if he do, he is a trespasser, and consequently cannot be deemed acting in discharge of his duty. In such case, therefore, if the occupier resist the officer, and in the struggle kill him, it is only manslaughter. For every man's house is his castle for safety and repose for himself and his family.' Where this happened, it was ruled: 1. That it is not murder, because he cannot break the house to arrest. 2. But it was manslaughter, 'because he knew him to be a bailiff.' But 3. 'Had he not known him to be a bailiff, or one who came upon that business, it had been no felony because done in [defense of] his house.' *Cook*, 1 Hale P. C. 458; Cro. Car. 537; W. Jones, 429, 1640; 1 East, 321. 'This last instance,' in contrast with the 2nd, 'must be understood to include at least a reasonable ground of suspicion that the party broke the house with a felonious intent; and that the party did not know . . . nor had no reason to believe that it was merely as a trespasser with a different intent.' East, *ib.*

The privilege is confined to the *outer doors* and windows only—for if the officer enter by an open outer door, he 'may break open the inward doors, tho the process be without a *non omittas* [a clause empowering the sheriff to enter where otherwise he would have no authority], and therefore the killing of him in such case is murder.' 1 Hale P. C. 458; East, 323. If the person whom the officer is about to arrest, or the goods which he is about to seize, be within the house at the time, he may, once being in, break open any inner doors to

search for him or them, without demanding admission. *Hutchinson* v. *Birch, &c.* (sheriffs of London), 4 Taunt. 619, 1812. But it seems that if the person be not within the house at the time, the officer acting under civil process must demand admittance before he will be justified in breaking an inner door. *Ratcliffe* v. *Burton,* 3 B. & P. 223, 1802. But if the house be that of a *stranger,* the justification of the officer will depend on his finding the goods there in fact—provided the door is open. *Cooke* v. *Birt* (sheriff of Surrey), 5 Taunt. 765, 1814; or on his finding the person, *Johnson* v. *Leigh* (a sheriff), 6 Taunt. 246, 1815. An officer attempting to attach defendant's goods in his house, put his hand over the lower hatch (of an outer door), which was closed, the higher being open. A struggle ensued, but the officer got into the shop, when defendant shot him, and this was held murder; no question was raised about breaking an outer door, but only about the legality of the process. *Baker,* 1 Lea. 112, 1775; East, 323. See further *Crabtree* v. *Robinson,* and cf. *Long* v. *Clarke,* 1894, 1 Q. B. 119: C. A.; and other cases under *Semayne's case,* 5 Coke 91, 1604, in 1 Smith's L. C.

'If a stranger, whose ordinary residence is elsewhere, upon a pursuit taketh refuge in the house of another, this is not *his* castle, he cannot claim the benefit of sanctuary in it.' Foster, 320, 321; East, 323, who adds that this must be subject to the officer breaking in doing so at his peril—'unless, as it seems, where the parties act under a magistrate's warrant.' The last words cited from East may now be taken to refer to the various search-warrants for persons or things, for which see under *Apprehension.*

Fresh pursuit] 'This privilege [of the householder] is also confined to arrests *in the first instance;* for if a man who is legally arrested (and laying hold of the prisoner, and pronouncing words of arrest, is an actual arrest) escape from the officer, and take shelter, though in his own house, the officer may, upon fresh pursuit, break open the door, in order to retake him, having first given due notice of his business, and demanded admission, and been refused.' Foster, 320; East, 324. 'If it be not, however, upon fresh pursuit, it seems that the officer should have a warrant from a magistrate.' East, *ib.*, cf. 1 Hale P. C. 459.

Resistance—degree] Even where resistance is lawful, unnecessary violence must not be used. *Curtis,* 1756, being in the house of Cowling, who had made his escape from arrest, swore, when the officers arrived with assistants to take Cowling, that the first person who entered to retake him should be a dead man, and, immediately on the officers breaking open the door, struck an assistant with an axe and killed him. This was held murder (by nine to two, who thought it was manslaughter), and a few of the judges were of opinion, that even if the officers could not have justified breaking open the door, yet that it would still have been so, for at the worst they had committed a bare trespass in the house of Cowling, without any attempt on the property or person of Curtis; and admitting that a trespass in the house, with an attempt to make an unjustifiable arrest of the owner, could be considered as some provocation to a bystander, yet 'the knocking a man's brains out, or cleaving him down with an ax, on so slight a provocation, savoureth rather of brutal rage, or, to speak more properly, of diabolical mischief, than of human frailty. And it ought always to be remembered, that in all cases of homicide upon

sudden provocation, the law indulgeth to human frailty, *and to that alone*.' So the fact that *Stockley*, 1772, deliberately resolved on shooting W., in case he offered to arrest him again, was (East suggests, in view of *Curtis*, above), sufficient of itself to warrant a conviction for murder.

Notification] When 'a bailiff, having a warrant to arrest a man, pressed early into his chamber with violence, but not mentioning his business, nor the man knowing him to be a bailiff, nor that he came to make an arrest, snatched down a sword that hanged in his chamber, and stabbed the bailiff, whereof he presently died'; this was held, 'with some diversity of opinion,' not to be murder, 'for the prisoner did not know but that the party came in to rob or kill him, when he thus violently broke into his chamber without declaring his business.' *Anon.*, 1657, 1 Hale P. C. 470. See *Cook*, 1640, above, where the bailiff had no right to break the house, on the particular process, and Cook threatened to shoot him, before he did so.

In *Thomson*, 1 Moo. C. C. 80, 1825, where the officer was about to make an arrest (practically without any charge), a majority of the judges, who thought that had death ensued from his attack it would not have been murder, relied on the fact that defendant was in such a situation that he could not get away, and held a conviction for intent to murder, for which he had been sentenced to death, wrong. To the same effect is *Curvan*, 1826. Cf. *Curtis*, above, and *Stockley*.

Rescue—legal arrest] See that title. If the arrested person yield himself and make no resistance, 'but others endeavour to rescue him, and he doth no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, this is murder in them, but not in the party arrested'; otherwise, if he do any act to countenance the violence of the rescuers, *e.g.* first attempt his own rescue. *Stanley*, Kel. 86; 1 Sid. 159, 1664. *Jackson* and four other robbers being pursued by the hue and cry, Jackson, the rest being in the same field and refusing to yield, turned on his pursuers and killed one of them. By five judges this was held murder, and inasmuch as they all were of a company, and made a common resistance, and one animated the others, though at a distance from Jackson, they were all principals, viz. aiders, &c.,

Hue and cry] Arrest on hue and cry is good, though there be no warrant, if a felony has been actually committed (at any rate, by the pursued). They also resolved that one of the gang who was taken before the deceased was hurt, and was therefore in custody when the stroke was given, was not guilty, unless it could be proved that after his apprehension he had urged on Jackson: all guilty of robbery, and four of murder: 1675. 1 Hale P. C. 464.

Interference of third person] It is for the jury to determine for what purpose the third person intervened. If he interfered for the purpose of rescuing the arrested person, it would be murder, but if 'not knowing the bailiff, but intending to preserve the peace and prevent mischief,' it may, perhaps, not amount to murder. East 318, on *Stanley*, 1664, above.

A constable was killed in repressing a riot. Several defendants all used violence in different ways, some by beating him with sticks, some by throwing stones, &c. Alderson B. told the jury to

consider whether they all had the common intent of attacking the constables; 'if so, each of them is responsible for all the acts of all the others done for that purpose; and if all the acts done by each *if done by one man,* would together shew such violence, and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such a purpose, you ought to find the prisoners guilty only of manslaughter,' which they did. *Macklin,* 2 Lew. C. C. 225, 1838. The foregoing principles were illustrated by cases on the impressment of seamen, a practice now obsolete, though not abolished by law. See *Phillips,* Cowp. 830, 1778; *Broadfoot,* Foster C. C. 154, 1743; *Dixon,* East P. C. 308, 313, 1756; *Borthwick,* 1 Dougl. 207, 1779.

Order of superiors] See *Coercion,* above. The orders to a sentinel on board H.M.S. *Achille* from the preceding sentinel were to keep off all boats, unless they had officers in uniform in them, or unless the officer on deck allowed them to approach, and he received a musket, blank cartridges, and three balls. He called on some boats pressing forwards repeatedly to stop; but one persisted, and came close under. He then fired at a man who was in the boat, and killed him. The jury found that he fired under the mistaken impression that it was his duty. The judges nevertheless resolved unanimously that it was murder. They thought it, however, a proper case for pardon; and further, they were of opinion that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified. *Thomas,* 1 Russ. Cri. 813, 1816; see 4 M. & S. 441. On this case, Professor Dicey observes that it illustrates curiously the position of a soldier. 'The judgment of the court rests upon and illustrates the incontrovertible principle of the common law that the fact of a person being a soldier and of his acting strictly under orders, does not of itself exempt him from criminal liability for acts which would be crimes if done by a civilian.' The Law of the Constitution, Pt. 2, ch. 9, p. 298, note 4, 8th ed. 'When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence.'

The same writer deals *ib.* with the possible conflict between the duties of a soldier [or sailor] as a military [or naval] person and as a citizen thus:—'During a riot an officer orders his soldiers to fire upon rioters. The command to fire is justified by the fact that no less energetic course of action would be sufficient to put down the disturbance. The soldiers are, under these circumstances, clearly bound from a legal, as well as from a military point of view, to obey the command of their officer. It is a lawful order, and the men who carry it out are performing their duty both as soldiers and citizens.

An officer orders his soldiers in a time of political excitement then and there to arrest and shoot without trial a popular leader against whom no crime has been proved, but who is suspected of treasonable designs. In such a case there is (it is conceived) no doubt that the soldiers who obey, no less than the officer who gives the command, are guilty of murder. . . . In such an extreme instance as this the duty of soldiers is, even at the risk of disobeying their superior, to obey the law of the land.

An officer orders his men to fire on a crowd who he thinks could not be dispersed without the use of firearms. As a matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be used. The

order, therefore, to fire is not in itself a lawful order, that is, the . . . officer who gives it is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms. What is, from a legal point of view, the duty of the soldiers? The matter is one which has never been absolutely decided,' but Professor Dicey adopts the answer given by Stephen J. (1 Hist. Crim. Law, pp. 204-6; add Dig. Crim. Law Art. 219) as embodying the authorities. The effect of that passage is 'that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds,' but not otherwise.

Professor Dicey also cites (*ib.* App. *note* 6) 'an almost judicial statement of the law as to the duty of soldiers when called upon to disperse a mob' in the Report of the Committee (L. Bowen L.J., Haldane Q.C., and Sir A. K. Rollit, a solicitor) on the Featherstone Riots, 1893 (Parl. Paper, Co.—7234), in which the following passage occurs (p. 10): 'The question whether, on any occasion, the moment has come for firing upon a mob of rioters depends . . . on the necessities of the case. Such firing to be lawful must, in the case of a riot like the present, be necessary to stop or prevent such serious and violent crime as we have alluded to; and it must be conducted without recklessness or negligence. When the need is clear the soldier's duty is to fire with all reasonable caution so as to produce no further injury than what is absolutely wanted for the purpose of protecting person and property. An order from the magistrate who is present is required by military regulations. . . . But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists. With the above doctrines of English law the Riot Act does not interfere.'

That superior orders will not excuse 'an extreme' illegality was laid down by Bridgman C.J. on the trial of *Axtell*, for treason, in commanding the troops at the trial of Charles I., &c.: 5 St. Tr. 1174, 1660. See under *Treason*. Cf. *Jones*, 1837.

Naval assistance in riots is regulated by the Admiralty Instructions, art. 441. See *Stephens*, &c., on Naval Law, p. 377, 1901; cf. *Marks* v. *Frogley*.

* *Defence of person or property*] See *Force* and *Self-defence* in Index.

For mere trespass on property, see *Provocation*, above, and East P. C. 288. Deadly weapons must not be used to prevent trespass. Captain Moir discharged a gun at a person who persisted in trespassing on his land, and the man died. He had gone home for pistols on seeing the trespasser, and angry words passed. He was found guilty of murder and executed. *Moir*, 1828, cited in *Price*, 7 C. & P. 178, 1835.

'If A., in defence of his house, kill B., a trespasser, who endeavours to make an entry upon it, it is at least common manslaughter, unless indeed there were danger of his life. But if B. had entered into the house, and A. had gently laid his hands upon him to turn him out, and then B. had turned upon him and assaulted him, and A. had killed him (not being otherwise able to avoid the assault, or retain his lawful possession) it would have been in self-defence. So it had been if B. had entered upon him, and assaulted him first, though his

entry were not with intent to murder him, but only as a trespasser, to gain the possession. In such case, A. being in his own house, need not fly as far as he can, as in other cases of self-defence; for he has the protection of his house to excuse him from flying; as that would be to give up the possession of his house to his adversary by his flight. But in these cases the homicide is excusable rather than justifiable.' East P. C. 287, citing 1 Hale P. C. 445, 485; and *Cook*, 1640.

A publican refused to serve two men owing to the lateness of the hour. Later one returned, got in and collared the publican, who still refused and struggled to put him out, where the other outside struck him with a sharp instrument which killed him. Buller J. held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them; 'for the landlord did no more . . . after the warning . . . than he lawfully might; which was no provocation for the cruel revenge taken, more especially as there was reasonable evidence of the prisoners having come a second time, with a deliberate intention to use personal violence, in case their demand for beer was not complied with.' *Willoughby*, East P. C. 288, 1791. Cf. *Archer*, 1857.

Several of the foregoing points are illustrated by *Meade*. He had made himself obnoxious to boatmen by giving information of certain smuggling transactions. They, in revenge, ducked him, and he was rescued by the police. Then they threatened that they would come and pull his house down at night, and at midnight a great number did come about his house, with noise and threatening and violent language; he, in fear, as he alleged, that his life and property were in danger, fired a pistol, by which one of them was killed. Holroyd J. said, 'A *civil trespass* will not excuse the firing a pistol at a trespasser in sudden resentment or anger. If a person takes *forcible possession* of another man's close, so as to be guilty of *a breach of the peace*, it is more than a trespass. So if a man with force invades and enters into the *dwelling* of another. But a man is not authorised to fire a pistol on every intrusion or invasion of his house. He ought, if he has a reasonable opportunity, to endeavour to remove himself without having recourse to the last extremity. But the making an attack upon a dwelling, especially *at night*, the law regards as equivalent to an *assault* on a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault; but no *words* or *singing* are equivalent to an assault, nor will they authorise an assault in return. If . . . there was nothing but the *song*, and no appearance of further violence—if . . . there was no reasonable ground for apprehending further danger, but . . . the pistol was fired for the purpose of *killing*, then it is murder.' Verdict, manslaughter. *Meade*, 1 Lew. C. C. 184, 1823.

Self-preservation] is a form of self-defence. Dudley and Stephens, another seaman (not indicted), and the deceased, a boy of about seventeen, were wrecked on the high seas, and compelled to put into an open boat, in which they drifted for 20 days. On the twentieth day, when they had all been many days without food or drink, and the boy especially was *in extremis*, Dudley, with the assent of Stephens (but not of the third man), killed the boy, and all lived on his flesh for four days. It was highly probable that otherwise they would all have died of starvation very soon. It was held by five judges of the Q. B. D. on these facts, found in a special verdict, that defendants

were guilty of murder: sentence was commuted to six months' imprisonment. *Dudley,* 1884. See *Necessity* in Appendix.

Abetting suicide] If A. persuade B. to kill himself, and B. do so, A. is guilty of murder; if, *e.g.,* B. takes poison in the absence of A., the persuader, yet A. is a principal in the murder. 1 Hale P. C. 431; citing *Vaux's case,* 1591; 4 Rep. 44 *a.* Indictment for the murder of a woman. Defendant stated that they had resolved to drown themselves; ultimately he found himself in the water, but whether by actually throwing himself in from a boat in which they both were, or by accident, did not appear; he got back into the boat, and found that she was gone; he endeavoured to save her, but could not. In his statement, which was read at the trial, he said he intended to drown himself, but dissuaded the woman from doing so. The judge told the jury that if they believed that he only intended to drown himself, they should acquit; but if they both went to the water for the purpose of drowning themselves, each encouraging the other to felony, the survivor was guilty of murder: also that if he was present at the time that she threw herself in, and consented to her doing it, the act was the act of both, and he would be guilty. They found that both went to the water for the purpose of drowning themselves, and he was convicted. The judges were clear that if deceased threw herself into the water with his encouragement, and through his example, as they had agreed, he was principal (in the second degree), and guilty of murder; but the fact was doubtful. *Dyson,* R. & R. 523, 1823. This was followed in *Alison,* a very similar case, where there was no suggestion of accident. (Another case, said, 1 Russ. Cri. 92 *q.*, to be *Anon.*, Fr. Moore, K. B. 754, in 1604, was cited): guilty; 8 C. & P. 418, 1838; and so *Jessop,* 16 Cox C. C. 204, 1877, where sentence of death was pronounced, but commuted. See *Fretwell,* 1862.

Accessories] See *Aiders, &c.*, above. To the general rule that principals in the second degree 'must be present at the perpetration' there are some exceptions 'founded in necessity and political justice.' Foster, 349, citing Kel. 52-3, and 1 Hale P. C. 616. 'A. with intention to destroy B. layeth poison properly disguised in his way. B. taketh it and dieth. A., though absent when the poison was taken, is a principal; and if this had been done at the instigation of C., he if absent would have been no more than an accessory in the murder, unless they had both mingled' it and laid it in B.'s way, in which case both would have been principals. But if the intermediary *innocently* administer the poison as a medicine on A.'s instructions, A., though absent, is a principal 'upon the same foot of necessity.' *Ib.* Cf. *Michael,* 1840. See, generally, *Common Design,* above.

After the fact] By 24-5 V. 100, 67: 'Every accessory after the fact to murder shall be liable at the discretion of the court to be kept in penal servitude for life.' A form of indictment will be found p. 92.

Wife] cannot set up *coercion* by husband in *Murder:* see Part III.

* *Direction*] The jury must be directed whether provocation or drunkenness is sufficient in any case to reduce to manslaughter. *Mowbray,* 8 Cr. A. R. 8, 1912.

* *Verdict*] See under *Manslaughter.*

MURDER, ATTEMPTED.

See *Attempts*, including *Attempted Suicide*.

Intent] By 24-5 V. 100, 11: 'Whosover shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing, or shall by any means whatsoever wound or cause any grievous bodily harm to any person with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life.'

Destroying, &c. building, ship, with that intent] See 24-5 V. 100, 12: by s. 13, 'Whosoever shall set fire to any ship or vessel or any part thereof, or any part of the tackle, apparel or furniture thereof, or any goods or chattels being therein, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be . . .' Conclusion as in s. 11, above.

Attempt] By s. 14: 'Whosoever shall attempt to administer to or shall attempt to cause to be administered to or to be taken by any person any poison or other destructive thing or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person or shall attempt to drown, suffocate, or strangle any person, with intent in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty . . .' Conclusion as in s. 11, above.

Otherwise than in preceding ss.] By s. 15: 'Whosoever shall by any means other than those specified in any of the preceding sections [above] of this Act, attempt to commit murder, shall be . . .' Conclusion as in s. 11.

Acquittal of murder] was no bar to an indictment for the attempt under 7 W. 4 & 1 V. 85, 3, 5, rpd., but of the same effect as ss. 11-14, above. *Connell*, 6 Cox C. C. 178, 1853: *per* Williams and Talfourd JJ., though such a verdict could have been found under 14-5 V. 100, 9.

Loaded arms] See s. 19.

Intent and attempt] Any one of a series of acts the final object of which is to kill, as *e.g.* in slow poisoning, is an attempt. *John White*, 1910, 2 K. B. 124; 79 L. J. K. B. 854; 74 J. P. 318; 22 Cox C. C. 325; 26 T. L. R. 466; 4 Cr. A. R. 257.

A dictum to the contrary effect in *Linneker*, below, was doubted, viz. 'although an attempt implies the intent, an intent does not necessarily imply an attempt.'

Proof] The same judge who thought that there must be a positive intention to murder, and that it is not enough that if death had taken place it would have been murder, in *Cruse*, 1838, which was under 1 V. 85, 2, rpd., doubted it in *Jones*, 9 C. & P. 258, 1840, and held that the intent might be inferred, if it would have been murder, had death ensued.

For shooting at A. (supposed to be B.) with intent to murder B., and similar cases, see under *Grievous Bodily Harm.*

Indictment under s. 14, above, for attempting to discharge a loaded pistol at S. with intent to murder him. Defendant, having a grudge against S., went to his house and drew a loaded pistol from his pocket, but it was instantaneously snatched out of his hand. Stephen J. held there was no evidence to go to the jury of any offence under s. 14, considering himself bound by *St. George* (overruled), where 'it was held that the words 'by drawing a trigger, or in any other manner,' meant in any other manner like drawing a trigger, as, *e.g.* by striking a percussion-cap with a hammer, and that an attempt to discharge a pistol by attempting to pull a trigger was not an offence within' these words. The only question reserved being whether there was an offence within s. 15, the C. for C. C. R. held that there was not, for s. 15 pointed to 'means' other than those mentioned in the earlier ss. But they clearly thought the case was within s. 14. *Brown,* 10 Q. B. D. 381; 52 L. J. M. C. 49; 15 Cox C. C. 199, 1883: C. C. R. See *Duckworth,* 1892. In a case very similar to *Brown,* where defendant avowed his intention to kill, the C. for C. C. R. held that it was within s. 18 as well as s. 14, though no trigger was drawn, the struggle to get the revolver having been successful. *Linneker,* 1906, 2 K. B. 99; 21 Cox C. C. 196.

Common design] of resistance to apprehension to the point of murder may be inferred where two poachers go together, one armed with a gun, and one with a stick, and the former fires, though the jury cannot say which was the one: sentence on the one who did not fire should be lighter: *Pridmore,* 77 J. P. 339; 29 T. L. R. 330; 8 Cr. A. R. 198, 1913.

Direction] The jury should be informed that they may on indictment, under s. 11, find 'unlawful wounding': *J. T. Parks,* 1914: verdict varied.

Sentence] S. 9 of 14-5 V. 100 does not prevent sentence under ss. 11-15, above, though, before the latter ss. were enacted, the 'attempt' mentioned in s. 9 must have been a common law crime: *J. White,* above.

The C. C. A. increased a term of penal servitude from twelve to fifteen years: *W. Simpson,* 5 Cr. A. R. 217; 75 J. P. 56, 1910.

The C. C. A. expressed the opinion that on trials of this sort defendant should have counsel: *T. Saunders,* 3 Cr. A. R. 227, 1909.

MUTILATION OF ANIMALS.

See *Animals* and *Cattle.*

MUTINY AND MILITARY AND NAVAL OFFENCES.

Mutiny is one of the many offences which only persons subject to military and naval law can commit.

That law is contained—

I. In the Army A. 1881, 44-5 V. 58, as replaced by 'Army (Annual) Acts' and as amended from time to time; and

II. In the Naval Discipline Acts, 1866, 29-30 V. 109; 1884, 47-8 V. 39; 1909, 9 E. 7, 41; 1915, 5-6 G. 5, cc. 30, 73.

I. *Army*] Some 'civil' offences, if committed by military persons, are triable by court-martial; but by proviso to s. 41 of 44-5 V. 58: '(*a*) A person subject to military law shall not be tried by court-martial for treason, murder, manslaughter, treason-felony or rape committed in any place within Her Majesty's dominions, other than the United Kingdom and Gibraltar, unless such person at the time he committed the offence was on active service or such place is more than one hundred miles as measured in a straight line from any city or town in which the offender can be tried for such offence by a competent civil court.

(*b*) A person subject to military law when in Her Majesty's dominions may be tried by any competent civil court for any offence for which he would be triable if he were not subject to military law.'

S. 162 (1) provides that the ordinary courts, in punishing, for an offence already punished by a court-martial, may take that punishment into consideration. See *Marks* v. *Frogley*, 1898, 1 Q. B. 888; 67 L. J. Q. B. 605; 78 L. T. 607; 19 Cox C. C. 92: C. A.

By (3), a commanding officer not delivering up to the civilian ministers of justice of any grade anyone under him properly claimed or not assisting the former in apprehending is guilty of a misdemeanour: by (4), a certificate of such conviction, with the judgment, must be sent to the Secretary of State.

Evidence] excluded by the Regulations from a court-martial, *e.g.* a confession or disclosure, may be admissible in a civil court: *Colpus, &c.*

Venue] By (5): 'Any offence committed by any such commanding officer out of the United Kingdom shall for the purpose of apprehension trial and punishment of the offender be deemed to have been committed within the jurisdiction of Her Majesty's High Court of Justice in England; and such court shall have jurisdiction as if the place where the offence was committed or the offender may be for the time being were in England.'

By 25-6 V. 65, 1, 3, where one person 'subject . . . to the Mutiny Act' is charged with the murder or manslaughter of another, the Q. B. may on the application of the War Secretary order the trial to take place at the Central Criminal Court.

Sentence by court-martial] A military person legally sent from India to finish his term of imprisonment in an English prison, which was not nominated, was released by the Q. B. on *habeas corpus* from 'the Queen's Prison': *Re Allen,* 3 E. & E. 358, 1860.

Articles of War] These and the Mutiny A. are now consolidated in the Army A. (s. 69); Manual of Military Law (War Office, 1914), p. 14. See, generally, *Navy,* below.

II. *Navy*] By 29-30 V. 109, 10, mutiny with violence, and failure to use one's 'utmost exertions to suppress such mutiny,' combined with acting traitorously, are punishable with death, and severe penalties are awarded for acting 'from cowardice' or with negligence during such a mutiny. By s. 11, where the mutiny is not accompanied by violence, the ringleaders are punishable with death, and those who join in or do not endeavour to suppress such mutiny are punishable with imprisonment, &c. The punishment for striking or attempting to strike superior officers may be death (s. 16), and insubordination and desertion are severely dealt with (ss. 17, 19).

Articles of War] are Part I. of 29-30 V. 109. See, generally, *Stephen's* Manual of Naval Law, 1912.

By s. 101: 'Nothing in this Act contained shall be deemed or taken to supersede or affect the authority or power of any court or tribunal of ordinary civil or criminal jurisdiction or any officer thereof in Her Majesty's dominions in respect of any offence mentioned in this Act which may be punishable or cognizable by the common or statute law or to prevent any person being proceeded against and punished in respect of any such offence otherwise than under this Act.'

By s. 87: 'Every person in or belonging to Her Majesty's navy and borne on the books of any one of Her Majesty's ships in commission shall be subject to this Act; and all other persons hereby made liable thereto shall be triable and punishable under' this A.

Concealment] By s. 15, every person subject to this A. wilfully concealing 'any traitorous or mutinous practice or design or . . . words spoken against Her Majesty . . . or tending to the hindrance of the service' is punishable.

See also *Inciting.*

Escape] See *Rescue.*

Superior orders] See under *Murder.*

NEGLECT OR NEGLIGENCE OF AND BY CERTAIN PERSONS.

See various titles. Negligence 'is a phrase constantly used in criminal cases, but the amount of negligence that would make a man so responsible cannot be defined. It is not a little failure of duty that would make him criminally responsible; a great failure of duty undoubtedly would. The line between the two is hard to define and must be left to a very great extent in each individual case to the common sense of the jury . . . that is what I understand to be laid down by' the K. B. in *Pinney,* 1832: *per* Blackburn J., *Eyre,* Finlason's Report, 57, 1868.

NEGOTIABLE INSTRUMENTS, OFFENCES RELATING TO.

See Index.

NOXIOUS DRUGS, ETC., ABUSE OF.

See *Abortion, Poisoning,* &c.

NUISANCE.

A. General Rules.

'Public or common nusances are such inconvenient or troublesome offences as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable, as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow subjects.' 4 Bl. Com. 167. It may be both indictable and actionable. *Rose* v. *Graves,* 5 M. & Gr. 613, 1843; *Fritz* v. *Hobson.*

What the legislature declares to be a public nuisance is indictable as such. *Gregory,* 5 B. & Ad. 555; 8 Cox C. C. 375, 1833; *Crawshaw,* 9 W. R. 38, 1860: C. C. R. (lottery): no defence that accused did not know his system (of prizes) was a lottery.

It is now settled that the fact, that the thing complained of furnishes, upon the whole, a greater convenience to the public than it takes away is no answer to an indictment for a nuisance; see *Ward,* 1836; *A.-G.* v. *Horner, per* Cozens-Hardy M.R. and Buckley L.J.: 1913, 2 Ch. 171, 181, because the balance of convenience is for the Attorney-General to decide. Cf. *Morris,* 1830.

The nuisance must be appreciable: *Bartholomew,* 1908.

After an indictment by a private prosecutor the court will, against his will, allow any other person to go on with it: *Wood,* 3 B. & Ad. 657, 1832.

Public or private?] 'The very existence of the nuisance depends upon the number' of persons annoyed, and is a fact to be judged of by a jury. *White,* 1 Burr. 337, 1757, below. Thus where a tinman was indicted by attornies for the noise made by him in carrying on his trade, and it appeared that it only affected the inhabitants of three numbers in Clifford's Inn, and that it might be in great measure prevented by shutting the windows, L. Ellenborough ruled that the indictment could not be maintained, as the annoyance, if anything, was a private nuisance. *Lloyd,* 4 Esp. 200, 1802. So leaving unburied children's bodies, to the detriment of *one* house: counts quashed: *Byers,* 1907. But a nuisance (*e.g.* a tannery for dipping stinking hides) near the highway and several houses, whereby the air thereabouts is corrupted, is public. *Pappineau,* 2 Str. 686, 1726. So discharging firearms (which title see) in public.

Making great noises in the night, with a speaking-trumpet, has been held to be an indictable offence, if done to the disturbance of the neighbourhood. *Smith,* 2 Str. 704, 1726: fined 5*l.* So there is a precedent of indictment for keeping dogs, which make noises in the night. 3 Chitty's Cr. Law, 647.

So, too, the keeping of swine in London is not only a nuisance by 2 W. & M. sess. 2, c. 8, s. 20 (which forfeits them for the benefit of the poor), but also at common law. *Ib.*, and *Wigg,* 2 L. Raym.

1163, 1706, where it was laid down as a rule never to quash indictments for nuisances. For pigs, see *Att.-Gen.* v. *Squire*, 5 Loc. Gov. R. 99, 1906.

Degree] It is a matter of some difficulty to define the degree of annoyance that constitutes a public nuisance. On an indictment for making great quantities of offensive liquors, oil of vitriol, &c., near the king's highway, it appeared that 'the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick and gave them head-achs.' It was held, that it was 'not necessary that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable.' *White*, above. So Heath J. said that an offensive trade was only indictable, where it was 'either destructive to the general health of the inhabitants, or rendered their dwellings uncomfortable or untenantable.' *Davey*, 5 Esp. 217, 1805: smoke from coke ovens—acquittal. But it was ruled, by Abbott C.J. on the trade of a varnish maker, that it was not necessary that a public nuisance should be injurious to health; that if there were smells offensive to the senses, it was enough, as the neighbourhood had a right to pure and fresh air. *Neil*, 2 C. & P. 485, 1826.

The nuisance need not be actual; it is enough if there is a reasonable probability. *Lister*, 1857.

Time] 'No length of time will legitimate a nuisance'; and 'it is immaterial how long the practice may have prevailed': *per* L. Ellenborough C.J., *Cross*, 1812, and *Reed*, 1871. 'However twenty years' acquiescence may bind parties whose private rights only are affected yet the public have an interest in the suppression of public nusances, though of longer standing,' *per* L. Ellenborough C.J., *Weld* v. *Hornby*, 7 East 195, 1806. Thus though the stell fishery, of salmon with nets, across a river had been established for 'a vast number of years,' yet Buller J. held that it continued unlawful, and gave judgment that it should be abated: cited in *Cross*, above. So it is a public nuisance to place a wood-stack for fuel in a street before a house, though it is the ancient usage of the town, and leaves sufficient room for passengers, for 'the prescription to make a nuisance is not good.' *Fowler* v. *Sanders*, Cro. Jac. 446, 1618. In one case, however, L. Ellenborough ruled, that length of time and acquiescence might excuse what might otherwise be a common nuisance. On an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place, Rag Fair, had been used as a market for the sale of clothes for above twenty years. L. Ellenborough said, that after twenty years' acquiescence, and it appearing to all the world that there was a market or fair kept at the place, he could not hold a man to be criminal who came there under a belief that it was such a fair or market legally instituted. *Smith*, 4 Esp. 111, 1802.

Situation] Where the defendant set up the business of a melter of grease, &c., in a neighbourhood where other manufactories, 'which emitted disagreeable and noxious smells,' had been carried on for years, L. Kenyon thought that he was not liable to be indicted for a nuisance, unless the annoyance was *much* increased by the new manufactory: what has long been borne is consented to by the inhabitants, though, perhaps, they might have objected successfully, in time.

Neville, 1 Peake 125, 1792. So where a person *continued* a noxious trade which his father carried on in the same place for nearly fifty years. *Ib.* But this case, from which L. Campbell C.J. dissented in *Fairie*, seems hardly reconcilable with the doctrine, above, that no length of time can legalise a public nuisance, although it may supply an answer to a private action: 2 Russ. Cri. 1836 *w.*

The trade of a horse-boiler had been carried on for many years before defendants came to the premises; but its extent was much greater under them. For them, it was shown that the neighbourhood was full of noxious trades, and evidence was given of the trade being carried on in an improved manner: *Neville*, above, was relied upon. L. Tenterden observing that there was no doubt that this trade was in its nature a nuisance, adopted the doctrine in that case. He left it to the jury to say whether in consequence of the alleged improvements there was or not increase of annoyance. *Watts*, Moo. & Mal. N. P. C. 281, 1829. Where a paper manufacturer had been used to send the washings of rags into the plaintiff's riparian water, but found out a new way of making paper and discharged the refuse of a certain fibrous plant into the water, it was held that he could do so provided he did not increase the pollution of the river. *Baxendale* v. *McMurray*, L. R. 2 Ch. App. 790, 1867; see also *Ball* v. *Ray*, L. R. 8 Ch. App. 467, 1873.

If a noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within its reach, or if a public road be made so near it, that the trade becomes a nuisance to wayfarers, the trader is entitled to continue his trade, because it was legal *before;* but a statutory licence to keep a slaughterhouse does not entitle its continuance 'one hour after it becomes a nuisance to the neighbourhood': *per* Abbott C.J., *Cross*, 2 C. & P. 483, 1826.

In a noisy business in a trade district regard must be had to the nature and habits of the neighbourhood and to the pre-existing noises: *Rushmer* v. *Polsue and Alfieri*, 1907, A. C. 121: H. L.

Statutory authority] See *Highways*. The erection of a small-pox hospital was found by a jury to be a nuisance; and the H. L. held it was no answer to say that the defendant acted *bonâ fide* under the powers of a statute that did not directly and imperatively order the things complained of to be done. *Hill* v. *Met. Asylum Managers*, 6 Ap. Cas. 193; 50 L. J. H. L. 353, 1881.

B. Particular Instances.

Highways] See that title.

Railways] See *Pease*, 1832, for *statutory* cases. But where a proprietor, without the authority of an A., made a railway from his colliery to a seaport, on the turnpike way, which it narrowed in some places, so that there was not room for two carriages to pass, although he gave the public (paying a toll) the use of the railway, yet it was held that the facility thereby afforded—especially to coal traffic—was not such a convenience as justified the obstruction. *Morris*, 1830.

Steam-engines] Some nuisances are punished by 1-2 G. 4, 41. By s. 1, the court, in case of a conviction for the improper construction

or negligent use of furnaces of steam-engines, may award reasonable costs to the prosecutor. By s. 2, the court may make an order for preventing the nuisance in future *before* passing sentence. By s. 3, the Act does not extend to mines, ore-smelting, &c.

Certain trades] producing noxious and offensive smells, have been held nuisances when carried on in a populous neighbourhood, as making candles in a town by boiling stinking stuff, which annoys the whole neighbourhood. *Tohayle* (before 1639), cited Cro. Car. 510; but candle-making in a town was held not a nuisance in 1606, as candles were absolutely necessary, 2 Roll. Ab. 139—a view criticised by Hawk. P. C. 1, 75, 10, because there is no necessity to make them *in a town*, just as 'a brewhouse erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nusance; and so in the like case may a glasshouse or swineyard.' Cf. *Wigg*, 1706; and for a manufactory of vitriol, &c., *White*, 1757; and for a tannery, *Pappineau*, 1726. See *St. Helen's Co.* v. *Tipping*, 35 L. J. Q. B. 66, 1865: H. L.

Prospective danger] In *Lister*, D. & B. C. C. 209; 26 L. J. M. C. 196; 7 Cox C. C. 342, 1857, defendants were indicted for keeping, storing, &c. wood naphtha and spirits of wine in a warehouse in the City; the quantities were from 4,000 to 5,000 gallons of naphtha, and from 40,000 to 50,000 of spirits. The mixing the two together was carried on on the premises. Naphtha is more inflammable even than gunpowder, passing into vapour at a heat of 140° Fahr.; and, if inflamed, water would not extinguish it, except in enormous quantities. There was no dispute that a fire on these premises could not be quenched, and that the consequences would be very disastrous; but it was proved that no light of any kind whatsoever was ever allowed in the warehouse, and that without ignition the joint store was not dangerous. Ultimately fifteen judges agreed that, as from the nature and quantity of the substances, a real danger to the lives and property of the public was created, the defendants were indictable; and that the jury were entitled to consider the possibility of ignition from *without* the warehouse, and on all the facts together were warranted in finding defendants guilty.

Gunpowder] Several decisions were mentioned, in which it had been held that manufacturing or keeping large quantities of gunpowder in towns, or populous places, was indictable. See *Williams*, 1700, *Burn's* 'Justice,' Gunpowder; *Taylor*, 2 Str. 1167, 1742; *Crowder* v. *Tinkler*, 19 Ves. 617, 1816, indictment directed and speedy trial; and these cases are confirmed by the above decision.

Public rivers] In *Medley*, 6 C. & P. 292, 1834, the chairman, deputy-chairman, superintendent, and engineer of a gas company were found guilty of conveying the refuse of gas into the Thames, whereby the fish were destroyed, and the water was rendered undrinkable, &c. L. Denman C.J. held, that the question for the jury was, whether the special acts of the company amounted to a public nuisance; that fishermen had been thrown out of employment was nothing to the matter. See also under *Highways*.

Indecency] 'It hath been said that all *common stages* for rope-dancers, and also all *common gaming-houses*, are nusances in the

eye of law . . . not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons,' to the inconvenience of the neighbourhood. Hawk. P. C. 1, 75, 6.

An indecent exposure in a place of public resort, if actually seen only by one person, no other person being in a position to see it, is not a common nuisance. *Webb,* 1848. So *Farrell,* 9 Cox C. C. 446, C. C. R. Ir., 1862. But this view was doubted on the conviction of *Elliott,* L. & C. 103, 1861; but no judgment was given. Of two counts for indecent exposure in an omnibus, several passengers being therein, one laid it as 'in an omnibus,' and the other 'in the public highway.' It was held that an omnibus was sufficiently public to sustain the indictment: *Holmes,* 1 D. & P. C. C. R. 207; 22 L. J. M. C. 122; 6 Cox C. C. 216, 1853; and *semble* that a railway carriage would be also a public place: *Langrish* v. *Archer.* So of indecent exposure on the roof of a house, where the act could not be seen on the highway, but was seen by seven persons from the back windows of another house, it was held that the place was public. *Thallman,* L. & C. 326; 33 L. J. M. C. 58; 9 Cox C. C. 388, 1863. An urinal, open to the public, approached from a public footpath, is a public place. *Harris,* L. R. 1 C. C. R. 282; 40 L. J. M. C. 67; 11 Cox C. C. 659, 1871: C. C. R., which throws a good deal of doubt on *Orchard,* 3 Cox C. C. 248, 1848.

In *Wellard,* 14 Q. B. D. 63; 54 L. J. M. C. 14; 15 Cox C. C. 559, 1884: C. C. R., there was indecent exposure in a place where, in fact, the public went without any legal right. It was held that the jury were justified in finding that the place was public. 'It is obvious that what is a public place may vary from time to time,' *per* L. Coleridge C.J. It seems also, *ib.,* that the offence may be indictable if committed before several people, *even* if the place be not public.

'It appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanour.' Campbell's note to *Crunden,* below; 'all open lewdness grossly scandalous.' Hawk. P. C. 1, 5, 4; 4 Black. Comm. 59, 65. Thus undressing on the beach and bathing in the open sea, so as to be distinctly seen from the neighbouring houses, is indictable, although the houses had been recently erected, and, until their erection, it had been usual for whole regiments of soldiers to bathe there, 'for,' said M'Donald C.B. 'whatever place becomes the habitation of civilised men, there the laws of decency must be enforced.' *Crunden,* 2 Campb. 89, 1809, confirmed by K. B.; *Sidley,* 1664. Bathing so near a public footway frequented by females that exposure must occur is a nuisance, and it is no defence that there has been an usage to bathe at that place time out of mind. *Reed,* 12 Cox C. C. 1, 1871, *per* Cockburn C.J. Cf. *Cross,* 1826.

It is not necessary that the indecency or disorder should be perceptible from outside: *Rice,* L. R. 1 C. C. R. 21; 35 L. J. M. C. 93; 10 Cox C. C. 155, 1866.

Offensive exhibition] Exhibiting an offensive and disgusting picture, although there be nothing immoral in it, and although the motive of the exhibitor may be innocent and even laudable, is a nuisance. *Grey,* 4 F. & F. 73, 1864. So at common law keeping a booth on a race-course for the purpose of showing an indecent

exhibition on payment. *Saunders,* 1 Q. B. D. 15; 45 L. J. M. C. 11; 13 Cox C. C. 116, 1875: C. C. R.

Obscenity] For obscene prints, see 14-15 V. 100, 29, and 20-1 V. 83; or books, see *Hicklin,* 37 L. J. M. C. 89; 11 Cox C. C. 19, 1868: Q. B., where it was held defendant was within 20-1 V. 83, though his object (viz. to attack a church) was, from his point of view, good, if, in fact, his matter (intended to expose that church) injured public morals. See further under *Libel.*

Dead bodies] For exposure, see *Clark,* 1883; and for cremation, see title, *Dead Bodies.*

Inns] 'The keeper of an inn may be indicted and fined, as guilty of a public nusance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or . . . refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price.' Hawk. P. C. 1, 78, 1, 2; *Ivens,* 7 C. & P. 213, 1835, where an innkeeper was indicted and fined twenty shillings; the tender is now obsolete unless demanded; *Hawthorn* v. *Hammond,* 1 C. & K. 404, 1844.

But a refreshment bar, though attached to the inn (hotel), is not an inn at common law, and therefore no indictment will lie for refusing to supply refreshments there. *Rymer,* 2 Q. B. D. 136; 46 L. J. M. C. 108; 13 Cox C. C. 378, 1877: C. C. R.

Gaming-houses] See under *Gaming.* In *Dixon,* 10 Mod. 336, 1716, it was held that the keeping a gaming-house was a common law nuisance. So Hawk. P. C. 1, 75, 6. A *feme covert* may be convicted jointly with her husband, as in *Dixon;* for she may probably have a greater share in the management than he. Hawk. P. C. 1, 92, 30; see Part III. on *Coercion, &c.* See *Rogier,* at 493, 1738. 'It seems that the keeping of a cockpit is not only an indictable offence at common law, but is considered as a gaming-house within the 33 H. 8, 9.' Hawk. P. C. 1, 92, 29.

The offence is within 22-3 V. 17.

Betting-house] See *Betting.*

Lotteries] By 10-11 W. 3, 17 (otherwise 23), 1, and 42 G. 3, 119, 1, all lotteries are declared to be a public nuisance. See *Hardwick* v. *Lane,* 20 Cox C. C. 576, 1903, and *Crawshaw,* 1860. By 9-10 V. 48, art unions, for the distribution of works of art, are legalised.

Horse races] By 42-3 V. 18, unlicensed horse races within the metropolitan area are [public] nuisances.

Bawdy-houses] are common nuisances, both on the ground of corrupting 'the manners of both sexes' and of 'endangering the public peace, by drawing together dissolute' persons. Hawk. P. C. 1, 74; *ib.* 75, 6. A *feme covert* is punishable jointly with her husband for this offence as if she were sole. *Ib.;* see Part III.: *Coercion; Williams,* 1 Salk. 384, 1712. A lodger, who keeps only a single room for the use of bawdry, is indictable: see *Pierson,* 2 L. Raym. 1197; 1 Salk. 382, 1706; but the bare solicitation of chastity is not indictable: *ib.,* and Hawk. P. C. 1, 74, 1.

Who keeps?] See 25 G. 2, 36, 8.

Evidence] 'Though the charge [in the indictment 'without charging any particular fact'] is general, yet at the trial you may give in evidence particular facts, and the particular time of doing them,' *per* L. Hardwicke C. *Clarke* v. *Periam*, 2 Atk. 339, 1742; it being, in fact, a cumulative offence. 'The same rule as to keeping a common gaming-house.' *Ib.*; cf. *Common Scold*. See this case further under *Connected Acts*.

It is not necessary to prove who frequents the house, which in many cases might be impossible, but if unknown persons are proved to have conducted themselves there in a disorderly manner, it is enough. *I'Anson* v. *Stuart*, at 754.

The offence is within 22-3 V. 17.

Disorderly houses] Borough Q. S. have jurisdiction to try this offence, for 25 G. 2, 36, 5, does not confine it to assizes or county Q. S. *Charles*, 31 L. J. M. C. 69; 9 Cox C. C. 18; 10 W. R. 62, 1861: C. C. R. S. 5 applies to summary prosecutions by 48-9 V. 69, 13. See further *Brothel-keeping*.

Landlord's liability at common law] If a weekly tenant keeps a bawdy-house with the knowledge of the landlord, who nevertheless does not get any additional rent thereby, the latter cannot be convicted. *Barrett*, 32 L. J. M. C. 36; L. & C. 263, 1862; *Stannard*, L. & C. 349; 9 Cox C. C. 405, 1862. See *Tenants*, below.

Play-houses, &c.] 'Play-houses having been originally instituted with the laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident,' drawing together numbers of coaches or people, &c., to the inconvenience of the neighbourhood. Hawk. P. C. 1, 75, 7.

Players, plays, and play-houses are now regulated by 6-7 V. 68, by s. 2 of which all theatres, which are not authorised by letters patent from the crown, or by licence from the lord chamberlain, or the justices of the peace, are unlawful.

Entertainments] By 25 G. 2, 36, 2, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London or Westminster, or within twenty miles thereof—but so far as this relates to the administrative county of Middlesex it is repealed by 57-8 V. 15, 2 (12)—without a licence from the magistrates, now the London County Council, shall be deemed a disorderly house, and the keeper is liable to a penalty of 100*l.*, and for keeping a disorderly house. A room thus used is within the statute, although it is not exclusively so used, and no money be taken for admission; but the mere accidental or occasional use of the room, for such a purpose will not be within it: *per* L. Lyndhurst C.B., *Gregory* v. *Tuffs*, 6 C. & P. 271, 1833. It is for the jury to say whether such use be normal. See also *Gregory* v. *Tavernor*, *ib.* 280; *Marks* v. *Benjamin*, 5 M. & W. 565, 1839; *Tucker*, 2 Q. B. D. 417; 46 L. J. M. C. 197; 13 Cox C. C. 600, 1877: C. C. R.—skating-rink with music; and cases collected in Chitty's Statutes under *Public Entertainment*.

Dangerous animals] 'Keeping ferocious animals without proper control is a public nuisance and indictable accordingly,' and so, perhaps, in the case of a dangerous unmuzzled mastiff. There is a difference between wild animals and tame animals that sometimes break out. Burn's Justice, Nuisance, p. 1032, 30th ed.; 2 L. Raym. 1583.

Contagious or infectious disease] It is indictable knowingly to expose a person having a contagious, &c. disease, as the small-pox, in public. *Vantandillo,* 4 M. & S. 73, 1815; *Burnett, ib.* 272, 1815. So where any one exposes an animal without taking reasonable precautions: *Henson,* D. & P. C. C. 24, 1852: horse with glanders brought to a fair.

Under many Acts the jurisdiction is summary, but there is an exception in 54-5 V. 76, 13: although, apparently, indictment is not meant. There may be a right to be tried by a jury, as in *Dennis,* below.

Unwholesome food] See 4 Inst. 261 and *Dixon,* 1814. It may be that *victuallers, &c.,* are guilty of 'a common nuisance for selling bad food, even if they do not know the fact': *per* Parke B., *Burnby* v. *Bollitt,* 17 L. J. Exch. 190, 1847. A butcher publicly exposing for sale or selling diseased meat, known to be so, is indictable at common law: *Stevenson,* 3 F. & F. 106, 1862; and a carrier who knowingly sends such meat to market, *Jarvis, ib.* 108, 1862—but not unless he knew that it was for human food: *Crawley, ib.* 109, 1862; *Shillito* v. *Thompson,* 1 Q. B. D. 12, 1875. Where death resulted from eating diseased meat, *Kempson,* the seller, was convicted of manslaughter before Pollock B.: L. J. Newsp. July 1, 1893, p. 477: sentence, eight months' imp. w. h. l.

Markets] 'A right to hold a market involves . . . upon the part of the owner: A right of having a concourse of buyers and sellers for . . . the commodities vendible in the market (*Downshire* v. *O'Brien,* 1887, 19 L. R. Ir. 380); this right may justify a concourse which, but for the right, would be liable to be put down as a nuisance (*Elwood* v. *Bullock,* 1844, 6 Q. B. 383, 411)': 20 Halsbury, 5. *Draper* v. *Sperring,* 10 C. B. N. S. 113, 1861, is an instance of a market-owner liable by statute for the droppings of animals. *Ib.*

Fire-arms] See that title.

Eaves-dropping, common scold] Eaves-droppers, or such as listen under walls or windows, or the eaves of houses, 'to kearken after discourse, and thereupon to frame slanderous and mischievous tales,' are common nuisances, and indictable at Q. S., and may be punished by fine and finding sureties for their good behaviour. 4 Bl. Com. 168; Burn's Justice, under *Eaves-Droppers.*

So, 'a common scold is a public nusance to her neighbourhood,' and may be indicted; on conviction she may be put into the 'cucking-stool' (or 'ducking-stool,' as Hawk. P. C. 1, 75, 14, calls it), 4 Bl. Com. 168. The particulars need not be set forth in the indictment: Hawk. P. C. 2, 25, 59; nor is it necessary to prove the particular expressions used; 'it is sufficient to prove generally that she is always scolding': *per* Buller J., *I'Anson* v. *Stuart.*

Liability for acts of servants, &c., and others] For *Highways*, see under that title.

A man may be guilty of a nuisance by the act of his agent or servant. Thus the directors of a gas company are liable for an act done by their superintendent and engineer, under a general authority to manage their works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the method, which the directors had no reason to suppose discontinued. *Medley*, 1834.

So *Stephens*, 1866. But where the smoke of furnaces was not consumed, but defendant himself had by no means been guilty of negligence, the nuisance being due to the carelessness of a stoker, the court held that he was not *criminally* responsible for his servant's negligence, and explained *Stephens*, on the ground that it was a civil case, as the judges there, in effect, said. *Chisholm* v. *Doulton*, 22 Q. B. D. 736; 58 L. J. M. C. 133, 1889; cf. *Coppen* v. *Moore*.

Defendant had a shooting-ground at Bayswater, near the highway; visitors shot with rifles at a target, and also at pigeons; as the pigeons frequently escaped, persons collected outside and around to shoot at them as they strayed, causing noise and disturbance, and doing mischief by the shot. The K. B. held that the evidence supported the allegation that the defendant caused such persons to assemble, discharging fire-arms, &c., inasmuch as their so doing was a *probable* consequence of his keeping a shooting-ground in such a place. *Moore*, 3 B. & W. 184, 1832.

Tenants] If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term. So he is, if he let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant. If one buy the reversion during a tenancy, and the tenant afterwards, during his term, erect a nuisance, the reversioner is not liable for it; but if such reversioner re-let, or having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance: *per* Littledale J. 'The nuisance here has been a natural consequence of the erection,' *per* L. Denman C.J. It is the duty of a landlord to bind his tenants to cleanse or to let him in to do so, in default, *per* Taunton J., *Pedly*, 1 Ad. & E. 822, 1834.

Evidence] Indictment for an offensive trade; a conviction before justices for a previous offence at the same place is not admissible, as the former offence is not necessarily a nuisance. There was a difference of opinion whether it would have been admissible, even if the offence had been a nuisance. *Fairie*, 8 E. & B. 486, 1857. See *Maybury*, 4 F. & F. 90, 1864.

Punishment—abatement] The punishment is fine and (or) imprisonment; and the judgment of the court may be, that the defendant shall remove it at his own costs. Hawk. P. C. 1, 75, 14-15. But where the continuing of the nuisance is not averred, the judgment of abatement would not be proper. *Stead*, 8 T. R. 142, 1799; and so *Justices of West Riding*, 7 T. R. 467, 1798. And where the court is satisfied that the nuisance is effectually removed *before* judgment

is prayed, they will not give judgment to abate. *Incledon,* 13 East 127, 1810. The judgment, in fact, is adapted to the circumstances. When such judgment is given, it is only to remove or pull down *so much* of the thing as actually causes the nuisance; as, if a house be built too high, the judgment is to pull down only so much of it as is too high. And the like where there is a conviction for carrying on an offensive trade, or where the nuisance is temporary; the judgment is only to prevent the defendant from using the building again for the offensive purpose. *Pappineau;* see 9 Co. 54; Co. Entries, 92 *b*.

Where defendant had entered into a recognisance to appear at the assizes and plead to an indictment for nuisance, and at the time of the assizes he was on the continent in ill-health, the nuisance having been abated, and the prosecutor being willing to consent to an acquittal, Patteson J. after conferring with Erskine J. in these circumstances, allowed a verdict of not guilty to be taken. *Macmichael,* 8 C. & P. 755, 1839.

Force, numbers, &c.] do not necessarily constitute riot; see that title.

Corporations] See under *Jurisdiction.*

OATHS AND COMBINATIONS, UNLAWFUL.

Common law] forbids any to be 'ministred' without authority, so sacred are they. 3 Inst. 165. Hence, if a meeting of licensing justices is preliminary and informal, the offence cannot take place. *J. Shaw*, 22 Cox C. C. 376; 27 T. L. R. 181; 75 J. P. 191; 104 L. T. 112; 6 Cr. A. R. 103, 1911: c. q.

Statutes] By s. 1 of 37 G. 3, 123: 'Any person or persons who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same, to engage in any mutinous or seditious purpose; or to disturb the publick peace; or to be of any association, society, or confederacy, formed for any such purpose; or to obey the order or commands of any committee or body of men not lawfully constituted; or of any leader or commander, or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done, or to be done; or not to reveal or discover any illegal oath or engagement, which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement; shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years; and every person who shall take any such oath or engagement not being compelled thereto,' is subject to the same punishment. In *Marks*, 3 East 157, 1802, the K. B. held a combination to raise wages (and for other trade union purposes) within this s.

By s. 2, coercion is no defence, unless the oath be revealed within four days; by s. 3, persons not present may be guilty; by s. 5, the formula is immaterial if there be anything 'in the nature of an oath.'

By 52 G. 3, 104, 1: 'Every person who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at the administering of, any oath or engagement, purporting or intending to bind the person taking the same to commit any treason, or murder, or any felony punishable by law with death, shall, on conviction thereof by due course of law, be adjudged guilty of felony . . . and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction . . . be . . . guilty of felony, and shall be transported as a felon for the term of his natural life, or for such term of years as the court . . . shall adjudge.' The first *lacuna* here is due to 7 W. 4 & 1 V. 91, which abolished the death penalty.

The statutes are not confined to oaths administered with a seditious or mutinous intent. *Marks*, above; *Ball*, 6 C. & P. 563, 1834; *Brodribb, ib.* 571, 1816: poachers sworn to secrecy.

Indictment] It is sufficient to aver that the oath was administered, not to give evidence against a member of an association formed to do a 'certain illegal act,' without setting out the act. *Brodribb.*

Prosecution under 39 G. 3, 79, and 57 G. 3, 19, must be in the name of a law officer of the crown: 9-10 V. 33 (not in this respect affected by 32-3 V. 24, Sch. I. See Sch. II.). Registered friendly societies are practically excepted from these two statutes by 59-60 V. 25, 32. Partly on this ground the defendants in *Luby* v. *Warwickshire Miners' Association,* 1912, 2 Ch. 371, argued that they, a trade union, not being so excepted, were illegal societies within these two statutes; but Neville J. admitting that the branches and delegates of the unions came within the words, declined to regard mere membership as criminal, either (1) because the statutes are obsolete, or (2) other statutes dealing with unions are inconsistent with criminality, have, in fact, exonerated them from these statutes; he accepted (2).

The oath] 37 G. 3, 123, 5, was confirmed by 52 G. 3, 104, 6: 'any engagement or obligation whatsoever in the nature of an oath.'

In *Moors,* 1801, the object imputed was 'to disturb the public peace'; held not necessary to aver *how* the society intended to do so.

Evidence] Parol evidence may be given of the oath, though the administerer appeared to read it from a paper, to produce which no notice has been given. And where the oath is not on the face of it seditious, evidence of his declarations, at the time, is admissible to show that the brotherhood it referred to is a seditious society. *Ib.*

If the oath was not administered on the Testament, it is immaterial, if the swearer was intended to believe himself under a binding engagement. *Brodribb; Lovelass,* 1 Moo. & Rob. 349; 6 C. & P. 596, 1834: trade union. Under 37 G. 3, 123, 5, Williams B. said that the oath contemplated by the A. was not required to be of 'a formal nature,' but it was sufficient if it was intended to operate as an oath, and was so understood by the person taking it: Moo. & Rob.

Defence—disclosure] If the swearer took the oath in joke or was setting a trap, it is no defence if it was *administered* seriously: *Eadon,* 31 St. Tr. 1068, 1813: Luddite sworn on Book of Common Prayer.

52 G. 3, 104, 2, substitutes fourteen days for the four of 37 G. 3, 123, 2, where a commanding officer may receive the revelation of an offender under him.

Both the above statutes provide (ss. 7, 8, respectively), that any one who has once been tried under them, shall not be liable to be tried again 'for the same offence or fact, as high treason or misprision'; but, if not so tried, they may be.

Unlawful combinations] Unlawful oaths have always been closely connected with unlawful combinations. See *Conspiracy* and *Mutiny.*

By 39 G. 3, 79, 2, all societies, the members whereof are required to take unlawful oaths, &c. within the intent of 37 G. 3, 123, or any not required or authorised by law, or which has members whose names are kept secret from the general body, are declared unlawful combinations.

By s. 8, offenders may be summarily convicted, or on indictment; in the latter case they are liable to transportation for seven years, or to imprisonment for two.

By 57 G. 3, 19, 25, all societies demanding oaths, &c., within

37 G. 3, 123, or 52 G. 3, 104, or unauthorised oaths, and their members, are guilty of unlawful combination within 39 G. 3, 79, above.

In *Dixon,* 6 C. & P. 601, 1834: trade union, Bosanquet J. held that every person engaging in an association, the members of which necessarily take an unauthorised oath, is guilty within 57 G. 3, 19, 25. See *Luby's case,* above.

Administering, &c. voluntary oaths, &c.] By 5-6 W. 4, 62, 13: 'it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person hath not jurisdiction or cognisance by some statute in force at the time being; provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation, before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.' See *Nott,* 1843: perhaps the offence is not indictable.

Not triable at Q. S.

OBSCENE EXHIBITION.

See under *Nuisance.*

OBSCENE LIBEL.

See *Indecent Libels.*

OBSCENE PUBLICATIONS, &c.

It is not a common law misdemeanour to preserve and keep these in possession in order to sell them, &c.; but it is to procure them with that intent: *Dugdale* v. *R.*, 1 E. & B. 425; D. & P. C. C. 64; 22 L. J. M. C. 50, 1853: error.

Punishment is within 14-5 V. 100, 29.

Sending prints by post to fulfil an order by post is not a 'public sale' within that s. Publication may be through a *private* sale: common law misdemeanour. *A. A. Jackson,* 3 Cr. A. R. 192, 1909. See *Forbidden Contents* under *Post Office.*

OCCUPIERS AND OWNERS, OFFENCES BY.

See *Defectives.*

OFFENSIVE TRADE.

See under *Nuisance.*

OFFICE-HOLDERS (MINISTERIAL), OFFENCES BY.

Time limitation] By 56-7 V. 61, 1, no prosecution shall lie for any act done 'in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Act, duty or authority' unless 'it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof.'

The day on which the offence is committed is excluded from the reckoning. *Radcliffe* v. *Bartholomew*, 1892, 1 Q. B. 161; 61 L. J. M. C. 63. By 52-3 V. 63, 3, month means calendar month.

Common law] See under *Cheating*. 'Any publick officer is indictable for misbehaviour in his office.' *Anon.*, 6 Mod. 96, 1704, approved by L. Mansfield in *Bembridge*, 'even although the same conduct, if in a private transaction, would, as between individuals, have only given rise to an action': 9 Halsbury, 485, citing *Bembridge; Leheup*, 3 Doug. K. B. 327, 332 *n.*, 1783, 1755; *Val. Jones*, 31 St. Tr. 251, 1809; *Baxter*, 5 Cox C. C. 302, 1851; *Martin*, 1809; *Dale*, D. & B. C. C. 37, 1852.

Who is a 'public officer'?] 'We think a public officer is one who discharges any duty in which the public is interested, and more particularly if he receives payments from public money.' A colonel so held to be one by C. C. A. in *Whitaker*, 1914: favouritism in placing contract; he is also a 'ministerial' officer (as alleged in the indictment); public offices must be 'judicial' or 'ministerial': *ib.* For one definition of 'public' and 'judicial office,' see 46-7 V. 57, 64, and the Public Bodies, &c. A., p. 450.

Judicial officers] Negligence and oppression are variously punished, frequently by forfeiture of the office: 4 Bl. Com. 141. See *Offices, Public, &c.* and *Perversion of Justice*.

Malfeasance] Where the act done is clearly illegal, it is not necessary to support an indictment, whatever may be the case of an information, to show that it was done with corrupt motives. Thus, where a licence had been duly refused by the Surrey magistrates, City magistrates having concurrent jurisdiction in Southwark, duly appointed another day, and granted the licence, it was held that this was an illegal act, and indictable, 'without the addition of corrupt motives.' *Sainsbury*, 4 T. R. 451, 1791; so *Holland*, 1 T. R. 692, 1787. Still more so when it proceeds from oppressive or corrupt motives. *Williams*, 3 Burr. 1317, 1762, where magistrates refused licences because the applicants had not voted for their candidates.

The clerk to an officer for the exchange of prisoners who showed favour for bribes was convicted: *Beale*, 1797; see 1914, 3 K. B.

1300. So now of a returning officer formerly dealt with by the House of Commons: *Sudbury Election Petition,* Douglas El. Cas. 177, 1705.

A gaoler is punishable for barbarously misusing the prisoners. Hawk. P. C. 1, 66, 2. So overseers of the poor for misusing paupers, by lodging them in unwholesome rooms, &c. *Wetherill,* Cald. 432, 1784. Or by exacting labour from such as are unfit to work. *Winship,* Cald. at 76, 1780.

Where an overseer received from the father of a bastard a sum of money as a composition with the parish, and neglected to give credit for this sum in account, he was punishable, though the contract is illegal. *Martin,* 1809. See also *Bembridge,* 1783, above, and *Wyat,* 1 Salk. 380, 1704: a constable. Contrast *Hall,* 1891, where one reason was that an A. created a remedy for breach of its provisions and a tribunal to try it.

Presumptions] In such indictments it is sufficient to state generally that defendant is such officer without showing his appointment; and he is presumed from his situation to know the acts from which his duty arises, so they need not be averred. So on a charge of disobedience of orders, it will be assumed that such orders still continue in force; nor need it be alleged that the neglect of duty was corrupt, if a statute makes *wilful* neglect a misdemeanour. *Hollond,* 5 T. R. 607, 1794.

Sale of offices] See *Vaughan,* 1769; *Hopkins* v. *Prescott,* 4 C. B. 578, 1847; and *Charretie,* 13 Q. B. 447, 1849: East India director's nomination to a cadetship.

Nonfeasance] See *Refusal,* below. The prosecution must prove—1, that defendant holds the office; 2, that it was his duty, and within his power to perform the particular act; and 3, that he neglected so to do.

Where an officer is bound, either by common law or by statute, by virtue of his office to perform an act, neglect to perform that act is indictable: *e.g.* a coroner, 2 Chitt. C. L. 255; a sheriff, *Antrobus,* 1835; a constable, *Wyat,* 1704; *Bootie,* Burr. 865, 1759: parish constable declining to detain a night-walker apprehended; and an overseer of the poor, *Tawney,* 1705, 1 Bott, Poor Laws, 6th ed. (1827) 358: not relieving the poor, or doing so when there is no need for it.

Overseers] The majority of the judges were of opinion, that an overseer cannot be indicted for not relieving a pauper, unless there has been an order of justices therefor, or the case is of immediate and urgent necessity. *Meredith,* R. & R. 46, 1803. But where the overseer had under his care a poor woman, for whom he neglected to provide necessary meat, &c., whereby she was extremely weakened, and, through want, &c., died, he was convicted, and sentenced to a year's imprisonment. *Booth, ib.* 47, *n.* 1796. Another neglected, when required, to supply medical assistance to a pauper dangerously ill; it was held that the offence was sufficiently charged and proved, though the pauper was not in the parish workhouse, nor had previously received or stood in need of parish relief. *Warren, ib.* 48, *n.* 1820.

Extortion] 'Extortion in a large sense signifies any oppression under colour of right; but in a strict sense it signifies the taking of

money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.' Hawk. P. C. 1, 68, 1. So the refusal by a public officer to perform the duties of his office, until his fees have been paid, where none are legally due, is extortion; *e.g.* by a coroner, 3 Inst. 149 (1347?); an undersheriff, *Hescot,* 1 Salk. 330; 1694; *Empson* v. *Bathurst,* Hutt. 53. 1620. A ferryman must not take more than is due by custom: *Roberts,* 4 Mod. R. 101, 1692. So it is extortion for a miller to take more toll than is due by custom; and where the farmer of Newgate market erected such a number of stalls that the market people had not space to sell their wares, it was held that forcing them to take and pay for the use of the stalls would be extortion. *Burdett,* 1696.

It is extortion for an official to collect money under threat, without proper authority, though it may be due, and he may pay it over in due course to his superior. See *Burdett,* 1696, and *Roberts,* above, and cf. *Gillham,* 6 T. R. 267, 1795; *Higgins,* 4 C. & P. 247, 1830.

Where a private prosecutor caused a man to be committed without bail and then colluded with the gaoler to have him put in irons, until he paid a sum to the gaoler to be relieved of them, this was held oppression and extortion, and the prosecutor was indicted. *Tracey,* 3 Salk. 192, 1704.

It must be proved that the defendant fills the office in question. See *Best Evidence.* The usual fees of the office must also be proved. Several persons may be indicted jointly, if all are concerned; for in this offence there are no accessories, but all are principals. *Atkinson,* 2 L. Raym. 1248; 1 Salk. 382, 1705; *Loggen,* 1 Str. 75, 1718.

Indictment] The sums and figures alleged to have been received should be given, but the exact sum need not be proved.

Extortion is punishable at common law, by fine and imprisonment, and by removal from office. Hawk. P. C. 1, 68, 5. Penalties are also given against 'king's officers' by 3 E. 1, the first st. of Westminster, c. 26, for taking any reward 'to do his office . . . he that so doth shall yield twice as much and shall be punished at the king's pleasure.'

Sheriffs] See that title.

Coroners] *Jervis* on Coroners, 6th edn., 234, gives a form of indictment for not taking an inquest: *Whitcomb,* 1 C. & P. 124, 1823, a coroner was found guilty, on information, of corruptly agreeing with a murderer, afterwards convicted, to procure a verdict exonerating him.

A modern code is provided by 50-1 V. 71 and 55-6 V. 56, the Coroners Acts, 1887 and 1892.

India] See that title.

Refusing to execute a public office] by a person duly chosen is indictable, *e.g.* a constable: *Lone,* 2 Str. 920, 1732; an overseer: *Jones.* 2 Str. 1146; 7 Mod. 410, 1741; *Genge,* Cowp. 13, 1774; a sheriff: *Woodrow,* 2 T. R. 731, 1788 (information, to save time). See *Nonfeasance,* above.

The prosecution must prove the due election or appointment of the defendant, his liability to serve, notice to him of his appointment, and his refusal. Thus, it must be proved, that a corporation electing a constable had power by *prescription* to do so, for they possess no

such power of common right. *Bernard,* 2 Salk. 502; 1 L. Raym. 94, 1696. The notice of his appointment must then be proved, *Harpur,* 5 Mod. 96; Comb. 328, 1695; and his refusal, or neglect to take the oath to execute the office, from which a refusal may be presumed. But indictment as a remedy is perhaps obsolete: 1 Russ. Cri. 617.

The following list* of persons exempt from serving as *churchwarden* or *overseer* is given in *Steer's* Parish Law, pp. 104, 361, 6th ed. (1899), and probably applies to any other common law office there may be in the ecclesiastical parish:—Peers of the realm, members of parliament, sheriffs, *Stephenson* v. *Langston,* 1 Hagg. Con. R. 380 [1804]; acting justices of the peace, *Gayer,* 1 Burr. 245; 1 L. Raym. 492 [1757]; and clergymen—these persons are exempt by the common law—Gibs. [Cod. Jur. Ecc. Ang., 1761], 215; Roman Catholic priests, 31 G. 3, 32, [8]; dissenting ministers, 1 W. & M. 18 [11 or 8]; 52 G. 3, 155, 9; barristers and solicitors, Com. Dig. Attorney; law courts officers, 1 Roll. Rep. 368 [Hawk. P. C. 2, 10, 39]; practising physicians, 5 H. 8, 6; 32 H. 8, 40; members of the college of surgeons in London in actual practice, 18 G. 2, 15; practising apothecaries, 6-7 W. & M. 4, [amd. by] 30-1 V. 59; medical practitioners registered under 21-2 V. 90, 35; and persons living out of the parish, although they occupy lands within it, Gibs. 215; 18 G. 2, 15 [10]; but if they occupy a house of trade there, although they take their meals and sleep in another parish, they are liable, *Stephenson* v. *Langston* [above]. A person who is not resident, nor the occupier of any house or land within the parish, is not legally qualified to serve as churchwarden; and where such a person has been nominated, the court will issue a *mandamus* to the rector to nominate a churchwarden for the parish. *In re Barlow,* 30 L. J. Q. B. 271 [1861]. An inhabitant to be qualified for the office of churchwarden, must in some sense be a resident in the parish; the mere payment of rates is not sufficient. *Harding* [53 J. P. 75]; 6 T. L. R. 54 [1889]. Each of three partners in trade has been held liable to serve as a householder within 43 Eliz. 2 [1], although no one of them resided on the premises. *Poynder,* 1 B. & C. 178; 2 D. & R. 258 [1823]. By the word 'householder' is meant a person who occupies as tenant. A servant who occupies a house of his master in part payment of his services, and as subservient thereto and necessary for the performance thereof and not merely as a matter of convenience, is not a householder. *Spurrell,* L. R. 1 Q. B. 72; 35 L. J. M. C. 74 [1865]. A mere lodger is not liable to serve. *Ford* v. *Chauncy,* 1 Hagg. Con. 382 [1715]. All officers in the army, navy, and marines, although upon half-pay. *Gayer* [above]. All persons in the regular militia are exempt, 45-6 V. 49, 40; and local militia, 52 G. 3, 138, 197; and men enrolled in, and officers and non-commissioned officers appointed to the army and navy reserve forces, 45-6 V. 48, 7; 16-17 V. 73, 8; and naval volunteers, 22-3 V. 40, 7 [royal naval volunteer reserve, 3 E. 7, 6, 1]; . . . and income tax, 5-6 V. 35, 35; inland revenue, 16-7 V. 59, 17; and customs commissioners and officers, 39-40 V. 36, 9. Dentists registered under 41-2 V. 33, need not serve unless they desire to do so, s. 30. Inspectors of factories and workshops are exempt, 41-2 V. 16, 67. A quaker will not be compelled to serve, *Adey* v. *Theobald,* 1 Curt. 447 [1836]. It would appear that women are eligible for the office of churchwarden, *Olive* v. *Ingram,* 2 Stra. 1114; 7 Mod. 263 [1739]. It does not appear that any of

* It is practically impossible to make absolutely complete lists.

these persons who are exempt (except aliens, minors, Jews, lunatics, and felons) are ineligible to serve such office if they are willing. With the above exceptions, it may be stated generally, that every parishioner must serve the office of churchwarden if legally chosen into it.' It does not, however, appear from *Steer* (*ib.*), who enumerates as 'parochial lay officers' churchwardens, parish clerk, sexton and beadle, that churchwardens were ever indictable for refusing to serve, and the contrary appears from *Prideaux's* Churchwarden's Guide, pp. 39, 43, 16th ed. (1895). Parish constables are no longer appointed.

The following persons* are disqualified from being overseers:—Those concerned in contracts for goods for relief of the poor, for the union in which the parish is, 12-13 V. 103, 6; the master of the workhouse or relieving officer, 13-14 V. 101, 6; an assistant overseer, 29-30 V. 113, 10; a person convicted of felony, fraud, or perjury, 4-5 W. 4, 76, 48; a person convicted of corrupt practices at an election [46-7 V. 51, 6], 47-8 V. 70. (*Steer*, as above.)

N.B.—Some of these enactments have been replaced by later ones.

Defence—churchwarden—overseer—exempt—disqualified] It may be shown that the defendant is not an *inhabitant* of the parish or ward for which he is chosen, *e.g.* constable, though he may occupy a tenement there, be rated for it and trade there, for the constable's is a *personal* service: *Adlard*, 4 B. & C. 772, 1825; cf. *Donne* v. *Martyr*, 8 B. & C. 62, 1828: collector.

It is not any defence that the defendant resides in the jurisdiction of a private leet within the hundred for which he is elected: *Genge*, above; or that no constable had ever before been appointed for the place. *Terrey*, 2 Keb. 557, 1670.

The punishment is fine or imprisonment, or both. *Bower*, 1 B. & C. 587, 1823.

Disqualification] See title *Judgment*.

Triable at Q. S.

Excise officer] By 53-4 V. 21, 7: 'If any collector or any person appointed to be an officer, and employed in relation to duties of excise, deals or trades in any goods subject to any such duty, or carries on or is concerned in any trade or business subject to any law of excise, he shall be guilty of a misdemeanour, and shall, on conviction, forfeit his office or employment, and be incapable of ever holding any office or employment in or relating to the excise.'

* It is practically impossible to make absolutely complete lists.

OFFICES, PUBLIC—SALE AND BROKERAGE OF.

See *Common Law* under *Bribery*. Trafficking in certain offices—all public—was punished, by 5-6 E. 6, 16 (rpd. for offices in the Customs), by forfeiture of the office, and by disability to hold the office and by avoidance of the contract. That A. was extended by 49 G. 3, 126, the Sale of Offices A. 1809, whereby any such dealings whatever were made misdemeanours. In the *Earl of Macclesfield*, 16 St. Tr. 767, 1402, 1725: impeachment, 'the evidence . . . clearly established that L. Macclesfield had sold masterships through his agent . . . that he had received sums for consenting to the transfer of others; that this mode of disposing of the office . . . led to great abuse; that in several instances the suitors had suffered from the master becoming insolvent, and that L. Macclesfield had taken great pains to conceal these abuses and losses from the public': Campbell C., Lives of the Chancellors, c. 722: who has no doubt that 5-6 E. 6, 16, was transgressed: *ib.* Prosecutions under this A. have been rare, but a conviction on indictment (followed by fines) is recorded in the *Times* of July 24, 1918, of a retiring tax-collector and the person whom, for a year's purchase of the salary, he had recommended as his successor. Offences committed abroad are to be tried in the K. B. D.

OFFICIAL SECRETS, COMMUNICATION OF, &c.

See *Spying*.

The Official Secrets A. 1889, is repealed and replaced by 1-2 G. 5, 28, the Official Secrets A. 1911.

1.—(1) If any person for any purpose prejudicial to the safety or interests of the State—

(*a*) approaches or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; or

(*b*) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or

(*c*) obtains or communicates to any other person any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy;

he shall be guilty of felony, and shall be liable to penal servitude for any term not less than three years and not exceeding seven years.

(2) On a prosecution under this section, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place within the meaning of this Act, or anything in such a place, is made, obtained, or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved.

2.—(1) If any person having in his possession or control any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained owing to his position as a person who holds or has held office under His Majesty, or as a person who holds or has held a contract made on behalf of His Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract—

(*a*) communicates the sketch, plan, model, article, note, document, or information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it, or

(*b*) retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it:

that person shall be guilty of a misdemeanour.

(2) If any person receives any sketch, plan, model, article, note, document, or information, knowing, or having reasonable ground to believe, at the time when he receives it, that the sketch, plan, model, article, note, document, or information is communicated to him in contravention of this Act, he shall be guilty of a misdemeanour, unless he proves that the communication to him of the sketch, plan, model, article, note, document, or information was contrary to his desire.

(3) A person guilty of a misdemeanour under this section shall be liable to imprisonment with or without hard labour for a term not exceeding two years, or to a fine, or to both imprisonment and a fine.

3. For the purposes of this Act, the expression 'prohibited place' means—

(*a*) any work of defence, arsenal, factory, dockyard, camp, ship, telegraph or signal station, or office belonging to His Majesty, and any other place belonging to His Majesty used for the purpose of building, repairing, making, or storing any ship, arms, or other materials or instruments of use in time of war, or any plans or documents relating thereto; and

(*b*) any place not belonging to His Majesty where any ship, arms, or other materials or instruments of use in time of war, or any plans or documents relating thereto, are being made, repaired, or stored under contract with, or with any person on behalf of, His Majesty, or otherwise on behalf of His Majesty; and

(*c*) any place belonging to His Majesty which is for the time being declared by a Secretary of State to be a prohibited place for the purposes of this section on the ground that information with respect thereto, or damage thereto, would be useful to an enemy; and

(*d*) any railway, road, way, or channel, or other means of communication by land or water (including any works or structures being part thereof or connected therewith), or any place used for gas, water, or electricity works or other works for purposes of a public character, or any place where any ship, arms, or other materials or instruments of use in time of war, or any plans or documents relating thereto, are being made, repaired, or stored otherwise than on behalf of His Majesty, which is for the time being declared by a Secretary of State to be a prohibited place for the purposes of this section, on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy.

4. Any person who attempts to commit any offence under this Act, or incites, or counsels, or attempts to procure another person to commit an offence under this Act, shall be guilty of felony or of a misdemeanour according as the offence in question is felony or misdemeanour, and on conviction shall be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence.

5. Any person charged with an offence which is a felony under this Act may, if the circumstances warrant such a finding, be found guilty of an offence which is a misdemeanour under this Act.

6. Any person who is found committing an offence under this Act, whether that offence is a felony or not, or who is reasonably suspected of having committed, or having attempted to commit, or being about to commit, such an offence, may be apprehended and detained in the same manner as a person who is found committing a felony.

7. If any person knowingly harbours any person whom he knows, or has reasonable grounds for supposing, to be a person who is about to commit or who has committed an offence under this Act, or knowingly permits to meet or assemble in any premises in his occupation or under his control any such persons, or if any person having harboured any such person, or permitted to meet or assemble in any premises in his occupation or under his control any such persons, wilfully refuses to disclose to a superintendent of police any information which it is in his power to give in relation to any such person he shall be guilty of a misdemeanour and liable to imprisonment with or without hard labour for a term not exceeding one year, or to a fine, or to both imprisonment and a fine.

8. A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General:

Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.

9.—(1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed, he may grant a search warrant authorising any constable named therein to enter at any time any premises or place named in the warrant, if necessary, by force, and to search the premises or place and every person found therein, and to seize any sketch, plan, model, article, note, or document, or anything of a like nature or anything which is evidence of an offence under this Act having been or being about to be committed, which he may find on the premises or place or on any such person, and with regard to or in connexion with which he has reasonable ground for suspecting that an offence under this Act has been or is about to be committed.

(2) Where it appears to a superintendent of police that the case is one of great emergency and that in the interest of the State immediate action is necessary, he may by a written order under his hand give to any constable the like authority as may be given by the warrant of a justice under this section.

10.—(1) This Act shall apply to all acts which are offences under this Act when committed in any part of His Majesty's dominions, or when committed by British officers or subjects elsewhere.

(2) An offence under this Act, if alleged to have been committed out of the United Kingdom, may be inquired of, heard, and determined, in any competent British court in the place where the offence was committed, or in the High Court in England or the Central Criminal Court, and the Criminal Jurisdiction Act, 1802, shall apply in like manner as if the offence were mentioned in that Act, and the Central Criminal Court as well as the High Court possessed the jurisdiction given by that Act to the Court of King's Bench.

(3) An offence under this Act shall not be tried by any court of general or quarter sessions, nor by the sheriff court in Scotland, nor by any court out of the United Kingdom which has not jurisdiction to try crimes which involve the greatest punishment allowed by law.

(4) The provisions of the Criminal Law and Procedure (Ireland) Act, 1887, shall not apply to any trial under the provisions of this Act.

11. If by any law made before or after the passing of this Act by the legislature of any British possession provisions are made which appear to His Majesty to be of the like effect as those contained in this Act, His Majesty may, by Order in Council, suspend the operation within that British possession of this Act, or of any part thereof, so long as that law continues in force there, and no longer, and the Order shall have effect as if it were enacted in this Act:

Provided that the suspension of this Act, or of any part thereof, in any British possession shall not extend to the holder of an office under His Majesty who is not appointed to that office by the Government of that possession.

12. In this Act, unless the context otherwise requires,—

Any reference to a place belonging to His Majesty includes a place belonging to any department of the Government of the United Kingdom or of any British possessions, whether the place is or is not actually vested in His Majesty;

The expression 'Attorney-General' means the Attorney or Solicitor-General for England; and as respects Scotland, means the Lord Advocate; and as respects Ireland, means the Attorney or Solicitor-General for Ireland; and, if the prosecution is instituted in any court out of the United Kingdom, means the person who in that court is Attorney-General, or exercises the like functions as the Attorney-General in England;

Expressions referring to communicating or receiving include any communicating or receiving, whether in whole or in part, and whether the sketch, plan, model, article, note, document, or information itself or the substance, effect, or description thereof only be communicated or received; expressions referring to obtaining or retaining any sketch, plan, model, article, note, or document, include the copying or causing to be copied the whole or any part of any sketch, plan, model, article, note, or document; and expressions referring to the communication of any sketch, plan, model, article, note or document include the transfer or transmission of the sketch, plan, model, article, note or document;

The expression 'document' includes part of a document;

The expression 'model' includes design, pattern, and specimen;

The expression 'sketch' includes any photograph or other mode of representing any place or thing;

The expression 'superintendent of police' includes any police officer of a like or superior rank;

The expression 'office under His Majesty' includes any office or employment in or under any department of the Government of the United Kingdom, or of any British possession;

The expression 'offence under this Act' includes any act, omission, or other thing which is punishable under this Act.

This A. is capable of application to temporary proceedings, *e.g.* the Dardanelles and Mesopotamia Commissions, by 6-7 G. 5, 34, 3 (2).

'Enemy' in s. 1, is not confined to a state actually at war with the crown: *Parrott,* 1913.

Census of Production A. 1906] By 6 E. 7, 49, 6 (1), (5), the illegal disclosure of any return or any knowledge officially obtained is a misdemeanour; maximum punishment, imprisonment for two years with hard labour or fine, or both.

It is immaterial whether the 'information' is correct or not, if there is the intent mentioned: *M.*, 11 Cr. A. R. 207; 32 T. L. R. 1, 1915. The source of the 'information' is immaterial, whether official or not: *Spalding,* 1917.

An indictment, evidently under a s. now re-enacted in s. 4, was quashed because the person whom defendants conspired to procure to commit an offence against this A. 'was not in actual 'possession' of the documents required, and therefore could not be convicted under the indictment.' *Stuart and Page,* 130 C. C. C. Sess. Pap. 855, 1899.

OPPRESSION, &c.

11-12 W. 3, 12, is 'an Act to punish governors of plantations in this Kingdom for crimes by them committed in the plantations.' Trial in K. B. (D.) or by commissioners; venue assigned by the commission; punishment as for the offence in England. This A. (with others) was extended by 42 G. 3, 85, to any person employed in any public service abroad. Disqualification for any public employment 'whatever' is added; and the venue includes Middlesex. This A. does not apply to felonies, as they are not mentioned; hence *Shawe,* though he had pleaded guilty to larceny in N. America, was discharged: 5 M. & S. 403, 1816. 'Abroad' includes *foreign* countries, *e.g. Turner,* acting deputy British consul at Buenos Ayres, convicted at common law for not keeping proper accounts as such: 24 L. J. Newspaper, 469, 1889; 1 Russ. Cri. 31.

PANIC, CREATING.

There is no authority on this point except 9 Halsbury, 602, where *Martin*, 1881, is referred to, viz. a *statutory* conviction for *the consequences* of a panic. Blackst., however, 4 Comm. 149, citing 2 Inst. 226, and 3 Inst. 198, refers to the common law offences of *spreading false news* 'to make discord' *among the great*, and to *false and pretended prophecies*, which 'terrify' the people 'with imaginary fears.' Several old statutes punished these offences, but they are all repealed.

Conspiracy to create a panic is certainly indictable. See *Press Offences*.

PARENTS, OFFENCES BY.

See *Children*.

PARLIAMENT, PRESENTING ADDRESS TO.

See *Unlawful Assembly*.

PARTNER, LARCENY BY.

See under *Larceny*.

PATIENT, NEGLIGENCE IN RESPECT OF.

See *Manslaughter*.

PERJURY.

A. Common Law. B. Statutes.

A.

Common law] Perjury at common law 'seemeth to be a wilful false oath, by one who being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not.' Hawk. P. C. 1, 69, 1. The offence, however, is not confined to courts of justice.

Judicial proceedings] Even at common law, judicial proceedings had a wide meaning, and there might be perjury outside them. 'Any false oath is punishable as perjury which tends to mislead the Court in any of their proceedings relating to a matter judicially before them, though it no way affect the principal judgment which is to be given in the cause; as where a person who offers himself to be bail for another knowingly and wilfully swears that his substance is greater than it is. Also . . . not only such oaths as are taken upon judicial proceedings, but also all such as any way tend to abuse the administration of justice are properly perjuries; as . . . before a justice in order to induce him to compel another to find sureties for the peace, &c.; . . . Also . . . in some cases . . . though it do not concern the administration of justice,' *e.g.* before commissioners appointed by the King to inquire into defective titles. Hawk. P. C. 1, 69, 3.

At common law the court need not be of record: *Griepe*, 5 Mod. 348; 12 Mod. 139; 1 L. Raymond, 256, 1697.

Arbitration under the Workmen's Compensation A. 1906, is a judicial proceeding: *J. Crossley*, 1909, 1 K. B. 411; 73 J. P. 119; 28 L. J. K. B. 299; 25 T. L. R. 225; 2 Cr. A. R. 8.

False evidence on oath before a grand jury is perjury: *Hughes*, 1 C. & K. 519, 1844.

There can be perjury in one's 'own cause,' *e.g.* in an answer in chancery, or in an affidavit 'concerning some collateral matter.' Hawk. P. C. 1, 69, 5—even when parties were not competent witnesses for themselves. Giving evidence in court and swearing an affidavit on a motion in a suit are equally judicial proceedings, and there may be a separate perjury and punishment in each: *Castro* v. *R.*, 1881.

Criminal trials—defendants] *Wookey*, 63 J. P. 409, 1899, seems to be the first conviction of a defendant-witness after the Cr. Ev. A. 1898. Defendant sworn after plea of guilty may be guilty of perjury: *C. Wheeler*, 1916. In *G. F. Boyd*, 1908, the C. C. A. deprecated an increase of sentence for perjury at the *original* trial.

'A juror who gives a verdict contrary to manifest evidence' cannot be guilty, for 'he is not sworn to depose the truth, but only to give a true judgment upon the depositions of others.' Hawk. s. 5.

Other proceedings] A false oath against simony by a clergyman at his institution is perjury: *Lewis,* 1 Str. 70, 1718.

Conviction for taking a false oath before a surrogate, to procure a marriage licence; the judges recommended a pardon because perjury could not be charged on such an oath. *Foster,* R. & R. 459, 1821; cf. *Alexander,* Lea. 63, 1767; and see also *Anon.,* 1 Vent. 370, 1685, and the observations, 2 Deac. Dig. C. L. 1001. But a surrogate certainly has power to administer the oath, and such a false oath, whether perjury or not, is certainly a misdemeanour, for the matter is of public concern. *Chapman,* 1849. And so is a false affidavit before a commissioner for affidavits in the Q. B. under the Bills of Sale A. 1854, rpd. *Hodgkiss,* L. R. 1 C. C. R. 212; 39 L. J. M. C. 14; 11 Cox C. C. 365, 1869. See Hawk. cited *Judicial Proceedings,* above.

'On the trial of an indictment, the proofs relate to' seven heads: 2 Stark. Ev. 621, 2nd ed.: here taken *seriatim.*

Authority to administer oath] See under *Oaths.* 'It seemeth clear that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature without legal authority for their so doing; or before those who are legally authorised to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no matter of force, but are altogether idle.' Hawk. P. C. 1, 69, 4.

It is not necessary to prove the appointment of the administerer (*e.g.* a master in chancery, surrogate, or commissioner); it is sufficient to show that he has acted in that character. See *Best Evidence,* and *Dunning,* below. But this evidence may be rebutted, and it may be shown that there was no appointment, or that it was illegal. Thus, after *proof* that an oath had been made before a person who *acted as* a surrogate, the defendant showed that he had not been duly appointed according to the canon, and was acquitted. *Verelst, ib.*

Special commission] But where the authority is derived from a special commission issued to him for that purpose, 'it is necessary to prove the authority, by the production and proof of the commission which created the special authority.' 2 Stark. Ev. 622, 2nd ed. So, on an indictment against a bankrupt before the commissioners, L. Ellenborough ruled that it was necessary to give strict proof of the bankruptcy, 'for unless the defendant really was a bankrupt the examination was unauthorised.' *Punshon,* 3 Camp. 96; 3 B. & C. 354, 1811. See also *Ewington,* 2 Moo. C. C. 223; Car. & M. 319, 1841, where there was no good petitioning creditor's debt.

Where a cause was referred by a judge's order, and it was directed that the witnesses should be sworn, '. . . before a commissioner *duly authorised,*' and a witness was sworn before a commissioner for taking affidavits (under rpd. 29 Car. 2, 5), it was held that she was not indictable for perjury, the commissioner not being 'duly authorised' by the statute to administer an oath for a *vivâ voce* examination. *Hanks,* 3 C. & P. 419, 1828. So of an affidavit used in the Court of Admiralty, and sworn before a Master Extraordinary in chancery, not having any authority to administer oaths in Admiralty matters,

though it was the practice of that court to receive such affidavits. *Stone,* 1 D. & P. C. C. R. 251; 23 L. J. M. C. 14, 1853. So of an arbitrator under 9-10 V. 95, 77, rpd., not having authority to administer an oath. *Hallett,* 1851. For a c. q., see *J. Shaw,* 1911.

Jurisdiction—indictment] Where a trial took place when the court had no jurisdiction (on a technical ground), a witness could not be indicted for perjury thereat: *Buxton* v. *Gouch,* 3 Salk. 269, 1707; *Cohen,* 1 Stark. N. P. C. 511, 1816.

By 5-6 W. 4, 50, 78, justices can punish furious driving but not *expressly* furious riding; perjury was alleged on an information for *riding;* held that defendant could not be convicted. *Bacon,* 11 Cox C. C. 540, 1870: *per* Kelly C.B. Though another view of the s. was taken in *Williams* v. *Evans,* 1 Ex. Div. 277; 35 L. T. 864, 1876, so that *Bacon* may be overruled on the s., the point of *no jurisdiction* is good: cf. *Bastardy,* below.

Where perjury was charged on the affidavit on an interpleader rule, and the indictment set out all necessary allegations (verdict, judgment, writ, levy, &c.), but omitted to state that a rule under the Interpleader A. was obtained, Coleridge J. held that the indictment was bad, as the affidavit did not appear to be made in a *judicial* proceeding; since for anything that appeared it might have been a voluntary oath. *Bishop,* Carr. & M. 302, 1842.

By 4 G. 4, 34, 2, rpd., all complaints arising between masters, &c., and their apprentices, about wages, &c., may be determined before a justice. An apprentice, having left, summoned his late master for wages, and swore falsely. This was held perjury, inasmuch as the magistrate had, at all events, jurisdiction to determine whether the relation of apprenticeship continued or not. *Proud,* L. R. 1 C. C. R. 71; 36 L. J. M. C. 62; 10 Cox C. C. 455, 1867.

But where a warrant was issued, illegally, because without a written information or oath as required by Jervis's A., 11-2 V. 42, under which S. was arrested and, without objection, convicted by justices of assaulting, &c. a constable, it was held by nine judges to one, after two arguments, that the constable was rightly convicted of perjury on that occasion against S., for the justices had jurisdiction to hear that charge, although the warrant on which he was brought before them was illegal, and ought not to have issued—as, the defendant being present in court, the illegality of the process by which he was brought there was immaterial. *Hughes,* 4 Q. B. D. 614; 48 L. J. M. C. 151; 14 Cox C. C. 284, 1879: C. C. R.

Indictment] It is not necessary in the *indictment* to show the *nature* of the authority of the administerer of the oath, though it must be proved. *Callanan,* 6 B. & C. 102, 1826.

Allegation of the trial of 'a certain indictment for misdemeanour' at Q. S., &c., without stating what the misdemeanour was, nor that the sessions had jurisdiction, it was held that the substance of the offence was sufficiently stated within a rpd. s., and further that competent authority to administer the oath need not be averred, though it must be proved. *Dunning,* L. R. 1 C. C. R. 290; 40 L. J. M. C. 58; 11 Cox C. C. 651, 1871; see above and *Occasion of Oath,* below, especially *Koops.*

Where a feme sole obtained judgment and then married, and afterwards took out a judgment summons in her maiden name, the judge amended the summons, by making her husband and her plaintiffs:

at the hearing defendant was sworn. It was held by the Q. B. that the amendment was without jurisdiction, and therefore the hearing was not of a cause in existence: *Pearce*, 32 L. J. M. C. 75; 9 Jur. N. S. 647; 7 L. T. 397; 9 Cox C. C. 258; 3 B. & S. 531, 1863.

'General averment that the defendant falsely swore, &c. upon the whole matter, is not enough; the indictment must proceed by particular averments,' *i.e.* '*assignments of perjury*, to negative that which is false': 1 Russ. Cri. 502.

Bastardy] Perjury was committed before magistrates on the second application for an order, a former one having been dismissed on the merits; but it was held, whether that dismissal was a defence or not, that the magistrates had jurisdiction to administer an oath. *Cooke*, 2 Den. C. C. R. 462; 21 L. J. M. C. 136, 1852.

A summons was granted more than twelve months after the birth, against a putative father, in which it was alleged that he had within the twelve months paid money for the maintenance of the child; but instead of alleging that the mother had given *proof* that such money had been paid, as the statute required, alleged that the mother stated (not on oath) that it had been paid. Defendant appeared, with an attorney, but took no objection of any sort, but swore that he had never paid any such money. Perjury was assigned, and proved at the trial; but it was also proved that the mother's information, on which the summons was issued, was not made on oath. It was held (*dissentiente* Martin B.), that the proceedings were civil and not criminal, and, therefore, that the defect was an irregularity which was capable of being and had been waived by defendant; consequently, that the jurisdiction was well founded, and the conviction right. *Berry*, Bell C. C. 46; 28 L. J. M. C. 70; 8 Cox C. C. 121, 1859.

Similarly, where no evidence had been given that defendant had paid any such money within the twelve months, and he had not in fact done so, but he took no objection at the hearing on that account, though the summons in the statutory form alleged such payment as a fact. Held, that petty sessions had jurisdiction to hear the complaint, as he had waived the irregularity which related to *process* only, and was not essential. *Simmons*, Bell C. C. 168; 28 L. J. M. C. 183; 8 Cox C. C. 190, 1859.

Again, where the mother's information was duly proved, but not the summons, the putative father having appeared and evidence having been given on both sides, it was held, that he having so appeared, and not having raised any objection, it was not necessary to give evidence of the existence of the summons at the trial of one of his witnesses for perjury. *Smith*, L. R. 1 C. C. R. 110; 37 L. J. M. C. 6; 11 Cox C. C. 10, 1867.

So, where a woman swore to the father of her child, but no deposition in writing was taken, a summons was issued and defendant appeared, it was held that by so appearing, he had waived the irregularity. *Fletcher*, L. R. 1 C. C. R. 320; 40 L. J. M. C. 123; 12 Cox C. C. 77, 1871.

See *Evidence*, below.

Where the oath was alleged to have been taken, 'before justices assigned to take the said assizes,' but in fact the trial was before one judge, who was sitting under the commission of *oyer* and *terminer* and gaol delivery, c. q. *Lincoln*, R. & R. 421, 1820. But the allegation that the oath was taken before *one* of the judges of assize,

though the names of *both* appear in the caption of the indictment, is good. *Alford,* 1 Lea. 150, 1776. See *Coppard.*

Where the indictment merely stated that defendant, intending to subject W. M. to the penalties, &c. of felony [this was in *Gardiner,* below, also], went before two magistrates, and 'did depose and swear,' &c. (setting out a deposition, which stated that W. M. had stolen a 5*l.* note from him), Coleridge J. held that it was bad, as it did not show that any charge of felony or any judicial proceeding was pending. *Pearson,* 8 C. & P. 119, 1837.

But where an indictment alleged that defendant went before a magistrate and was sworn, and that 'upon a certain information and examination' he did falsely, &c. 'say, depose, swear, charge, and give the said justice to be informed,' that he saw, &c.; it was held by the judges that this sufficiently showed that the oath was taken in a judicial proceeding. *Gardiner,* 8 C. & P. 737; 2 Moo. C. C. 95, 1839.

Other cases] An affidavit of debt made under 1-2 V. 110, 8, rpd., and sworn before a registrar of the court of bankruptcy, is sworn before a competent authority, though no bankruptcy existed and none might ever exist. *Dunn,* 12 Q. B. 1026; 11 Cox C. C. 267, 1847.

Where the justices were described as for the county when in fact they were for the borough, it was held that the judge had power to amend. *Western,* L. R. 1 C. C. R. 122; 11 Cox C. C. 93, 1868. See *Callanan,* above.

Where an information had been heard under the Licensing Acts, it was held that the beerhouse-keeper's license must be produced, otherwise there was no proof that he was duly licensed so as to give the justices jurisdiction. *Lewis,* 12 Cox C. C. 163, 1872.

So on an inquest held before a deputy-coroner, though there is no lawful cause for the absence of the coroner. *Johnson,* L. R. 2 C. C. R. 15; 42 L. J. M. C. 41; 12 Cox C. C. 264, 1873.

Evidence] There must be formal proof of the commencement of proceedings before justices by production of the summons or information or charge book. *Hurrell,* 3 F. & F. 271, 1862. Where, however, an indictment against a witness (for a defendant) alleged that the latter had been duly summoned, but did not aver that the summons was preceded by any information, and neither was produced at the trial, it was held good, as defendant had appeared and made no objection. *Shaw,* L. & C. 579; 34 L. J. M. C. 169; 10 Cox C. C. 66, 1865. See the bastardy cases, above.

Of jurisdiction] It was alleged that defendant had filed a petition for protection from process in the county court, and perjury was charged against him in subsequent proceedings; this sufficiently showed jurisdiction in the county court, without alleging that defendant had resided for six months within the jurisdiction. *Walker* v. *R.,* 27 L. J. M. C. 43, 1857.

An information under 1-2 W. 4, 32, 30 and 41, now mostly rpd., and 6-7 W. 4, 65, 9, rpd., if laid by a person not deposing on oath to the matter, must distinctly show that some other credible witness deposed on oath. If it leaves this doubtful, all further proceedings on it are without jurisdiction; and if defendant is summoned, and appears, a witness cannot be convicted of perjury. *Scotton,* 1844; see also *Goodfellow,* Car. & M. 569, 1842. Cf. *Parker,* 1864.

But unless a statute requires it, an information need not be on oath or even in writing. *Millard*, 1 D. & P. C. C. 166; 22 L. J. M. C. 108, 1853; and cf. *Hughes*, above. See *Dillon*, 1877, where there was no evidence of the destruction of the information.

Fictitious proceedings] Where 'actions' in the High Court against fictitious defendants were begun by writs and judgments issued on false affidavits of service of writs, and sheriffs were put in motion, the C. C. A. declined, in view of *Proud*, 1867, to say the proceedings were not 'judicial'; *semble*, it thought they were. *Castiglione, &c.*, 76 J. P. 351; 106 L. T. 1063; 23 Cox C. C. 46; 28 T. L. R. 403; 7 Cr. A. R. 233, 1912.

Object of the perjury] need not be attained, *Wookey*, above; it is complete at the moment when the oath is taken. Thus where it was in an affidavit which could not, from informalities in the *jurat*, be used as it was intended, Littledale J. held it indictable. *Hailey*, Ry. & Moo. N. P. C. 94; 1 C. & P. 258, 1824. So of an affidavit for an injunction, though no motion is ever made. *White*, Moo. & M. 271, 1829. Cf. *Ewington*, above.

Compulsory answers] are dealt with under *Privilege of Witnesses; Criminal Consequences.* Unless the answers under s. 25 of the Banky. A. 1914, are given in the presence of the registrar, though he administered the oath, there cannot be perjury. *Lloyd*, 19 Q. B. D. 213; 56 L. J. M. C. 118; 10 Cox C. C. 235, 1887: C. C. R., because there was no 'examination before the Court' within rpd. s. 27 of the 1883 A.: identical words in s. 25.

Courts-martial] By 29-30 V. 109, 67, if any person wilfully and corruptly gives false evidence on oath or affirmation, before any court-martial held under that (Naval Discipline) A., he is guilty of perjury. So of the army, 44-5 V. 58, 126 (2). It was doubted whether an indictment framed on the Naval A. was within the Vexatious Indictments A. or not; but the words of the *Army* A. are not open to doubt. *Heane*, 1864: at *common law* there can be perjury before a court-martial.

Local Marine Board] False swearing is perjury, for the board is a tribunal invested with judicial powers, and enabled to inquire on oath and pass a sentence affecting *status*. *Tomlinson*, L. R. 1 C. C. R. 49; 10 Cox C. C. 332, 1866.

Occasion, &c. of oath] The occasion must be proved as stated. Thus, if the perjury were committed on a trial at *nisi prius*, the record ought to be produced in order to show that such a trial was had: 2 Stark. Ev. 622, 2nd ed., citing *Olive* v. *Gwin*, Hardres, 118, 1658; 1 Str. 162; Hawk. 2, 46, 7; and for this purpose the *postea* alone, without a copy of the final judgment, was held sufficient. B. N. P. 243*a*, citing *Iles*, 1741. The point sometimes rises under *Materiality*, which see. See *Fellowes*, 1 C. & K. 115, 1843, where the county court was misdescribed in every count. Where an indictment alleged throughout, a trial before a sheriff, but in fact it took place before his deputy, not the under-sheriff, it was held by a majority no variance. *Dunn*, 1843.

'If,' said Denman C.J., 'the court do not require the oath, it is voluntary.' *Koops.*

On an indictment for an affidavit falsely sworn by an insolvent there had to be proof that the court by its practice required such an affidavit; such proof is not given by a clerk of the official assignee producing what purported to be printed rules of the court, given him by the clerk of the rules, but not otherwise shown to be rules of the court, he professing no other knowledge of the practice, except that he was in the habit of distributing such copies. *Koops,* 6 Ad. & E. 198, 1837.

The taking of the oath] It was always sufficient to aver that defendant *duly* took the oath. *M'Carther,* 1 Peake N. P. C. 155, 1793; but had he been sworn in his native Scottish way, in fact only by holding up his hand, the objection would have been good. *Ib.*

Evidence] It was enough to produce the original answer signed in chancery by defendant, to prove his handwriting, and to call the master who subscribed the *jurat* to prove the identity of defendant. *Morris,* 1760; *Benson,* 1810. In *Hailey,* 1824, the affidavit was signed only with the mark of the defendant, and the *jurat* did not state where it was sworn, nor that the affidavit was read over to her. Littledale J. said, 'As the defendant is illiterate, it must be shewn that she understood it. Where the affidavit is made by a person who can write, the supposition is that such person was acquainted with its contents; but in the case of a marksman it is not so. If in such a case the master by the *jurat* authenticates the fact of its having been read over, we give him credit; but if he does not, and the fact were so, he ought to be called to prove it. I should have difficulty in allowing the parol evidence of any other person to that fact.' (1 C. & P.) Where an affidavit of service of notice was in question and produced, but the notice was not annexed thereto, an acquittal was directed. *Hudson,* 1 F. & F. 56, 1858.

The oath averred was that defendant should speak 'the truth, the whole truth, and nothing but the truth,' and it was proved in fact to have been that he should 'true answer make.' Watson B. held that this was not a material variance. *Southwood,* 1 F. & F. 356, 1858. See *Proof,* below.

Circumstantial] There must be precise proof that defendant was the person who took the oath: *Brady,* 1 Lea. 327, 1784, where, though there could be little doubt about his identity for want of evidence of the actual swearing, defendant was acquitted practically by direction, though the jury were told they *might convict, i.e.* as was shown in *Price,* 6 East 323, 1805; 2 Stark. Ev. 624, 2nd ed.: circumstantial evidence is not excluded.

'Substance' of the oath] It was long a question whether it was incumbent to prove the whole of defendant's statement relative to the subject-matter, as where he has been both examined and cross-examined, or whether it was sufficient merely to prove so much of the 'substance' as was set out on the record, leaving it to defendant to prove any other part of his evidence qualifying, correcting or explaining that set out. Thus L. Kenyon ruled, that the whole of defendant's evidence on a former trial should be proved, for if in one part he corrected any mistake he had made in another, it would not be

perjury. *Jones,* Peake N. P. C. 51, 1791; see also *Dowlin, ib.* 227, 1793; 5 T. R. 311; *Anon. cor.* L. Gifford, betw. 1812 and 1824, cited in *Rowley,* Ry. & Moo. N. P. C. 300; 1 Moo. C. C. 111, 1825.

But the better opinion seems to the contrary; see below. '. . . this doctrine of compelling the prosecutor to prove more than a *primâ facie* case to establish the defendant's guilt is an anomaly in the criminal law; for in general the party indicting is not bound to anticipate matters of defence which it lies on the prisoner to bring forward . . . Nor does it seem that in this case the party indicted would sustain hardship in being compelled to shew that he had corrected the part of his evidence assigned as was done in [*Carr,* 1676] 1 Sid. 418.' 2 Chitty Cr. L. 312*b*, 2nd ed.

Belief—memory] It was formerly thought that an oath did not amount to perjury unless sworn in absolute and direct terms, and that if a man swore according as he *thought, remembered,* or *believed* only, he could not be convicted of perjury. 3 Inst. 166; 2 Chitty, above. But the modern doctrine is otherwise. It is 'certainly true, that a man may be indicted for perjury in swearing that he *believes* a fact to be true, which he must know to be false.' *Pedly: per* L. Mansfield. The difficulty, if any, is in the proof that he did not 'think' so. *Schlesinger,* 1847. See under *Witnesses* and *Parker,* 1842, under *Falsity,* and *Stolady,* below.

Equivocation] A statement may be verbally true, but substantially false. Thus a witness swore that he left the person, whose health was in question, 'in such a way that were he to go on as he then was, he could not live two hours. It afterwards turned out that the party was very well, but had got a bottle of gin to his mouth, and true it was in a sense of equivocation, that had he continued pouring the same liquor down, even for much less time than two hours, he was infallibly a dead man': *per* L. Mansfield, 2 Lofft's Gilb. Ev. 662, 1791.

Expert evidence—opinion] No indictment appears to be known for mere matter of *opinion.* See *per* Jessel M.R., *L. Abinger* v. *Ashton,* 17 Eq. 373, 1873: the inherent defect of expert evidence.

Variance—surplusage] Where the matter sworn was set out continuously, though the count contained several distinct assignments, L. Ellenborough said, 'Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words, but must you not prove that he swore in substance and effect the whole that you have stated? . . . It is essential . . . that words set out in the record should be either literally or substantially proved.' *Leefe,* 2 Camp. 134; 4 B. & C. 852, 1809. Where oral evidence by defendant contained all the matter *charged,* but non-material statements intervened at places, Abbott C.J. held the apparent continuity of the evidence set out immaterial, as the effect of what was material was not varied. *Solomon,* Ry. & Moo. N. P. C. 252, 1825. The same of the several parts of an affidavit: *Callanan.*

Where *houses* appeared in the indictment, professing the *substance and effect* of a bill in Chancery, in which, in fact, *house* was used, the variance was fatal. *Spencer,* 1824.

A clerical error will not be material if the sense is not altered thereby. *Beech,* Lea. 133; Cowp. 229, 1775.

Onus] A witness stated that he, as clerk of a solicitor in a case, had paid particular attention to it, but could not undertake to say that he had given the whole of defendant's testimony (and swore that nothing else was said to qualify it), but to the best of his recollection he gave all that was material to the transaction in question, Littledale J. thought that this evidence was *primâ facie* sufficient, and that if there was anything else material then sworn by defendant, he might prove it on his part. As he did not, he was convicted, and the judges held the conviction right. *Rowley,* 1825.

'When it has once been proved that particular facts positively and deliberately sworn to by the defendant, in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn.' 2 Stark. Ev. 625, 627, 2nd ed. See *Chitty,* C. L., cited above. Thus, where defendant answered in chancery that she had received no money, but on exception to this, she put in another answer, explaining that she meant 'before such a day,' on a trial at bar, an acquittal was directed. *Carr,* 1 Sid. 418; 1 Russ. Cri. 393, 1676.

A written deposition taken down before the magistrate was put in to prove what defendant then swore—perjuriously, as alleged—and it was proposed to call the attorney for the prosecution to prove some other matters not in the depositions sworn to by defendant; Park J. held that this could not be done. *Wylde,* 6 C. & P. 380, 1834. See *Depositions.*

Evidence at previous trial, &c.] On a trial for an indecent assault, the woman having admitted *consent* on cross-examination, no other witnesses were called, and the court directed an acquittal. The accused, however, denied *the fact,* and indicted her for perjury. She was allowed in her defence to call as witnesses all those (except herself) who might have been called on the former trial. *Harrison,* 9 Cox C. C. 503, 1864.

Proof] Perjury was an exception to the general rule that one of four kinds of copies of a *Record*—which see—is admissible. If it is alleged in an affidavit or deposition, the original had to be produced, unless defendant had it, or it was lost, &c. So the original record had to be produced, and defendant's signature and that on the jurat proved. T. s. 1535. See *Evidence,* above.

Materiality] Materiality is obviously relative. 'It seemeth clear that if the oath . . . be wholly foreign from the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury. . . . But perhaps in all these cases it ought to be intended that the question was put in such a manner that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him, through inadvertency, to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances, which afterwards appear to be

false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it.' Hawk. P. C. 1, 69, 8, citing 2 Rolle R. 41, 368 (cases in 1619, 1624); *Palmer*, 382; and *Hetley*, 97, 1629; he concludes that no general rule can be laid down, but *materiality* must be judged in each case. Cf. *Lavey*, 1850.

Indictment] It must *either* appear on the face of the facts averred that the matter sworn to was material, *or* there must be an express averment thereof. *Dowlin*, 1793; *Nicholl*, 1 B. & Ad. 21, 1830; *M'Keron*, 1792, cited in *Dowlin*.

Where there was an express averment that a letter was material that let in evidence to prove it so. *Bennett*, 2 Den. C. C. R. 240; 3 C. & K. 124; 5 Cox C. C. 207; 20 L. J. M. C. 217, 1851—this is the principle deduced from the case by (C. & K. and) Russ. Cri. 499, *n.*, but all the reports, as is there said of the first three, are 'very unsatisfactory.' Where the perjury was assigned on defendant's denial of his having agreed, on forming a company, of which he was a director, to advance 10,000*l.* for three years to answer any immediate calls, but it was not averred that this was material, or for what purpose the bill was filed or what was prayed, judgment was arrested because the questions entirely depended on the purpose for which the *suit* was instituted. *Bignold*, 1 Russ. Cri. 495, 1824. So of a similar answer denying a promise which would have been absolutely void by the Statute of Frauds, though it might be false swearing. *Benesech*, 2 Peake (Add. Cases), 93, 1797. See below.

A vendor having obtained a verdict in an action on a contract, defendants filed a bill for a discovery of other parol terms, and to restrain him from execution. His answer denied the existence of such terms. On an indictment for this answer, Coleridge J. held that the prayer of the bill being not to enforce the parol terms, but to obtain relief, on the ground of fraud, from the contract, the denial was on a matter material to the suit, and, therefore, indictable. *Yates*, Carr. & M. 132, 1841.

In *Tyson*, L. R. 1 C. C. R. 107; 37 L. J. M. C. 7; 11 Cox C. C. 1, 1867, a witness, to establish an *alibi*, swore a defendant was (i.) at a given place at a given time; (ii.) that he had lived there for two years; and (iii.) that he had never been absent thence for more than three nights. (ii.) and (iii.) were clearly proved to be false, and they were held material as strongly supporting (i.), which, if true, acquitted defendant.

Tate swore as a witness for S., charged with assaulting his wife, that he had seen her in adultery, and had told S. Cockburn C.J. held that it was an *immaterial* assignment: 12 Cox C. C. 7, 1871; doubted in *A. Hewitt*, 9 Cr. A. R. 192, 1913, which shows that while evidence taken alone may not be material, in view of other evidence it may be.

Evidence in mitigation of punishment] The decision in *Tate* may be doubted in view of *Wheeler*, 1916. So Hawk. P. C. 1, 69, 8: 'a man may as well be guilty of perjury by a false oath tending to extenuate or aggravate the damages as by an oath which is direct to the fact in issue.'

Credit of witness] All false statements wilfully and corruptly made by a witness on matters which affect his credit are material. *Tyson,* above. Where a man had been charged, in December, under the Licensing Acts, and had falsely sworn that he had not, when similarly charged in November, authorised a plea of guilty, it was held that such a statement was material. *Baker,* 1895, 1 Q. B. 797; 64 L. J. M. C. 177: C. C. R.

A question having no general bearing on the matter in issue may be made material by its relation to the witness's credit. 'Every question on cross-examination that goes to the credit of a witness is material,' *per* L. Denman C.J. *Overton,* 1843. Cf. *Hewitt,* above.

Inadmissible evidence] In *Phillpotts,* 2 Den. C. C. R. 302; 21 L. J. M. C. 18, 1857, the perjured evidence was afterwards withdrawn and was inadmissible, but it was held that this could not purge the false swearing; this was followed (after two arguments, by eleven judges to two), in *Gibbon,* L. & C. 109; 31 L. J. M. C. 98; 9 Cox C. C. 105, 1861, where in a bastardy case against H. the woman was cross-examined whether she had not had connection with G. in September; the question was material—owing to dates—only in so far as it affected her credit. She denied this, but G. was called and swore that she had. His conviction for this perjury was sustained, although his evidence was legally inadmissible and ought not to have been received. See also *Mullany,* L. & C. 593; 34 L. J. M. C. 111, 1865, where perjury about a christian name induced a judge to strike out a cause; held, material.

Degree] The *degree* of materiality is not, as it seems, to be measured. Thus the impugned evidence need not be sufficient for the party to recover on, for evidence may be very material, and yet not full enough to prove directly the issue. *Rhodes,* 1704, at 889. So if the evidence is 'but circumstantially material,' it is sufficient, *per* Holt C.J. *Griepe.*

Imperfect legal contracts, &c.] If in answer to a bill filed by A. for redemption of lands assigned to him by B., the defendant swear that he had no notice of the assignment, and therefore insists on tacking to his mortgage another bond debt due from B., this is material. *Pepys,* Peake N. P. C. 187, 1792. To a claim for specific performance (purchase of land) defendant had relied on the Statute of Frauds (the agreement not being in writing), and had also denied having entered into any such agreement; on this denial he was indicted; Abbott C.J. held that the denial of an agreement which by the statute was not binding on the parties, was wholly immaterial. *Dunston,* Ry. & Moo. N. P. C. 109, 1824, *n.* 9; but see *Bartlett* v. *Pickersgill,* 1760, cited in 4 Burr. 2255; 4 East 577 *n.*, where there was a conviction for denying a parol agreement (to buy land) though the court of equity had refused to enforce it. This was not followed in *Dunston,* because it did not appear that in *Bartlett* v. *Pickersgill,* the statute had either been pleaded or relied on.

Indictment] It became a material question, whether *on the occasion of a certain alleged arrest* L. touched K., &c. Defendant's evidence as set out was, 'L. put his arms around him and embraced him'; *innuendo,* that L. had *on the occasion to which the said evidence applied* touched the person of K. It was held by the K. B. that the

materiality of this evidence did not sufficiently appear in the indictment, where it was set out. *Nicholl*, 1830. An indictment stated that L. was charged by W. before a justice, of an offence against the game laws on 12th August, 1843, and that at the hearing C. B. falsely swore that he did not see L. during the whole of the said 12th August, &c.; and that '*at the time he the said* C. B. *swore as aforesaid, it was material and necessary* for the said justice,' to know whether he did see the said L. at all during the said 12th day. It was held by the judges that this averment of materiality was insufficient, because consistently with it the evidence might have been material for the justice in *some other* matter. *Bartholomew*, 1 C. & K. 366, 1844. Where it was averred to be material 'to know the state of the said C. F. E.'s dress at the time the alleged offence was so charged to have been committed,' this was held by the judges to be a sufficient averment of materiality, to allow prosecutor to show that the flap of his trousers was not unbuttoned, as sworn by defendant. *Gardiner*, 1839. A witness charged for having sworn at a trial that he did not write certain words in the presence of D.—averred to be material—it was held, on objection that D.'s presence was clearly not material, that the presence of D. might be material, though it does not appear otherwise than by the averment; immateriality could not be assumed against the record. *Schlesinger*, above. Where a plaintiff swore falsely in a cause that she had never been tried at the Old Bailey, and had never been in custody at a police station—she had, in fact, been acquitted—Campbell C.J. held, that there was evidence of materiality, on the ground that the falsehood made the judge believe her evidence more readily—an instance of Hawkins's canon, above—but he left the question to the jury, who found her guilty. *Lavey*, 1851, and below.

Patteson J. held that 'it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to, and stated by the said J. G. upon his oath,' was not a good averment of materiality. *Goodfellow*, 1842; the usual form is 'that it became material whether' such a thing 'happened or existed.'

Documents] A rule *nisi*, in answer to which the affidavit in question has been made, must be produced. If evidence on a civil trial be in question, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material, as well as the record. 2 Stark. Ev. 626, 2nd ed.

Judge or jury?] In *Bashford*, 1906, the recorder of London ruled that materiality was for the judge, but consented to state a case: *Law Journal*, Dec. 1, 1906, 769, where it is stated that the question has never been decided by the Court for C. C. R. In *Lavey*, L. Campbell C.J. asked, 'Is materiality a question for the judge?' and expressly asked the jury whether they had any doubt whether the evidence impugned was material, and directed them that their verdict must depend on that alone.

Statute, p. 934, has settled that it is for the judge. See *Courtney*, 7 Cox C. C. 111: C. C. R. Ir., 1856; *Gibbon*, 1861; *Worley*, 1849; *Southwood*, 1858; *Dunston*, 1824—*pro; contra—Lavey* and *Goddard*, 2 F. & F. 361, 1861.

Variance—common law] Where the perjury was in an answer to a bill filed in a particular term, and a copy produced was of one

amended in a subsequent term, it was held to be no variance, the amended being part of the original bill. *Waller,* 2 Stark. Ev. 623, 1708. Where the bill was stated to have been filed by A. against B. (defendant) '*and another*,' and in fact it was filed against B., C., and the attorney-general, but the perjury alleged was on a passage which was material between A. and B., L. Ellenborough held the variance immaterial, as it would have been enough to allege that the bill was filed against B. *Benson,* 1810. Where a date was not alleged as part of the record, and turned out to be wrong, it was held not material, and the variance not fatal, as it was not matter of description. In the same case it was alleged that when defendant signed a policy underwritten by A., B., C., &c., on a given date, he well knew [what does not appear], but it was proved that A. only did not underwrite it on that day, L. Ellenborough held the variance fatal, as a fact was alleged 'material with reference to the knowledge of the defendant.' *Hucks,* 1816. Where it was averred that a cause was depending between A. B. and C. D. (defendant, in perjury), L. Denman C.J. held that a notice of set-off given by the defendant intituled in 'A. B. *v.* C. D.' was not sufficient to support the allegation. *Stoveld,* 6 C. & P. 489, 1834. See also *Baily,* 7 C. & P. 264, 1835.

Misnomer] of the trial judge is no variance. *Coppard,* Moo. & Malk. 118, 1827; *Meek,* 9 C. & P. 513, 1840. Allegation that 'a certain action . . . came on to be tried in due form of law,' and was 'duly tried by a jury, &c.'; it appeared by the record that the trial ended in a non-suit, it was held that the indictment was good. *Bray,* 9 Cox C. C. 218, 1862. See *Dunn,* 1843. So in *Schlesinger,* 1847, the actual trial was before the secondary of London, but the averment 'before the sheriffs' was held good. In *Christian,* 1842, it was averred that the perjury took place in 'a certain action of contract pending in the [county] court,' &c., 'before J. M., then and there being judge . . . and . . . having . . . competent authority to administer the oath,' &c.; it was held that it sufficiently appeared that the court was statutory, and that there was a regular judicial proceeding and jurisdiction. *Lavey* v. *R.,* 1851. See *Rowland,* 1858, and 51-2 V. 43, 28, 180 (amended for forgery).

Documents] An allegation that the defendant made his warrant of attorney, directed to R. W. and F. B., 'then and *still* being attornies' of the K. B., is proved by putting in the warrant; for, as he admitted, they were at the time of execution, the presumption is they still are; see *Presumption* in Index. *Cooke,* 1836. An allegation that judgment was 'entered up' in an action, is proved by the production of the judgment book from the judgment office by a clerk therefrom. *Gordon,* Carr. & M. 410, 1842.

In a trial of a bankrupt for perjury the indictment averred exactly the same facts necessary to confer jurisdiction on the court as the bankrupt had set out in his petition. That petition was produced, and was the only evidence against him of those facts, but it was held by five judges sufficient so long as there was no contradiction. *Westley,* 29 L. J. M. C. 35; Bell C. C. 193; 8 Cox C. C. 244, 1859.

Titles of Acts] Pollock C.B. stated his opinion (and that, he believed, of the other four judges), generally, that where the title of an Act of parliament is not accurately stated, but sufficiently so

to enable 'the judges, who know the titles of all the Acts that have ever been passed,' to know with certainty what Act is meant, any minor inaccuracy is immaterial. *Ib.* See also *Lloyd,* 1887.

Falsity—evidence] One distinct assignment at least must be proved. *Rhodes,* 1704. And where the defendant's oath is to his belief only, it may be proper to aver that 'he knew' the contrary of what he swore. See *Belief,* above.

'. . . the defendant swears to the best of his recollection, and it requires very strong proof, in such a case, to show that the party is wilfully perjured; I do not mean to say that there may not be cases in which a party may not be proved to be guilty of perjury, although he only swears to the best of his recollection; but I should say that it was not enough to shew merely that the statement so made was untrue': *per* Tindal C.J., *Parker,* Carr. & M. 639, 1842.

It is not enough to show two contradictory oaths, *e.g.* before a magistrate and a grand jury, as *non constat* which of the contradictory statements was the true one: *per* Tindal C.J., *Hughes,* 1844; see *Corroboration,* below.

Where the averment was that defendant had sworn that he saw W. at about 11.15 'in the forenoon' of a particular day, and the evidence only proved that he had sworn that he saw W. at about 11.15, but had not sworn whether it was forenoon or afternoon, it was held that the averment was not proved, and Day J. directed an acquittal. *Bird,* 17 Cox C. C. 387, 1891.

If perjury is alleged in a county court, it is not necessary that the judge's notes should be produced. *Morgan,* 1852.

Award] F., plaintiff, was indicted for swearing that E., defendant, owed him 50*l.* The *cause* came on after indictment found and removed into K. B., and all matters in dispute were referred by consent to a barrister, who found that E. owed F. nothing. This award was admitted against F., who was convicted, but a new trial was ordered, as the decision was only the arbitrator's *opinion* and no proof of the falsity of what had been sworn: acquittal on second trial. *Fontaine Moreau.*

No evidence] Where prosecutor gave no evidence on one of several assignments, L. Denman refused to allow the defendant to show that the matter was not false. *Hemp,* 5 C. & P. 468, 1833.

Corrupt intention] 'Evidence is essential, not merely to show that the defendant swore falsely in fact, but also, as far as circumstances tend to such proof, to show that he did so corruptly, wilfully, and against his better knowledge.' 2 Stark. Ev. 627, 2nd ed. In this, as in other intents, the jury may infer the corrupt motive from the circumstances. *Knill,* 5 B. & Ald. 929, *n.*, 1822.

There must be proof that the false oath 'was taken with some degree of deliberation; for if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise or inadvertency, or a mistake of the true state of the question,' this would not 'amount to voluntary and corrupt perjury.' Hawk. P. C. 1, 69, 2; 4 Bl. Com. 137.

In *Stolady,* 1 F. & F. 518, 1859, Pollock C.B. said that it was not sufficiently precise to allege that defendant swore that a certain event did not happen between two fixed dates, *i.e.* he swore a defendant had been with him (and not *alibi*) every Sunday between those days; his attention not having been called to the particular day in question.

One witness not enough] 'It is a general rule that the testimony of a single witness is insufficient to' convict 'on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another.' 2 Stark. Ev. 626, 2nd ed.; Hawk. P. C. 2, 46, 10, below; 4 Bl. Com. 358.

One witness plus corroboration] 'But this rule must not be understood as establishing that *two witnesses* are necessary to disprove the fact sworn to by the defendant; for, if any material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction.' *Lee,* 1766; 1 Russ. Cri. 508 *f.* So 'it does not appear to have been laid down that *two witnesses* are necessary to disprove the fact sworn to by the defendant; nor does that seem to be absolutely requisite. But at least one witness is not sufficient; and, in addition to his testimony, some other independent evidence ought to be produced.' 1 Phill. Ev. 141, 6th ed. 'There must be something in the corroboration which makes the fact sworn to not true, if that be true also': *per* Alderson B. in *Boulter,* below. So under s. 13 of the 1911 A.: *Threlfall,* 24 Cox C. C. 230; 111 L. T. 168; 10 Cr. A. R. 112, 1914: one witness and a confession is enough, and one witness is enough to prove that a statement was sworn.

A distinction, however, appears to be taken between proving positive allegations in the indictment, and disproving the truth of the matter sworn to by the defendant; the latter, it is said, requiring the testimony of two witnesses. Thus, Hawkins (above) adds, 'but the *taking of the oath* and *facts deposed* may be proved by one witness only.' So it is said by Starkie (on this passage), that it seems the 'contradiction must be given by *two direct witnesses;* and that the negative supported by one direct witness and by circumstantial evidence, would not be sufficient.' He adds that he had been informed that it had been so held by L. Tenterden. 2 Ev. 2nd ed., 626, *n.*

In *Champney,* 2 Lew. C. C. 258, 1836, Coleridge J. said, 'One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, L. Tenterden was of opinion that two witnesses were *necessary* to a conviction.' In *Mudie,* 1831, L. Tenterden doubted whether a single witness was enough against the defendant's oath that that witness had paid, and the production of his book to prove it, where *several* individuals each swore that *he* had not paid at the time. Tindal C.J. distinctly held in *Parker,* 1842, that such corroboration is not sufficient; there must be corroboration of each debt, &c., on which there is an assignment.

Where a statement by defendant is put in, contradicting the matter sworn to by him, it has been held not to be necessary to call two witnesses to prove the falsity; one witness, with proof of the admission, being sufficient. Defendant swore an information that three women were concerned in a riot at his mill; and afterwards, at the sessions,

when the rioters were indicted, he, having been tampered with in favour of the women, then swore that they were not at the riot. There was no other evidence on his being indicted to prove that the women were in the riot, but his own information, which was read. The judge and other judges thought this evidence sufficient, and he was convicted. *Anon.*, 5 B. & Ald. 939 *n.*, 1764. So where the only evidence was that defendant had sworn contradictorily before committees of the Houses of Commons and of Lords. *Knill,* 1822. Perjury in an affidavit on his bill of costs was charged against a solicitor, only one witness was called, and in lieu of a second, it was proposed to put in the bill of costs, delivered; it was objected that this was not sufficient, the bill not having been delivered on oath; Denman C.J. was clear that the bill was sufficient, or that even a letter written by him contradicting his statement on oath, would be sufficient to make a second witness unnecessary. *Mayhew,* 6 C. & P. 315, 1834.

What is corroboration] 'The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction': *per* Coleridge J., *Yates,* 1841; but in *Shaw,* 1865, Erle C.J. said, 'It is well-ascertained law that, upon an indictment for perjury, it is necessary to have more than the evidence of one witness alone; for that is but the oath of one against one, which leaves the matter even, and entitles the prisoner to an acquittal. The prosecution must do more than that. They must turn the scale by corroborating their witness. The degree of corroboration, however, which is necessary is not definable, and any attempt to define it will prove illusory. It must be something which, in the opinion of the tribunal before which it is brought, is deserving of the name of corroboration.' 'Where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the [solitary] witness who spoke to such assignment, on the facts contained in the other [two] assignments'—and there was abundant evidence of guilt in those two. *Virrier,* 12 Ad. & E. 317, 1840. So on a *general* verdict: *Gaskell,* 1912: c. q.: the court could not know whether the jury convicted on each assignment; if they did on the uncorroborated one, that conviction could not stand.

In *Boulter,* 2 Den. C. C. R. 396; 21 L. J. M. C. 57; 5 Cox C. C. 543, 1852, defendant stated in a trial that in June, 1851, he owed no more than one quarter's rent; the landlord swore that he 'then owed five quarters'; to corroborate whom, a witness proved that in August, 1850, defendant had admitted to him that he *then* owed three or four quarters'. Held not to be sufficient corroboration, for the money might have been paid intermediately: c. q.

Defendant swore that he saw prosecutor committing an offence, and saw the flap of his trousers unbuttoned. Prosecutor deposed that he did not commit the offence, and that there was no flap; his brother also proved that at the given time he was not out of his presence more than three minutes, and his trousers had no flap. This was held

by Patteson J. to be sufficient corroboration. *Gardiner,* 1839. A., to prove an *alibi* for B., swore that B. was not out of his sight between 7 a.m. and 10 a.m. on a certain day, and on this perjury was assigned; Patteson J. held that evidence by one witness that at 8.30 a.m. B. was at one place on foot, and by another witness that at 9 a.m. A. was walking at another place six miles off, was sufficient corroboration. *L. Roberts,* 2 C. & K. 607, 1848.

Self-contradiction not enough] There appears, however, to be an objection to this kind of evidence, which is not easily removed, namely, that there is nothing to show which of the defendant's statements is the false one where no other evidence of the falsity is given. So *Hughes,* 1844. Hence, Holroyd J. said, 'Although you may believe that, on one or other occasion' defendant 'swore that which was not true, it is not a necessary consequence that she committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances, at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict where it is not possible to tell which was the true and which was the false. *Jackson,* 1 Lew. C. C. 270, 1823. So in *Harris,* 5 B. & Ald. 937, 1822, the K. B. was of opinion that perjury could not 'be legally charged and assigned by shewing such contradictory depositions, with an averment that each of them was made knowingly and deliberately, but without averring or shewing in which of the two depositions the falsehood consisted.' So where defendant was charged with perjury at the sessions, Gurney B. held that his deposition before the magistrate, entirely contradicting what he swore at the trial, was not in itself sufficient proof that the latter was false, but that there must be corroboration that he swore falsely at the trial, which was given in the form of showing the truth of the deposition: he was found guilty. *Wheatland,* 8 C. & P. 238, 1838.

On a charge of having falsely sworn that certain invoices, bearing certain dates, were produced by defendant to one C., C. was called, and swore that defendant had not produced the invoices which she had deposed to, but that she had produced *others;* and he produced a memorandum of them made at the time, proving that they were not those sworn to. Cockburn C.J. held that the memorandum was a sufficient corroboration. *Webster,* 1 F. & F. 515, 1859.

A policeman, having laid an information against a publican, swore on the hearing that he knew nothing of the matter, except what he had been told, and that 'he did not see any person leave the defendant's house after eleven' on the given night. It was proved by the magistrates' clerk that he, when laying the information, said that he had seen four men leave the house after eleven, and that he could swear to one being W. It was also proved, that on two other occasions he made a similar statement to two other witnesses, and that W. and others did in fact leave the house after eleven on that night. He moreover admitted on the summons for perjury that he had received money from the publican to settle the matter, and there was much evidence to this effect. It was held that it was sufficient for perjury, and that the conviction was right. *Hook,* D. & B. C. C. 606; 27 L. J. M. C. 222; 8 Cox C. C. 5, 1858.

False oath] *Linton* was indicted for falsely swearing that he had the consent of the father of a girl, to marry whom he thus got a licence from a surrogate unlawfully. Archibald J. ruled that two witnesses of the falsity of the allegation of consent were necessary; for the indictment disclosed an offence similar to perjury, and the objection was that there was only oath against oath. It was true the first [the husband's] oath was not made in a court of justice, but if that objection prevailed, the father [by his single oath] alone could convict the husband of perjury, but the husband could not [by his single oath] alone convict the father if he falsely swore in court that he had not consented: 1874. (This case seems only to be reported in earlier editions of this work.)

Affirmations] in lieu of oaths are in their position as regards perjury for all purposes.

False oath not necessarily perjury] L. Tenterden C.J. held that an indictment would not lie under rpd. 7 G. 4, 57, 71, against a debtor for omissions in a sworn schedule (substantively punished under s. 70), saying, 'It by no means necessarily follows that perjury must be committed in a false oath taken under a particular statute. Though a high misdemeanour, it would not be perjury unless so made by the statute requiring the oath.' *Mudie*, 1 Moo. & R. 128, 1831. See *De Beauvoir*, 7 C. & P. 17, 1835; *Harris, ib.* 253, 1835; and *Dodsworth*, 8 C. & P. 218, 1837—the former relating to the oath of a candidate on his property qualification, the two latter to that of a voter on his registration; in all the *bona fides* of the defendants was established, and they were acquitted; *Chapman*, 1849. In *J. Shaw*, 1911, perjury was withdrawn, but false oath was found: c. q.

5-6 W. 4, 62, amended Perjury A. 1911, abolished unnecessary oaths and substituted declarations in lieu thereof.

Punishment] At common law, fine and imprisonment at the discretion of the court.

B. Statutes.

The chief A. is 1-2 G. 5, 6, the Perjury A. 1911.

1.—(1) If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment with or without hard labour for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.

(2) The expression 'judicial proceeding' includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath.

(3) Where a statement made for the purposes of a judicial proceeding is not made before the tribunal itself, but is made on oath before a person authorised by law to administer an oath to the person who makes the statement, and to record or authenticate the statement, it shall, for the purposes of this section, be treated as having been made in a judicial proceeding.

(4) A statement made by a person lawfully sworn in England for the purposes of a judicial proceeding—

(*a*) in another part of His Majesty's dominions; or

(*b*) in a British tribunal lawfully constituted in any place by sea or land outside His Majesty's dominions; or

(*c*) in a tribunal of any foreign state,

shall, for the purposes of this section, be treated as a statement made in a judicial proceeding in England.

(5) Where, for the purposes of a judicial proceeding in England, a person is lawfully sworn under the authority of an Act of Parliament—

(*a*) in any other part of His Majesty's dominions; or

(*b*) before a British tribunal or a British officer in a foreign country, or within the jurisdiction of the Admiralty of England;

a statement made by such person so sworn as aforesaid (unless the Act of Parliament under which it was made otherwise specifically provides) shall be treated for the purposes of this section as having been made in the judicial proceeding in England for the purposes whereof it was made.

(6) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial.

2. If any person—

(1) being required or authorised by law to make any statement on oath for any purpose, and being lawfully sworn (otherwise than in a judicial proceeding) wilfully makes a statement which is material for that purpose and which he knows to be false or does not believe to be true; or

(2) wilfully uses any false affidavit for the purposes of the Bills of Sale Act, 1878, as amended by any subsequent enactment,

he shall be guilty of a misdemeanour, and, on conviction thereof on indictment, shall be liable to penal servitude for a term not exceeding seven years or to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.

3.—(1) If any person—

(*a*) for the purpose of procuring a marriage, or a certificate or licence for marriage, knowingly and wilfully makes a false oath, or makes or signs a false declaration, notice or certificate required under any Act of Parliament for the time being in force relating to marriage; or

(*b*) knowingly and wilfully makes, or knowingly and wilfully causes to be made, for the purpose of being inserted in any register of marriage, a false statement as to any particular required by law to be known and registered relating to any marriage; or

(*c*) forbids the issue of any certificate or licence for marriage by falsely representing himself to be a person whose consent to the marriage is required by law knowing such representation to be false,

he shall be guilty of a misdemeanour, and, on conviction thereof on indictment, shall be liable to penal servitude for a term not exceeding seven years or to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.

(2) No prosecution for knowingly and wilfully making a false declaration for the purpose of procuring any marriage out of the district in which the parties or one of them dwell shall take place after the expiration of eighteen months from the solemnization of the marriage to which the declaration refers.

4.—(1) If any person—

(*a*) wilfully makes any false answer to any question put to him by any registrar of births or deaths relating to the particulars required to be registered concerning any birth or death, or, wilfully gives to any such registrar any false information concerning any birth or death or the cause of any death; or

(*b*) wilfully makes any false certificate or declaration under or for the purposes of any Act relating to the registration of births or deaths, or, knowing any such certificate or declaration to be false, uses the same as true or gives or sends the same as true to any person; or

(*c*) wilfully makes, gives or uses any false statement or declaration as to a child born alive as having been still-born, or as to the body of a deceased person or a still-born child in any coffin, or falsely pretends that any child born alive was still-born; or

(*d*) makes any false statement with intent to have the same inserted in any register of births or deaths:

he shall be guilty of a misdemeanour and shall be liable—

(i) on conviction thereof on indictment, to penal servitude for a term not exceeding seven years, or to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine instead of either of the said punishments; and

(ii) on summary conviction thereof, to a penalty not exceeding ten pounds.

(2) A prosecution on indictment for an offence against this section shall not be commenced more than three years after the commission of the offence.

5. If any person knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, and the statement is made—

(*a*) in a statutory declaration; or

(*b*) in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return, or other document which he is authorised or required to make, attest, or verify, by any public general Act of Parliament for the time being in force; or

(*c*) in any oral declaration or oral answer which he is required to make by, under, or in pursuance of any public general Act of Parliament for the time being in force,

he shall be guilty of a misdemeanour and shall be liable on conviction thereof on indictment to imprisonment, with or without hard labour, for any term not exceeding two years, or to a fine or to both such imprisonment and fine.

6. If any person—

(*a*) procures or attempts to procure himself to be registered on any register or roll kept under or in pursuance of any public general Act of Parliament for the time being in

force of persons qualified by law to practise any vocation or calling; or

(*b*) procures or attempts to procure a certificate of the registration of any person on any such register or roll as aforesaid,

by wilfully making or producing or causing to be made or produced either verbally or in writing, any declaration, certificate, or representation which he knows to be false or fraudulent, he shall be guilty of a misdemeanour and shall be liable on conviction thereof on indictment to imprisonment for any term not exceeding twelve months, or to a fine, or to both such imprisonment and fine.

7.—(1) Every person who aids, abets, counsels, procures, or suborns another person to commit an offence against this Act shall be liable to be proceeded against, indicted, tried and punished as if he were a principal offender.

(2) Every person who incites or attempts to procure or suborn another person to commit an offence against this Act shall be guilty of a misdemeanour, and, on conviction thereof on indictment, shall be liable to imprisonment, or to a fine, or to both such imprisonment and fine.

8. Where an offence against this Act or any offence punishable as perjury or as subornation of perjury under any other Act of Parliament is committed in any place either on sea or land outside the United Kingdom, the offender may be proceeded against, indicted, tried, and punished in any county or place in England where he was apprehended or is in custody as if the offence had been committed in that county or place; and, for all purposes incidental to or consequential on the trial or punishment of the offence, it shall be deemed to have been committed in that county or place.

9.—(1) Where any of the following authorities, namely, a judge of, or person presiding in, a court of record, or a petty sessional court, or any justice of the peace sitting in special sessions, or any sheriff or his lawful deputy before whom a writ of inquiry or a writ of trial is executed, is of opinion that any person has, in the course of a proceeding before that authority, been guilty of perjury, the authority may order the prosecution of that person for such perjury, in case there shall appear to be reasonable cause for such prosecution, and may commit him, or admit him to bail, to take his trial at the proper court, and may require any person to enter into a recognizance to prosecute or give evidence against the person whose prosecution is so ordered, and may give the person so bound to prosecute a certificate of the making of the order for the prosecution, for which certificate no charge shall be made.

(2) An order made or a certificate given under this section shall not be given in evidence for the purpose or in the course of any trial of a prosecution resulting therefrom.

10. A court of quarter sessions shall not have jurisdiction to try an indictment for any offence against this Act, or for an offence which under any enactment for the time being in force is declared to be perjury or to be punishable as perjury, or as subornation of perjury.

11. The provisions of the Vexatious Indictments Act, 1859, and the Acts amending the same, shall apply in the case of any offence punishable under this Act, and in the case of any offence which under any other enactment for the time being in force, is declared to be perjury or subornation of perjury or is made punishable as perjury or as subornation of perjury, in like manner as if all the said offences

were enumerated in section one of the said Vexatious Indictments Act, 1859: Provided that in that section a reference to this Act shall be substituted for the reference therein to the Criminal Procedure Act, 1851.

12.—(1) In an indictment—

(*a*) for making any false statement or false representation punishable under this Act; or

(*b*) for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, solemn declaration, statutory declaration, affidavit, deposition, notice, certificate, or other writing,

it is sufficient to set forth the substance of the offence charged, and before which court or person (if any) the offence was committed without setting forth the proceedings or any part of the proceedings in the course of which the offence was committed, and without setting forth the authority of any court or person before whom the offence was committed.

(2) In an indictment for aiding, abetting, counselling, suborning, or procuring any other person to commit any offence hereinbefore in this section mentioned, or for conspiring with any other person, or with attempting to suborn or procure any other person, to commit any such offence, it is sufficient—

(*a*) where such offence has been committed, to allege that offence, and then to allege that the defendant procured the commission of that offence; and

(*b*) where such offence has not been committed, to set forth the substance of the offence charged against the defendant without setting forth any matter or thing which it is unnecessary to aver in the case of an indictment for a false statement or false representation punishable under this Act.

13. A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false.

14. On a prosecution—

(*a*) for perjury alleged to have been committed on the trial of an indictment for felony or misdemeanour; or

(*b*) for procuring or suborning the commission of perjury on any such trial,

the fact of the former trial shall be sufficiently proved by the production of a certificate containing the substance and effect (omitting the formal parts) of the indictment and trial purporting to be signed by the clerk of the court, or other person having the custody of the records of the court where the indictment was tried, or by the deputy of that clerk or other person, without proof of the signature or official character of the clerk or person appearing to have signed the certificate.

15.—(1) For the purposes of this Act, the forms and ceremonies used in administering an oath are immaterial, if the court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection, or has declared to be binding on him.

(2) In this Act—

The expression 'oath' in the case of persons for the time being allowed by law to affirm or declare instead of swearing, includes 'affirmation' and 'declaration,' and the expression 'swear' in the like case includes 'affirm' and 'declare'; and

The expression 'statutory declaration' means a declaration made by virtue of the Statutory Declarations Act, 1835, or of any Act, Order in Council, rule or regulation applying or extending the provisions thereof; and

The expression 'indictment' includes 'criminal information.'

16.—(1) Where the making of a false statement is not only an offence under this Act, but also by virtue of some other Act is a corrupt practice or subjects the offender to any forfeiture or disqualification or to any penalty other than penal servitude, or imprisonment, or fine, the liability of the offender under this Act shall be in addition to and not in substitution for his liability under such other Act.

(2) Nothing in this Act shall apply to a statement made without oath by a child under the provisions of the Prevention of Cruelty to Children Act, 1904, and the Children Act, 1908.

(3) Where the making of a false statement is by any other Act, whether passed before or after the commencement of this Act, made punishable on summary conviction, proceedings may be taken either under such other Act or under this Act:

Provided that where such an offence is by any Act passed before the commencement of this Act, as originally enacted, made punishable only on summary conviction, it shall remain only so punishable.

17. (Repeal of a large number of enactments from 1541—1909.)

S. 4 (1), *b*. Where a doctor gave certificates of death of persons who, he was falsely told, were dead, but not for the purpose of any registration A., a conviction under this sub-s. was upheld, because 'wilfully' = intentionally, and he knew that some of his statements (*e.g.* that he had attended in the last illness) were false: *M. J. Ryan,* 24 Cox C. C. 135; 78 J. P. 192; 110 L. T. 779; 30 T. L. R. 242; 10 Cr. A. R. 4, 1914.

S. 13. See *Threlfall.*

Evidence] The indictment alone, without the record of the trial or the certificate of it [now under s. 14], is insufficient proof of the previous proceedings. *Coles,* 16 Cox C. C. 165, 1887: under the corresponding rpd. s.

Perjury is within the Vexatious Indictments A.

Where no application was made to the judge for his consent to prosecute at the time of the alleged perjury, *i.e.* the trial, but about a fortnight afterwards the prosecutor's attorney went before the judge without summons or affidavit, and laid before him a newspaper report of the trial, and the judge wrote on it, 'I consent to the prosecution in this case,' signing his name, this was held to be a sufficient consent within the Act. *Bray,* 1862.

False evidence not on oath in other cases] Various other statutes, too numerous to set out, make false evidence (*not necessarily* on oath (*e.g.* on examination by Public Works Loan Commissioners under 38-9 V. 89)) perjury, or punishable as perjury. Many such ss. have been

rpd. by the principal A., which by s. 5 purports to provide for (almost if not) all unsworn false evidence.

Indictment A. 1915] has a Form—21—appended to it.

There cannot be a joint indictment; in *Philips, &c.,* 2 Str. 921, 1732, of six jointly indicted, four were convicted, but judgment was arrested.

Verdict] general: see *Gaskell,* 1912.

Venue] The recital in the *jurat* of the place where the oath is administered, is sufficient evidence that it was administered there—for purposes of venue. *Spencer,* Ry. & Moo. N. P. C., 1824; *Hailey,* 1824. But the *jurat* is not conclusive of the place of swearing; it may be rebutted: *Emden,* 9 East 437, 1808.

Subornation of Perjury.

'Subornation of perjury by the common law seems to be . . . procuring a man to take a false oath amounting to perjury, who actually takes such oath.' But if he 'do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished.' Hawk. P. C. 1, 69, 10.

Evidence] If the subornee has been convicted, it will not, as it seems, be sufficient against the suborner to prove merely the record of the conviction; but the whole evidence must be gone into as upon the former trial; cf. *Coles,* 1887. On indictment for procuring one Macdaniel, who had been convicted, to take a false oath, the record of Macdaniel's conviction for perjury was produced. 'But it was insisted for the prisoner, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was correct; that *Reilly* had a right to controvert the guilt of Macdaniel, and that the evidence given on Macdaniel's trial ought to be submitted to the consideration of the present jury, and the recorder obliged the counsel for the crown to go through the whole case in the same manner as if the jury had been charged to try Macdaniel.' *Reilly,* 1 Lea. 455, 1787, on which Starkie remarks: 'This authority seems at first sight to be inconsistent with that class of cases in which it has been held that as against an accessory before the fact to a felony, the record of the conviction of the principal is evidence of the fact. If the prisoner, instead of being indicted as a principal, in procuring, &c., had been indicted as accessory before the fact, in procuring, &c., the record would clearly have been good *primâ facie* evidence of the guilt of the principal. It is, however, to be recollected that this doctrine rests rather upon technical and artificial grounds than on any clear and satisfactory principle of evidence.' 2 Ev. 627, 2nd ed. It may also be observed that the indictment for subornation of perjury does not set forth the *conviction* of the false swearer, but only the preliminary circumstances and the taking of the oath; forming an allegation of his *guilt,* and not of his *conviction;* and in *Turner,* 1832, the judges expressed a doubt whether, if an indictment against a receiver stated, not the

conviction, but the *guilt* of the principal felon, the record of that conviction would be sufficient evidence of the guilt.

Corroboration of an accomplice, even though not statutory, is as necessary as in perjury: *L. Cohen,* 1914.

PERSONAL PROPERTY, OFFENCES RELATING TO.

See *Property* in Index.

PERSONATION.

See *False Personation.*

PERSONATION OF HUSBAND.

See under *Rape.*

PERVERSION AND INTERFERENCE WITH THE COURSE OF JUSTICE.

The law is almost entirely non-statutory. See *Cheating* at common law and *Attempts, Office-Holders* and *Offices, Public.*

Judges, &c.] For offences by judicial officers, see 3 Inst. 224, and 1 Anson on the Constitution, p. 378, 4th ed., and Vol. 2, Pt. 1, p. 222, 3rd ed., citing Mr. Kenrick's case in 1826 (Hansard, 2nd S. 657: alleged misconduct of 'a justice of great session in Wales,' recorder of Dover, and a J.P. for Surrey, but not in any judicial office: in effect for malicious prosecution before Surrey magistrates). The only instance of an address from both houses of parliament for the removal of a judge was in *Sir Jonah Barrington's case,* 1828, for 'malversation in office.' See 2 Todd, Parliamentary Government in England, p. 736. See also the impeachment of *L. St. Albans,* 'for bribery and corruption in the execution of his office.' 2 St. Tr. 1087, 1620.

Merely offering a judge a bribe is criminal. 3 Inst. 147. See, generally, *Bribery.*

Magistrates] In 1574, Dyer C.J. himself drew indictments against county justices for oppression, partiality and negligence, and charged the jury against them; for an attack by one of them on his character the author was apparently punished: 5 Foss's Judges, 484.

Counsel, &c.] Counsel 'are punishable for any foul practice as other ministers of justice are.' Hawk. P. C. 2, 22, 30; and see *Maintenance.* There is an indictment 'against a counsellor for betraying his client's cause and taking fees of the other side': *Walker,* in Tremaine's Pleas of the Crown, 261, 1655. See also *Anon.,* 6 Mod. R. 137, 1705, and, generally, *Marchant's* Barrister-at-Law, ch. 6.

Legal process] See *False Personation, Privilege under Libel,* and *Process* in Index. See also *Embracery, Perjury,* and *Subornation.*

Corruption of witnesses] Analogous to the offence of embracery is persuading a witness from attending to give evidence, or advising a defendant to stand mute, offences punishable with fine and imprisonment. It is not material that the attempt has been unsuccessful. Hawk. P. C. 1, 21, 15; *Lawley,* 2 Str. 904, 1731.

For the protection of witnesses from arrest, intimidation or tampering, see under *Witnesses.*

In *Loughran,* 1 Craw. & Dix. Circ. C. 79, 1839: Ir., there was a conviction for intimidating a crown witness. The common law misdemeanour is not confined to the offences against witnesses 'in a criminal matter' (*sic* 9 Halsbury, 498, which is not exhaustive). Triable at Q. S. *ib.* See *Onslow,* below.

Conspiracy] 'to defeat the public justice of the kingdom' may be charged, as in *Macdaniel* 1756 to 1759, where several persons had sworn away the life of an innocent man to get the reward for a conviction. So of procuring a place on a grand jury so as to indict persons: *Scarlet,* 12 Co. R. 98, 1613.

Accessories] See that title and *Misdemeanours,* below.

Printed comment—newspapers] See *Libel.* The limits of Press *privilege* (if any) were admirably explained by L. Shaw for the J. C. of the P. C. in *Arnold* v. *King-Emperor,* 1914. In *Spenceley* v. *De Willott,* a rule *nisi* for a new trial was granted because 'plaintiff had published a statement of the case which was distributed about the court and the hall [Westminster] before and at the trial.'

In *Reason,* 1722, where a dying declaration had got into print, Pratt L.C.J. said, 'And there is, too, an examination in print; that ought not to be, and the person that did it ought to be censured. Are juries to be prepossessed? Here is a printed pamphlet, whereof the title is Mr. Lutterell's Cry for Justice.' Counsel for the crown said that it was in the prisoner's favour. 'If the examination is true,' said the L.C.J., 'it ought to be produced, and the prisoners ought to come fairly to their trial, and, if guilty, God forbid but they should suffer, but not by passionate insinuations in print; and it is an unprecedented thing, and if it comes out who did it, I shall take a course with them; it is a way of preventing all manner of justice': 16 St. Tr. 33.

It does not matter whether a charge is pending before justices or has actually been committed, nor *semble* whether it be indictable or not, if the comment is improper. *D. Davies,* 1906, 1 K. B. 32; 75 L. J. K. B. 104; 22 T. L. R. 97: punished before trial for contempt of court; publication before committal.

During and after the hearing before a magistrate, and between that and the trial of certain persons, ultimately convicted, and during the trial a 'publication went far beyond any fair and *bonâ fide* report of the proceedings before the magistrates. They (*sic*) contained, couched in florid and sensational form, a number of statements highly detrimental to [the defendants]. Much of these statements related to matters of which evidence would not have been admissible against them in any event, and purported to be the result of investigations made by the 'special crime investigator' of the newspaper' (*per* L. Alverstone C.J.). Both the editor and the reporter were indicted and convicted, and the Court for C. C. R. held that the offence was indictable; it might also be contempt of court. *Tibbits and Windust,* 1902, 1 K. B. 77; 71 L. J. K. B. 4; 66 J. P. 5; 20 Cox C. C. 70.

Contempt of court] *William de Brewse* was indicted and convicted for a contempt of justices of *oyer* and *terminer* in 1305-6: 3 Inst. 142. It is always indictable: *Judge of the Brompton County Court,* 1893, 2 Q. B. 199; 62 L. J. Q. B. 604; 57 J. P. 648; 68 L. T. 829. Beside the summary jurisdiction of the court in which the matter, *e.g.* an indictment, is pending, there may be, *semble,* a criminal information or an ordinary indictment for 'violent and inflammatory language at public meetings or otherwise . . . likely to influence the minds of witnesses, &c.' *Onslow, &c.,* 12 Cox C. C. 358, 1873: Q. B. Triable at Q. S.

Misdemeanours] It may be an indictable contempt to conceal or comfort, &c. one known to be guilty of 'inferior crime' of the 'nature' of 'trespass' if there is 'a warrant out against him,' but it is not more than that. Hawk. P. C. 2, 29, 4.

Photographs] Possibly the 'impropriety' of publishing the likeness of a man 'simply because he is accused of crime,' commented on by L. Alverstone C.J. in *Morrison,* 1911, may be indictable.

Coroners] For an indictment for obstructing him in his duty, *e.g.* by burying a body to prevent an inquest, see Form 31, S. R. & O. 1916, p. 133.

Bail] Indemnification of recognisances, however honest, is indictable, *i.e.* any party to such an agreement is indictable. *W. H. Porter,* 1910, 1 K. B. 369; 79 L. J. K. B. 241; 74 J. P. 159; 26 T. L. R. 200; 3 Cr. A. R. 237.

Defendant] An information was granted against a defendant who distributed handbills vindicating himself and attacking the prosecution in the assize town and shortly before his trial; the judge postponed the trial: *Jolliffe,* 1791.

The ultimate conviction of the defendants attacked had nothing to do with the matter. *Ib.,* and *Williams* and *Romney,* 1823.

Q. S.] Indictment lies for disobeying their order: *Robinson,* 2 Burr. 800, 1759: grandfather ordered to maintain grandchildren; but where there is *also* a summary remedy it is oppressive to indict: *per* L. Mansfield.

See also *Compounding,* for misprision, and *Escape.*

PICKETING, ILLEGALLY.

See under *Conspiracy in Restraint of Trade.*

PICKLOCKS, POSSESSION OF.

See *Implements* in Index.

PIGEONS, OFFENCES RELATING TO.

Larceny may be committed of tame pigeons, even although unconfined; and by 24-5 V. 96, 23: 'Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon, under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay over and above the value of the bird any sum not exceeding two pounds.'

For 'larceny at common law,' see *Animals:* it may be committed of young or old pigeons 'when shut up': East P. C. 607; but not of 'old pigeons being out of the house': Hawk. P. C. 1, 33, 40 (*i.e.* wandering wild away from their cote and not known by the taker to be tame: Steph. Dig. Cr. L. Art. 333).

Where B. gave notice to A. that if A.'s pigeons continued to come on to his land and injure his crops he would shoot them, and he afterwards did shoot one and left it on the ground, it was held that this was not an unlawful killing within the meaning of the s., for the s. applies only to acts such as *larceny*. *Taylor* v. *Newman,* 4 B. & S. 89; 22 L. J. M. C. 186, 1863: approved in *Hudson* v. *Macrae.*

See *Smith* v. *Dear,* 20 Cox C. C. 458, 1903.

PILOTS, OFFENCES BY,

under s. 607 of 57-8 V. 60, are, when they are in charge of the ship, dealt with like those of the master, &c. See under *Ships.*

PIRACY.

Common law—jus gentium] 'The offence of piracy by common law consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. But it is no felony at common law.' Hawk. P. C. 1, 37, 4; 4 Bl. Com. 72; East P. C. 796. More acurately there are two jurisdictions of the crown, one 'over the British seas' (at common law, viz. of murder, robbery, &c.); the other 'in concurrence with other princes and states . . . in the most remote parts of the world': *jure gentium, i.e.* against piracy proper. Hawk. *ib.* s. 2; hence Bl. *ib.* calls this a case 'in which the statute law of England interposes to aid and enforce the law of nations as a part of the common law.' Again, the *despoiled* person, whether 'Christian or infidel, Turk or pagan,' must be one 'with whose country we are in amity, trade or correspondence.' Hawk. *ib.* (*i.e.* not an enemy): in which case *any* country 'may punish' any one: *ib.* s. 1. If the crown be *at war* with the state of which the *accused* is a subject, it follows, in certain cases, from the definition that he would not be guilty, for in war the offence would not amount to felony, &c.; if the belligerent commissioned his acts or his action was 'professedly' or 'wholly political,' *i.e.* directed against the other belligerent *only* in the interest of the accused's country. Hall—approved in *Republic of Bolivia, &c.*, below—thinks that at any rate he could not be guilty of the 'coarser' piracy. But it does not follow that subjects of a belligerent are, in the absence of any such justification, excused from piracy merely because their sovereign is at war with that of the despoiled. The accused must show a genuine act of war as recognised by international law.

'The high seas'—land] Mere landing, *e.g.* on an uninhabited island belonging to no state, does not exclude piracy. So *Hall*, Intern. L. P. 2, c. 6: still less of a 'piratical' descent on 'state territory.' See *Coombes*, 1785; Hawk. s. 17.

A branch of a branch of the Amazon is not a place for 'piracy': *per* Vaughan-Williams L.J. (and Pickford J.), *Republic of Bolivia* v. *Indemnity, &c. Co.*, 1909, 1 K. B. 785.

Statutes] Before 28 H. 8, 15, rpd. for *piracy*, the offence was only punishable by the civil law, and that statute does not make it a felony. By other statutes, however, the offence is made felony. See the Seventh Report of the Commissioners on Criminal Law, 1843, p. 70.

By s. 8 (or 7) of 11 (& 12) W. 3, 7: 'if any of his Majesty's natural-born subjects or denizens of this kingdom shall commit any piracy or robbery, or any act of hostility against other his Majesty's subjects upon the sea under colour of any commission from any foreign prince or state, or pretence of authority from any person

whatsoever, such offender and offenders and every of them shall be deemed adjudged and taken to be pirates, felons, and robbers, and . . . [if] convicted under this' A. or 28 H. 8, 15, 'shall . . . suffer . . . pains of death, loss of lands, goods and chattels.'

By s. 9 (or 8): '. . . if any commander, or master of any ship, or any seaman or mariner, shall in any place where the admiral hath jurisdiction betray his trust, and turn pirate enemy or rebel, and piratically and feloniously run away with his or their ship or ships or any barge boat ordnance ammunition goods or merchandizes or yield them up voluntarily to any pirate or shall bring any seducing messages from any pirate enemy or rebel or consult combine or confederate with or attempt or endeavour to corrupt any commander master officer or mariner to yield up or run away with any ship goods or merchandizes or turn pirate or go over to pirates or if any person shall lay violent hands on his commander whereby to hinder him from fighting in defence of his ship and goods committed to his trust or that shall confine his master or make or endeavour to make a revolt in the ship shall be adjudged deemed and taken to be a pirate, felon, and robber . . .': punishment as in last s.

It was decided by the judges, that the making, or endeavouring to make, a revolt on board a ship, with a view to procure a redress of what defendants may think grievances, and without any intent to run away with the ship, or to commit any act of piracy, is an offence within this s. *Hastings,* 1 Moo. C. C. 82, 1825.

8 *G.* 1, 24] By s. 1: '. . . if any commander or master of any ship or vessel, or any other person or persons, shall . . . any wise trade with any pirate, by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas, with any ammunition, provision, or stores of any kind, or shall fit out any ship or vessel knowingly, and with a design to trade with or supply or correspond with any pirate, felon, or robber upon the seas, or if any person or persons shall any ways consult, combine, or confederate or correspond with any pirate, felon, or robber on the seas, knowing him to be guilty of such piracy, felony, or robbery,—such offender and offenders . . . shall . . . be deemed adjudged and taken to be guilty of piracy, felony, and robbery,' and shall be tried by either statute above mentioned . . . 'and in case any person or persons belonging to any ship or vessel, whatsoever, upon meeting any merchantship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and, though they do not seize and carry off such ship, or vessel, shall throw over-board or destroy any part of the goods or merchandizes belonging to such ship or vessel, the person or persons who shall be guilty thereof shall in all respects be deemed and punished as pirates as aforesaid,' *i.e.* as above.

18 *G.* 2, 30] By s. 1, 'all persons being natural-born subjects or denizens of his Majesty, who, during' any war, 'shall commit any hostilities upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, against his Majesty's subjects by virtue or under colour of any commission from any of his Majesty's enemies, or shall be any other ways adherent, or giving aid or comfort to his Majesty's enemies upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power,' &c., 'may be tried as pirates, felons, and robbers in the . . .

Court of Admiralty, on ship-board or upon the land, in the same manner as' pirates, &c. are under 11-12 W. 3, above; and so punished.

Under this statute it has been held, that persons 'adhering' to the king's enemies, merely cruising in enemy's ships with intent to take the king's and his subjects' ships, may be tried as pirates under the usual commission under 28 H. 8, 15: *i.e.* treason may be piracy and *vice versâ*. *Evans*, East P. C. 80, 798, 1782.

Punishment] All the above statutes were repealed so far as regards the *punishment* of piracy and persons accessory thereto by s. 1 (rpd.) of 7 W. 4 & 1 V. 88, the Piracy A. 1837.

Piracy A. 1837] By s. 2: 'Whosoever with intent to commit, or at the time of or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon.'

By s. 3: 'Whosoever shall be convicted of any offence which by any of the [above] Acts . . . amounts to the crime of piracy, and is thereby made punishable with death, shall be liable . . . to be transported beyond the seas for . . . life.'

By s. 4: 'In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall, on conviction, be liable to be imprisoned for any term not exceeding two years.'

For evidence in these cases, see under *Depositions*.

'Taking'] There must be evidence of facts which, had the transaction occurred within the body of a county, would have rendered the offence larceny or robbery at common law. There must therefore be a taking *animo furandi* and *lucri causâ*. It has been said that if a ship is attacked by a pirate, and the master, for her redemption, gives his oath to pay a sum certain, though there is no taking, yet it is piracy by the law marine, but by the common law there must be an actual taking, though but to the value of a penny, as in robbery on the highway. 1 Beawes, Lex Mercatoria, 6th ed. (1813) 355. If a ship is riding at anchor, with part of the mariners in her boat, and the rest on shore, so that none remain in the ship, if she be attacked and robbed, it is piracy. *Ib.*

Who may be guilty] The subject of a foreign power in amity with this country may be punished for piracy committed on English property. 1 Beawes, Lex Merc. 6th ed. (1813) 353. Where several seamen on board the King Charles II. seized the captain, 'he not agreeing with them, and, after putting him ashore, carried away the ship and afterwards committed several piracies,' it was held that 'this force upon the captain, and carrying the ship away (which was explained by their use of it afterwards), was piracy' and they were executed. *May*, East P. C. 796, 1696. Where a master, having

insured ship [not stated to be British] and goods at London and Rotterdam, ran the goods on shore in England, with intent to defraud the owners and insurers, and when the ship was burned (probably by him), duly 'protested' ship and cargo, on an indictment for piracy and stealing, it was held to be only a breach of trust and no felony, and that it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined. *Mason*, East P. C. 796; 8 Mod. 74, 1723: trial under a commission by 22 H. 8, 15. Defendants were convicted on a count for feloniously and *piratically* stealing cable, &c., on the high seas, within the jurisdiction of the admiralty. They were Deal pilots, who, taking a vessel into Ramsgate, had, in collusion with the master, cut away the cable and part of the anchor, which had before been broken, for the purpose of causing an average loss to the underwriters; they contrived to tow away the cable and convert it to their own use. It was objected that their offence was not larceny, having been committed by them jointly with the master of the vessel, not for the purpose of defrauding the owners, but for the purpose of defrauding the underwriters for the benefit of the owners. A majority of the judges, however, held the conviction right. *Curling*, R. & R. 123, 1807.

Accessories] were triable only by the civil law, and, if their offence was committed on land, they were not punishable at all before 11-12 W. 3, 7, 10. By that s. and by 8 G. 1, 24, 3, they are declared to be principal pirates, felons, and robbers, and are to be in every way dealt with as such.

'The knowingly receiving and abetting, within the body of a county, one who has committed piracy upon the sea is not an offence cognizable by the common law, for where the common law cannot punish the principal, it cannot punish anyone as accessory to such principal. *Query*:—Whether the Admiralty has jurisdiction in such case.' *The Case of the Admiralty*, 6 Coke Rep. Pt. 13, 51, 1610.

Admiralty jurisdiction] is concurrent with any other which may exist when 'piracy as defined by the law of nations' is *also* an offence under 41-2 V. 73, the Territorial Waters Jurisdiction A. 1878, by s. 6 thereof.

Venue] See that title and *Coombe*, 1785.

By 46 G. 3, 54, 'all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be inquired of, tried . . . according to the common course of the laws of this realm, used for offences committed upon the land within this realm, and not otherwise, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the king's commission or commissions, under the Great Seal of Great Britain, to be directed to any such four or more discreet persons as the lord chancellor, &c., shall from time to time think fit to appoint.' The commissioners are to have the same powers as commissioners under the 28 H. 8.

Chinese coolies rose at sea, between Macao and Peru, against a French captain and crew which was conveying them, killed them, took the vessel back to China, and abandoned her. Some were tried in China; one fled to Hong-Kong. The J. C. of the P. C. ultimately

decided that the murder by a Chinese of one who was not a subject of China, outside of China, could not, without evidence, be assumed to be a crime against the laws of China (within the ordinance regulating extradition between Hong-Kong and China, which did not include piracy generally), though it might be against French law, having been committed on French territory; defendant, therefore, could not be extradited to *China* on this ground. But he ought to have been committed for trial at Hong-Kong for piracy, *jure gentium*, for this is justiciable anywhere; presumably, therefore, in China. *Attorney-General for Hong-Kong* v. *Kwok-A-Sing*, L. R. 5 P. C. 179; 12 Cox C. C. 565; 42 L. J. P. C. 64; 29 L. T. 114; 21 W. R. 825, 1873. On a writ of *hab. corp.* defendant had been discharged from felony in seizing ship and murder; this was approved by the J. C.; a second discharge from piracy, *jure gentium*, was reversed; apparently, if they had believed the ship was a slave-ship (and the coolies rose to regain their liberty), they would have upheld it. Mellish L.J. approved the definition: Piracy is 'robbery within the jurisdiction of the Admiralty.'

POACHING.

See *Game* and cf. *Deer*.

POISONING.

Intent or attempt to murder] See 24-5 V. 100, 11, 14.
Cf. *Abortion,* and ss. 58, 59, for drugs therein, and *Williams,* 1844.

Other intents] By 24-5 V. 100, 22: 'Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to, or attempt to cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life . . .'
Not triable at Q. S.

Endangering life, &c.] By s. 23: 'Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony . . .' Conclusion as in s. 22, above, but maximum term, ten years.
Triable at Q. S.

Intent to injure, aggrieve, or annoy] By s. 24: 'Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be kept in penal servitude,' *i.e.* the maximum term is five years.

Indictment and verdict] By s. 25: 'If, upon the trial of any person for any felony in . . . section [23] mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanour in . . . section [24] mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanour, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanour.'

Poisoning fish] See *Sea, &c.*, and cf. *Fish.*

The intent] Administering cantharides to a woman with intent to excite her sexual passion [see under *Procuration*], in order that defendant may have connection with her, was held to be within 23-4 V. 8, 2, rpd., where the words are identical with s. 24, above. *Wilkins,*

L. & C. 89; 31 L. J. M. C. 72; 9 Cox C. C. 21, 1861. But where cantharides was administered in so small a quantity as to be insufficient to occasion injury or to produce any effect on the human system, it was held by Cockburn C.J. that there was no offence within s. 24, despite the intent to annoy, because it could not, in that form, be said to be noxious: *Hennah*. The question is whether the drug in the form and quantity in which it is administered is noxious or not. *Cramp*, 1880.

Cf. cases under *Assault*.

PONDS, OFFENCES CONNECTED WITH.

See *Sea*.

POSSESSING STOLEN PROPERTY.

See *Receiving, &c.*, which is not quite the same offence.

POST-OFFICE—OFFENCES RELATING TO THE.

See titles, *Letters, Stamps* and *Telegraph.*

Statutes] 8 E. 7, 48, the Post Office A. 1908, is the principal A.

Larceny of postal packets, &c.] By s. 12 of the Larceny A. 1916 (with which s. 50 of the P. O. A. is almost identical), every person who (1) steals a mail bag; or (2) steals from a mail bag, post-office, officer of the post-office or mail, any postal packet in course of transmission by post; or (3) steals any chattel, money or valuable security out of a postal packet in course of transmission by post; or (4) stops a mail with intent to rob [or search] the mail, shall be guilty of felony: maximum sentence, penal servitude for life.

The words, *or search,* are only in the P. O. A.

By s. 51 of the P. O. A., anyone who unlawfully takes away or opens a mail bag 'sent by any vessel employed by or under the Post Office for the transmission of postal packets under contract' or 'unlawfully takes a postal packet in course of transmission,' &c. out of such a bag is guilty of felony: maximum sentence, 14 yrs. p. s.

Receivers] S. 52 is almost verbally identical with s. 33 (2), (3) of the Larceny A. 1916, which see. Sentence, therefore, is subject to the remarks on s. 55, below.

Fraudulently retaining letters, &c.] By s. 53: 'If any person fraudulently retains or wilfully secretes, or keeps, or detains, or when required by an officer of the post-office, neglects or refuses to deliver up (*a*) any postal packet which is in course of transmission by post and ought to have been delivered to any other person, or (*b*) any postal packet in course of transmission by post or any mail bag which shall have been found by him or by any other person, he shall be guilty of a misdemeanour'; on conviction on indictment punishment is by fine and imprisonment.

Diversion of letters] By s. 54: '(1) If any person not in the employment of the postmaster-general wilfully and maliciously with intent to injure any other person either opens or causes to be opened any letter which ought to have been delivered to that other person, or does any act or thing whereby the due delivery of that letter to that other person is prevented or impeded, shall be guilty of a misdemeanour, and be liable to a fine not exceeding fifty pounds, or to imprisonment . . . for any term not exceeding six months. (2) Nothing in this section shall apply to a person who does any act to which this section applies where he is parent or in the position of a parent or guardian of the person to whom the letter is addressed.

(3) A prosecution shall not be instituted in pursuance of this section except by the direction or with the consent of the postmaster-general.

A letter in this section means a postal packet in course of trans-

mission by post and any other letter which has been delivered by post.'

S. 55 is: 'If any officer of the post-office steals or for any purposes whatever embezzles secretes or destroys a postal packet in course of transmission by post he shall be guilty of felony and shall on conviction be liable at the discretion of the court to imprisonment for any term not exceeding two years with or without hard labour or to penal servitude for a term not less than three years and not exceeding seven years, or if the postal packet contains any chattel or money or valuable security to imprisonment for any term not exceeding two years with or without hard labour or to penal servitude for life or any term not less than three years.'

S. 18 of the Larceny A. 1916, enacts the same as s. 55, except that (i) it omits 'for any purposes whatever' and 'secretes or destroys,' and (ii) says nothing of (a) *imprisonment*, which, however, is unnecessary by virtue of 54-5 V. 69, 1 (2); (b) the *lower* limit of p. s. It would seem, therefore, to affect a sentence of *p. s.* which A. the indictment is under. The court leans to the lighter sentence. *Turner*, 1903.

Opening or detaining letters] By s. 56: '(1) If any officer of the Post Office, contrary to his duty, opens or procures or suffers to be opened any postal packet in course of transmission by post, or wilfully detains or delays, or procures or suffers to be detained or delayed, any such postal packet, he shall be guilty of a misdemeanour': punishment, fine or imprisonment, or both. '(2) Provided that nothing in this section shall extend to the opening, detaining or delaying of a postal packet returned for want of a true direction, or returned by reason that the person to whom the same is directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof, or to the opening or detaining or delaying of a postal packet under the authority of this Act or in obedience to an express warrant in writing under the hand of a Secretary of State'; in Ireland 'under the hand and seal of the Lord Lieutenant'; in the Isle of Man, under the hand of the Governor with the sanction of a Secretary of State.

Money orders] By s. 58 (1), every officer of the post-office who 'grants or issues any money order with a fraudulent intent' is guilty of felony, and liable to seven years' p. s. By (2), if he re-issues a money order previously paid he is within (1). By s. 59, a money order is 'an order for the payment of money and a valuable security' within Forgery and Larceny Acts. By (2): 'If any person with intent to defraud obliterates, adds to or alters any such lines or words on a money order as would, in the case of a cheque, be a crossing of that cheque or knowingly offers, utters or disposes of any money order with such fraudulent obliteration, addition or alteration, he shall be guilty of felony and be liable to the like punishment as if the order were a cheque.'

By s. 60, offences in respect of the poundage or commission or the paper of postal orders, *i.e.* frauds, are punished under the provisions for offences 'connected with stamp duties.' See *Stamps*.

Injury to post-office property] By s. 61: '(1) A person shall not place or attempt to place in or against any post office letter box any fire, any match, any light, any explosive substance, any dangerous

substance, any filth, any noxious or deleterious substance, or any fluid, and shall not commit a nuisance in or against any post office letter box, and shall not do or attempt to do anything likely to injure the box, appurtenances, or contents.

(2) If any person acts in contravention of this section, he shall be guilty of a misdemeanour, and be liable . . . on conviction on indictment, to imprisonment . . . for a period not exceeding twelve months.'

Forbidden contents] By s. 63 (1): 'A person shall not send or attempt to send a postal packet which either—(*a*) encloses any explosive substance, any dangerous substance, any filth, any noxious or deleterious substance, any sharp instrument not properly protected, any living creature which is either noxious or likely to injure other postal packets in course of conveyance, or an officer of the post-office, or any article or thing whatsoever which is likely to injure either other postal packets in course of conveyance or an officer of the post-office; or (*b*) encloses any indecent or obscene print, painting, photograph, lithograph, engraving, book, or card, or any indecent or obscene article, whether similar to the above or not; or (*c*) has on the packet, or on the cover thereof, any words, marks, or designs of an indecent, obscene, or grossly offensive character.

(2) If any person acts in contravention of this section he shall be guilty of a misdemeanour, and shall be liable . . . on conviction on indictment, to imprisonment,' &c. 'for a period not exceeding twelve months.

(3) The detention in the post-office of any postal packet on the ground of its being in contravention of this section shall not exempt the sender thereof from any proceedings which might have been taken if the same had been delivered in due course of post.'

Accessories] An editor inserted in his newspaper advertisements, not themselves offensive, of obscene books, &c., to be sold by foreigners abroad, well knowing to what the advertisements referred. A police officer wrote to the advertised addresses and obtained the books. A conviction for causing and procuring, &c. an offence against this s. was upheld, by virtue of 24-5 V. 94, 8, as aiders, &c. in misdemeanour are themselves principals. *De Marny*, 1907, 1 K. B. 388; 76 L. J. K. B. 210; 21 Cox C. C. 371; 23 T. L. R. 221: C. C. R.

Indecency is a question of fact on all the circumstances for the jury. *H. Key*, 1908. Sending *Obscene Publications* (which see), &c. through the post is not a 'public sale.'

By s. 69, soliciting anyone to commit an indictable offence under this A. is a misdemeanour: maximum sentence, 2 years' imp. with h. l.

Venue] By s. 72 (1): 'Any offence against this Act may be tried either in the county or place in which it was actually committed, or in any county or place in which the alleged offender is apprehended, or is in custody, or (where the offence is in respect of a mail bag, or postal packet, or money order, or any chattel, money, or valuable security sent by post) in any county or place through which or any part thereof the mail, mail bag, postal packet, money order, chattel, money, or security passed in due course of conveyance by post . . . (2) Where the offence is committed in any highway, harbour, canal, river, arm of the sea, or other water, constituting the boundary of two or more counties or places, it may be tried in any of the said

counties or places.' (3) Aiding, &c. an offence against this A. may be tried anywhere where that offence may be.

By s. 73, post-office property is laid in the postmaster-general, and no value of the things in question need be proved.

Evidence] By s. 74, a thing is proved to be 'a postal packet' if it 'is in the course of transmission by post or has been accepted by the postmaster-general therefor.'

By s. 77, if an offence against this A. is also one at common law or under another A., any court may direct proceedings to be continued in either of the latter ways.

Punishment] Post employees 'cannot claim the benefit of their good character in the same way as other prisoners': *B. R. Noble,* 1 Cr. A. R. 30, 1908.

Definitions] By s. 89 (*inter alia*), 'the expression 'mail' includes every conveyance by which postal packets are carried, whether it be a carriage, coach, cart, horse, or any other conveyance, and also a person employed in conveying or delivering postal packets, and also any vessel employed by or under the post office for the transmission of postal packets by contract or otherwise in respect of postal packets transmitted by the vessel. The expression 'mail bag' includes a bag, box, parcel, or any other envelope or covering in which postal packets in course of transmission by post are conveyed whether it does or does not contain any such packets; . . . the expression 'postal packet' means a letter, post card, reply post card, newspaper, book packet, pattern or sample packet, and every packet or article transmissible by post includes a telegram. The expression 'officer of the post-office' includes the postmaster-general, and any person employed in any business of the post-office, whether employed by the postmaster-general, or by any person under him, or on behalf of the post-office. The expression 'post-office' includes any house, building, room, carriage, or place used for the purposes of the post-office, and any post-office letter box. The expression 'valuable security' has the same meaning as in the Larceny Act [s. 1 unrpd.], 1861, and includes anything which is a valuable security within the meaning of that Act and any part of such thing whatsoever, entitling, or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings-bank, or the whole or any part of any debenture, deed, bond, bill, note, warrant, or order, or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or of any warrant or order for the delivery or transfer of any goods or valuable thing. . . .' By s. 90 (*inter alia*): 'For the purposes of this Act—(*a*) A postal packet shall be deemed to be in course of transmission by post from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed, and (*b*) the delivery of a postal packet of any description to a letter carrier or other person authorised to receive postal packets of that description for the post, shall be a delivery to a post-office; and (*c*) the delivery of a postal packet at the house or office of the person to whom the packet is addressed, or to him or to his servant or agent or other person considered to be authorised to receive the packet according

to the usual manner of delivering that person's postal packets, shall be a delivery to the person addressed.'

What is a post letter] Under a rpd. s. it was held, where an inspector secretly put, but did not post, a 'trap' letter, with a sovereign, amongst others, which a suspected letter-carrier was about to sort, and the letter was not delivered, but the marked sovereign was found on him, that he was not rightly convicted of stealing *a post letter*, such letter not having been posted in the ordinary way, but was rightly convicted of larceny of the sovereign, 'the property of the postmaster-general.' *Rathbone*, 2 Moo. C. C. 242, 1841; *Shepherd*, 25 L. J. M. C. 52, 1856: C. C. R. An official put a half-sovereign into a letter, on which he wrote a fictitious address and posted it in the ordinary way to 'trap' a suspected employee, who in fact stole the money. It was held by fifteen judges that this was a 'post-letter' within the s., and not the less so because it had a fictitious address. *Young*, 1 Den. C. C. R. 194; 2 Cox C. C. 142, 1846; Pollock C.B. thinking he had ruled wrongly in *Gardner*, 1845, an exactly similar case, where he had only permitted a conviction for larceny. Where a person took a letter containing notes to the post-office, which was at an inn, but did not post it, but laid it and the postage money on a table, telling the defendant, a servant of the inn, who was not authorised to receive letters, that it was to be posted, and she said she would 'give it to them,' but stole the letter, &c.: Wightman J. held that this was not a 'post letter' within the s. *Harley*, 1 C. & K. 89, 1843.

'*Officer of the post-office*,' *s.* 89] replaces 'employed by or under the post-office.' The employment of the accused must be proved, though by s. 73 (2) 'the nature or particulars of the employment' need not be *alleged*. It is not necessary in these cases to produce the actual appointment of the prisoner, it is sufficient to show that he acted in the capacity imputed to him. *Borrett; Rees*, 6 C. & P. 606, 1834; *Shaw*, 1771; *Ellins*.

A person employed at a receiving-house of the general post-office to clean boots, &c., and who occasionally assisted in tying up the letter-bags, was held not to be a person 'employed by or under the post-office' within 52 G. 3, 143, 2, rpd. *Pearson*, 4 C. & P. 572, 1831. Defendant was a letter-carrier employed by the post-office, and had been in the habit of calling at a lodge, and receiving letters there, with a penny on each for the postage at the post-office; he sometimes omitted to call, and then the letters were posted; when he was ill another person had done exactly the same. He was charged with embezzling such pence. It was urged that as the charge was of embezzling, *i.e. by virtue of his employment*, it must be shown that it was his duty to receive the money, and not, as here, his mere voluntary act; but it was held by Coleridge J. that there was evidence to go to the jury, that the pence were received 'by virtue of' his 'employment.' *Townsend*, Carr. & M. 178, 1841: n. g. S. delivered two 5*l*. notes to Mrs. D., the wife of the postmaster of C., at which post-office money orders were not granted, and asked her to send them by G., defendant, a letter-carrier from C. to W., in order that he might get two 5*l*. money orders for them at the W. post-office. Mrs. D. gave these instructions to G., and put the notes by his desire into his bag. G. afterwards took the notes out of the bag, and pretended, when he got to the W. post-office, that he had lost them. It was

found by the jury that G. had no intention to steal the notes when they were given to him by Mrs. D. It was held by all the judges that this was not larceny, on the ground that the notes were not in G.'s possession 'as a post-office servant' (one count), but as a bailee (the other count being for simple larceny). *Glass*, 1 Den. C. C. R. 215; 2 Cox C. C. 236, 1847. Thus 'a postman may, like any other servant, make himself a bailee in matters outside the proper course of his employment or by special agreement.' *Wright* on Possession, p. 164. S., the postmistress of G., received from A. a letter unsealed, but addressed to B., and with it 1*l*. for a post-office order, 3*d*. for the poundage on the order, 1*d*. for the postage, and 1*d*. for the person who got the order. S. gave the letter unsealed and the money to defendant, who was the letter-carrier from G. to L., telling him to get the order at L., and enclose it in the letter, and post the letter at L. He destroyed the letter, never procured the order, and kept the money. Cresswell J. held that he was indictable under rpd. s. 26 (1837), as being at the time in the employment of the post-office. *Bickerstaff*, 2 C. & K. 761, 1848. Defendant was employed to carry letters from C. A. to F., and for nothing else. On one occasion, at the request of the postmaster at F., he assisted in sorting the letters at that place, and whilst so engaged stole one of the letters containing money. It was held that he was 'employed under the post-office,' within rpd. s. 26. *Reason*, 1 D. & P. C. C. 226; 6 Cox C. C. 227, 1853. Coleridge J. distinguished *Glass*, above, on the ground that 'it was not the business of the postmaster to get money orders.'

Where defendant was employed by a postmistress to carry letters from D. to B. at a weekly salary paid him by the postmistress, which was repaid to her by the post-office, it was held that he was a person employed by the post-office within 52 G. 3, 143, 2, rpd. *Salisbury*, 1831; if one is so employed, it is not necessary that he should get possession in the course of his duty.

Stealing, &c.] Where defendant secreted half a bank-note on one day, and the other half on another day, it was held to be a secreting of the note within 7 G. 3, 50, rpd. 'The doubt was, whether *secreting* in the statute did not mean the *original* secreting, as taking does; but' the judges 'distinguished between taking and secreting, for after the prisoner had got possession of the second letter he secreted both.' *Moore*, East P. C. 582; Lea. 575, 1792.

An official made a mistake in the sorting of two letters containing money, and he threw the letters unopened down a water-closet in order to avoid a penalty for such mistake. It was held that this was a larceny of the letters and money, and also a secreting of the letters within rpd. s. 26. *Wynn*, 1 Den. C. C. R. 365; 18 L. J. M. C. 51, 1848.

Where several securities, &c., are embezzled, see *Ellins*. It is not necessary to prove the execution of the stolen instruments. *Ib*. Country bank-notes paid in London, and on their way to be re-issued, were held within 7 G. 3, 50, rpd. *Ranson; Willoughby*, 1783, was a post-office case. For post-office orders, &c. for money, see *Gilchrist, Vanderstein*. Former statutes did not contain the word 'coin' or 'money.' Defendant was indicted under 7 G. 3, 50, above, for stealing a gold quarter-guinea, he being a sorter in the post-office; and it was objected successfully that as the letters contained *money*, and not securities for money, the case was not within the Acts. *Skutt*, Lea. 106, 1774; East P. C. 582. The security specified in the statute must

be valid and available. *Pooley,* R. & R. 12; Lea. 887; 3 B. & P. 311, 1800: unstamped draft.

A servant being sent with a letter, and a penny to pay the postage, and finding the office shut, put the penny inside the letter, and fastened it by means of a pin, and then put the letter into the box, which a post-office messenger stole; it was held by L. Denman C.J. that he might be convicted of stealing a post letter containing money, although the money was not meant for the addressee. *Mence,* Carr. & M. 234, 1841.

Evidence] It seems that what is mentioned in the letter secreted, &c., will not be evidence against defendant to prove that the letter contained an enclosure mentioned in it. *Plumer,* 1814, where both the letter opened and a bill mentioned in it were found in defendant's, a sorter's, pocket. The letter was read, the judge reserving the point, which was not decided. The letter had marked upon it, 'paid 2*s.*,' *i.e.* double postage. This was written by the clerk of the writer, who was not called; and there was also an official mark that two shillings had been paid. There being no other proof that a double letter had been posted, the judges held a conviction wrong. *Ib.*

On an indictment under rpd. statutes, the jury found specially that defendant was a person employed by the post-office, &c., that he secreted a letter which came into his hands by virtue of his office, containing a 10*l.* note, but that he did not open the same, nor know that the bank-note was contained therein, but that he secreted it with intent to defraud the king of the postage (eightpence), which had been paid to him [and not to embezzle the note]. He, it is stated, remained in prison at least five years—which seems to imply that the judges thought he was guilty (but see *Howatt,* below)—but no judgment appears to have been given. *Sloper,* East P. C. 583; Lea. 81, 1772.

Where defendant, with intent to steal the mail-bags, pretended to be the guard, and procured them to be let down to him from the window of the post-office by a string, and carried them away, all the judges held a conviction right, on a count for stealing the letters out of the post-office, for his artifice in obtaining the delivery of them was the same as if he had actually taken them out himself. *Pearce,* East P. C. 603, 1794. See *Kay,* below. It was held, also, that a letter-carrier taking letters out of the office, intending to deliver them to the owners, but to embezzle *the postage,* could not be indicted (under the *then* statutes) for stealing such letters. *Howatt,* East P. C. 604; Lea. 83, 1795; cf. *Sloper,* above. See *Dowdeswell* and *James,* 1890.

'*Post-office*' *defined*] S. 89, above. It was held that a 'receiving house' was not such, but such house was 'a place for the receipt of letters' within the A.; and, if a shop, the whole shop, and not merely the box, was to be considered as 'a place for the receipt of letters,' and, therefore, the putting of a letter on the shop counter, or giving it to a person belonging to the shop, was a posting it. *Pearson,* 1831. To constitute the offence under 52 G. 3, 143, 3, rpd. of stealing a letter from the place of receipt, it was held, that the letter must be carried wholly out of the shop, and, therefore, if a person took and opened a letter in the shop, and there stole the contents, without taking it out of the shop, the case was not within that s. *Ib.*

Possession of posted letters] In *Pearce,* above, 'the property did

not pass; the postmaster having no property in the mail-bag to part with.' East P. C. 673 [its contents?]. The owner of a watch placed it with the seller to be regulated; defendant, pretending by letter that he was the owner, desired the watchmaker to send it by post directed to the owner, and then by personating him obtained it from the postmaster. He was held to be rightly convicted of larceny, for, on receipt by the postmaster, the special property of the seller, the bailee ceased, 'the general property of the true owner became entirely unincumbered, and drew to it the possession, unless the postmaster himself became the bailee. . . . But this he did not, according to *Pearce's case.*' *Kay*, D. & B. C. C. 231; 26 L. J. M. C. 119; 7 Cox C. C. 289, 1857: the judgment which turned on the form of indictment was most severely criticised by Bramwell B. (who doubted at the trial) in *Middleton*, 1873, which see, and *Dowdeswell*. See *Cryer*, 1857.

'An officer of the post-office,' says Wright on Possession, p. 164, 'seems not as such to be a bailee of letters or other things in his charge, but to be merely a custodian for (and in a position similar to that of a servant of the sender [citing *Kay, Gard'ner, Pearce*, Alderson B. in *Watts*, 1850, 2 Den. 25].'

Some of the above offences are not triable at Q. S. See *Quarter Sessions*.

POUND-BREACH.

An indictment for this, *i.e.* rescuing cattle distrained and impounded, was tried at Bedfordshire Q. S. in 1893: *Butterfield*, 17 Cox C. C. 598.

PRESS OFFENCES.

See under *Libel*.

False news] See the *Conspiracy* cases and 7-8 V. 24, 4, which expressly preserves this offence, so that, despite the repeal of the whole A., it survives. Cf. 52-3 V. 63, 38. See *Panic*. To attempt to influence prices by this means is a misdemeanour.

Elections] See that title.

PRICES, ILLEGALLY INFLUENCING.

See *Trade, &c.*

PRISON BREACH AND CONNECTED OFFENCES.

Where a person is in lawful custody on a charge of treason or felony and effects his escape by force, this offence is a felony at common law; where he is in custody on an inferior charge, it is a misdemeanour. 2 Inst. 589; 1 Hale P. C. 607; see 1 E. 2, st. 2, below.

On a prosecution there must be proved—1, the offence punished by 2, the lawfulness of the imprisonment; and 3, the breach.

1. *The charge*] The statute *de frangentibus prisonam*, 1 E. 2, st. 2 (or 23 E. 1, according to *The Statutes Revised*, from which the text is here taken), enacts, 'that none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise.' If the offence, therefore, for which the person is arrested does not require judgment of life or member, prison-breach is not a felony. And if the offence for which the person is committed be supposed in the *mittimus* [= the authority to the gaoler to detain] to be of such a nature as requires a capital judgment, yet if in the event it be found of an inferior nature, and not to require such a judgment, it seems difficult to maintain that the breaking of the prison on a commitment for it can be felony. Hawk. P. C. 2, 18, 15. Perhaps the stating the offence in the *mittimus* to be one of lower degree than felony, will not prevent the breaking from being a felony, if in truth the original offence was not lower. *Ib.* One charged with high treason, who breaks prison, is only guilty of felony. *Ib.* s. 17. It is immaterial whether the person breaking had been tried or not. *Ib.* s. 16.

If the custody is on a *capias*, or on a *mittimus*, on suspicion of felony, he is within the statute, 'be he never so innocent, and the prosecution never so groundless'; for he is bound to submit to his imprisonment, until 'discharged by due course of law.' But there is a distinction between the two, for a *capias* is a lawful warrant and matter of record, whether there has been a felony or not; but, if there has been none, breaking prison on a *mittimus* is no felony. 2 Inst. 590; 1 Hale P. C. 610; Hawk. *ib.* ss. 5-7. A man may therefore be convicted for breaking prison before he is convicted of the felony for which he was imprisoned. 2 Inst. 592; 1 Hale, 611; Hawk. *ib.* s. 18—'the breach of prison' being 'a presumption of the guilt of the principal offense.' Hale, 612. Yet if he has been tried and acquitted of the principal offence, he ought not to be indicted for the breaking. And if he has been so indicted before the acquittal, after it, he may plead *that* acquittal in bar to the indictment for breach. 1 Hale P. C. 611, 612. But a dismissal of a charge by magistrates is not tantamount to an acquittal on indictment: *per* Martin B., *Waters*, 12 Cox C. C. 390, 1873, where defendant, arrested

without warrant, had been remanded by a magistrate without any evidence on oath, had escaped from a 'lock-up,' and had voluntarily appeared at the hearing; guilty, six weeks' imprisonment.

2. *The legality*] The imprisonment must be lawful; actual imprisonment will not be sufficient; it must be *primâ facie* justifiable. Therefore where a felony has been committed, but defendant is apprehended for it, without just cause of suspicion, and the *mittimus* is informal, and he breaks prison, this will not be felony, though it would (probably) be otherwise if there were such strong causes of suspicion as justify his arrest and commitment. Hawk. *ib.* ss. 8, 15; 1 Hale P. C. 610. So if his imprisonment on *mittimus* is unjustifiable; see last paragraph.

The statute extends 'to a prison in law,' as well as to 'a prison in deed,' and to 'lawful arrest.' 2 Inst. 589. An imprisonment in the stocks (*ib.*), or in the house of him who makes the arrest, or in the house of another, is sufficient. 1 Hale P. C. 609. So if one arrested for felony or suspicion thereof, felony in fact having been committed, violently rescues himself from the hands of the arrester. *Ib.* (relying on *Coke*, here cited). So Hawk. as above, s. 4, 'for imprisonment is nothing else but a restraint of liberty.'

'It is therefore enough if the gaoler have a sufficient notification of the offense for which he was committed, and the prisoner of the offense whereof he was arrested, and commonly, they know their own guilt, if they are guilty, without much notification.' Hale, *ib.* 610.

3. *The breach*] An actual breaking with force, and not merely a constructive breaking, must be proved. 'If the gaoler sets open the prison doors, and the felon escapes,' this is no felony in the latter, though it may be in the former. Hale, *ib.* 611. And if the prison be fired, and the prisoner escapes to save his life, this excuses the felony, unless the prisoner himself set fire to the prison, or it be done with his privity. *Ib.*, after 2 Inst. 590. In these cases the breaking amounts to a misdemeanour only (escape). And so, if other persons without his privity break the prison and he escape, he is only guilty of escape. Hawk. as above, ss. 9, 10. 'No breach of prison will amount to felony, unless the prisoner escape.' Hawk. *ib.* s. 12, *e.g.* if he be taken away by force: 2 Inst. 590; 1 Hale, 611. A man convicted of felony, in escaping over the walls of Brixton prison, threw down some bricks from the top, which had been purposely placed there loose, without mortar, in the form of pigeon holes, for the purpose of giving an alarm, and so preventing escapes. A doubt arose whether there was such force used as to constitute prison-breaking, but the judges were unanimously of opinion that the conviction was right. *Haswell*, R. & R. 458, 1821.

Punishment] 'As a high misdemeanour' (not felony), this offence is punishable by fine and imprisonment. Hawk. as above, s. 21; 4 Bl. Com. 130.

Accessories] See 28-9 V. 126, 37, and that title. By s. 4, 'prison' shall mean 'gaol, house of correction, bridewell, or penitentiary; it shall also include the airing grounds or other grounds or buildings occupied by prison officers for the use of the prison, and contiguous thereto.'

A crowbar is included in the words of s. 37, 'any other article or thing,' which may not be used to help escape. *Payne*, L. R. 1 C. C. R. 27; 35 L. J. M. C. 170, 1866.

In *Holloway*, 1851, the indictment under 4 G. 4, 64, 43, rpd., charged that A., being a prisoner, and endeavouring to effect his escape, had procured a key to be made, and had made overtures to defendant, a turnkey, to induce him to assist him, &c., that defendant received the key with intent to enable A. to escape, &c. It was held that the offence and intent were stated with sufficient certainty.

For *Homicide* of the prison-breaker, see that title.

Other offences] Triable at Q. S.

'Except for mutiny or incitement to mutiny or gross personal violence to an officer of the prison,' 61-2 V. 41, 5 (1) (*b*), corporal punishment may not be inflicted by prison rules, and when it may, only with certain safeguards. *Ib.*

Vagrancy A. 1824] Anyone committed under this A. who breaks or escapes 'shall be deemed an incorrigible rogue' (which title see) within the A. and may be punished as such: ss. 5, 10.

PRIZE-FIGHTING.

See *Affray*, *Assault*, and this title under *Manslaughter;* and cf. *Taylor*, 1875.

PROCURATION.

See *Prostitution*.

By s. 2 of 48-9 V. 69, the Criminal Law Amendment A. 1885, as amended by 2-3 G. 5, 20, 2: 'Any person who—

(1) Procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connexion, either within or without the Queen's dominions, with any other person or persons; or

(2) Procures or attempts to procure any woman or girl to become, either within or without the Queen's dominions, a common prostitute; or

(3) Procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become an inmate of or frequent a brothel elsewhere; or

(4) Procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of or frequent a brothel within or without the Queen's dominions,

shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused.'

By s. 3: 'Any person who—

(1) By threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(2) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(3) Applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connexion with such woman or girl,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.'

Punishment] By s. 3 of 2-3 G. 5, 20, a male may in addition 'be sentenced to be privately whipped, and the number of strokes

and the instrument with which they shall be inflicted shall be specified by the court in the sentence.'

A brothel-keeper received a girl brought to her by her co-defendant and shared the girl's money with the girl, but she in no way persuaded her to frequent the house, as she did frequently of her own freewill, living at home; finally she became a common prostitute. Bosanquet C.S. directed an acquittal, saying, 'The girl wanted no procuring at all. It must be real procuration. . . . The Act is not aimed at brothel-keepers. . . . It is aimed at people who get girls by some fraud or persuasion or by inviting them to do it if they cannot get money in any other way—turning them on to the streets.' *Helen Christian and another,* 23 Cox C. C. 541, 1913. Defendant pleaded guilty to an indictment under 2-3 G. 5, 20, 7 (4), and to keeping a disorderly house.

'*Under twenty-one*'] This need not be averred in the indictment: 'a girl' is enough. *S. Jones,* 6 Cr. A. R. 290, 1911.

'*Any other person*'] Hence, not the procurer. Indictment for such an attempt quashed. *C——.,* 74 J. P. 208, 1910.

Conspiracy] But the actual procurer may be guilty of conspiring with others to procure for one of them; following *Whitchurch,* 1890; *Elizabeth Mackenzie* and *George Higginson,* 75 J. P. 159; 27 T. L. R. 152; 6 Cr. A. R. 64, 1910: former convicted of procuration and conspiracy, the latter of aiding, &c. and conspiring with her, of common law conspiracy and of indecent assault. It is possible that the common law conspiracy counts were bad, but the court declined to throw any doubt on the conspiring to procure the defilement of a girl being a common law offence.

Corroboration] This was supplied by the girl's going to lodgings provided by defendant, though there was no evidence of improper conduct between them. *C. Cohen,* 3 Cr. A. R. 234, 1909. See also *Mash* v. *Darley,* where the only corroboration offered by the prosecutrix was evidence of another crime—viz. rape—c. q.: the corroboration must 'implicate the accused in respect of the offence charged; when that fails it is wholly immaterial that there is corroboration of other portions of her evidence.' *M. Goldstein,* 11 Cr. A. R. 27, 1914.

Venue] Procuring is a continuous offence; if the actual connection takes place in England, though the procuring is in Scotland, there is jurisdiction here. *Mackenzie* and *Higginson,* above.

PROFANITY.

See *Blasphemy.*

PROFESSIONAL MISCONDUCT.

See *Disqualification* in Index.

PROPERTY, OFFENCES AGAINST.

See Index.

PROSPECTUS, OFFENCES IN RESPECT OF.

See *Companies.*

PROSTITUTION, ENCOURAGING AND LIVING ON THE EARNINGS OF.

The physical element in prostitution, under the statutes, need not be normal connection: *de Munck,* 13 Cr. A. R. 113, 1918.

See *Living on Immoral Earnings* and *Soliciting,* I. 2.

An indictment charging the offence for one day is good; and the ordinary rule of evidence on *Similar Acts*—which title see—applies. *Hill and Churchman,* 1914, 2 K. B. 386; 83 L. J. K. B. 820; 24 Cox C. C. 150; 78 J. P. 303; 110 L. T. 831; 10 Cr. A. R. 56.

Triable at Q. S. *Ib.*

PUBLIC MEETING, DISORDERLY CONDUCT AT,

'for the purpose of preventing the transaction of the business for which the meeting was called together,' and incitement thereto, are, by 8 E. 7, 66, summarily punishable; and when the meeting is 'political, in a parliamentary constituency,' during an election, they are illegal practices within 46-7 V. 51, and so may be, by s. 52, found on indictment for a corrupt practice.

PUBLIC OFFICER, OFFENCES BY.

See *Office-Holders*.

PUBLIC OFFICES, SALE OF.

See *Offices*.

PUBLIC WORSHIP, DISTURBING.

See *Disturbing, &c.*

PUBLICATION, OFFENCES BY.

See Index.

RAILWAYS—OFFENCES RELATING TO.

Signing false statements, &c.] Delivering mortgage deeds, bonds or certificates without a statutory declaration, or signing false declarations, &c., are offences by directors or officers within 29-30 V. 108, 15, 16 (amended 1-2 G. 5, 34), 17 (amended 1-2 G. 5, 6). Offences under s. 16 are no longer indictable.

Misconduct of servants] By 3-4 V. 97, 13, 14, there is power for duly authorised officials, &c., to arrest summarily employees, drunk, negligent, acting recklessly, &c., and to indict them at Q. S.: maximum punishment, two years' imp. w. h. l.

Endangering safety] By 24-5 V. 100, 32: 'Whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony'; maximum punishment, penal servitude for life; a male under the age of sixteen years may also be whipped.

By s. 33: 'Whosoever shall unlawfully and maliciously throw, or cause to fall or strike, at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage, or truck, or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part, shall be guilty of felony, and being convicted thereof shall be liable' as in s. 32, above, except the whipping.

By s. 34: 'Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanour'; maximum punishment, imprisonment for two years w. h. l.

Obstructing, &c. the line] By 24-5 V. 97, 35: 'Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway, any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully or maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck, using such railway, shall be guilty of felony'; maximum punishment, exactly as in s. 32, above. Not triable at Q. S.

By s. 36: 'Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanour'; maximum punishment, imprisonment for two years w. h. l. Triable at Q. S.

Intent] Where some one designedly placed on a railway an obstruction, though not expressly to upset carriages, it was held indictable under 3-4 V. 97, 15, rpd., which corresponded partly to 24-5 V. 97, 36, and partly to s. 33, above. *Holroyd*, 2 Moo. & R. 339, 1841, where defendant had indicted the company for a diversion, and asserted that the earth and rubbish on their line had been accidentally dropped by his workmen; the jury disagreed..

Where defendant threw a stone over the parapet of a bridge, which fell on the tender of a passing engine, but there was no one on the tender at the time, though there was on the engine, it was held that he could not be convicted under rpd. s. 7 of 14-5 V. 19, where the words required some person on the vehicle struck. *Court,* 6 Cox C. C. 202, 1853. The omission is supplied in the similar s. 33, above.

Indictment under that s. (7), rpd., for throwing a stone into a railway carriage. There had been considerable popular excitement against a person who was about to travel by the train, and there was a crowd assembled at the time of his departure, and defendant threw a stone at this person, apparently, whilst he was in the carriage. Erle J. expressly in view of the preamble in s. 4 and the terms of s. 6 (both rpd.), considered 'that the *intent to endanger the safety of any person* travelling on the railway, spoken of in' two ss. 6, 7, rpd., 'must appear to have been an intent to inflict some grievous bodily harm, and such as would sustain an indictment for assaulting or wounding a person with intent to do some grievous bodily harm.' This intent accordingly, he left to the jury, who found not guilty. *Rooke,* 1 F. & F. 107, 1858.

What is a railway] A railway finished (and used for conveying workmen and materials), but not yet open to the public, is within 3-4 V. 97, 15, above. *Bradford,* 29 L. J. M. C. 171; 8 Cox C. C. 309, 1860: C. C. R. 'Railway' is defined, 3-4 V. 97, 21, and there are other definitions for other purposes; see *Stroud's* Judicial Dictionary.

What is obstruction] Defendant altered the arms of a signal and the colour of two 'distant' signal lights, with the result that the driver of a train slackened speed, and nearly brought the train to a standstill, causing delay. It was held that this was an obstruction within s. 36, above. *Hadfield,* L. R. 1 C. C. R. 253; 39 L. J. M. C. 131; 11 Cox C. C. 574; 22 L. T. 664; 18 W. R. 955, 1870. So where a man caused a goods train, on which he wished to ride, to slacken speed by holding up his hands, as the officials do. *Hardy,* L. R. 1 C. C. R. 278; 40 L. J. M. C. 62; 11 Cox C. C. 656; 23 L. T. 785; 19 W. R. 359, 1871.

Felonies and misdemeanours] 24-5 V. 97, 35, and 24-5 V. 100, 32, above, make some offences felonies. S. 36 of the former, and s. 34 of the latter—*ib.*—make the same acts done *without* intent a misdemeanour. See *Gilmore,* 1882: the point is now of less consequence.

For offences on railways, see *Gaming* and *Nuisance.*

RAPE AND UNLAWFUL CARNAL KNOWLEDGE (NOT INCEST).

By 24-5 V. 100, 48: 'Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.' The normal sentence is five years: *B. E. Robinson,* 11 Cr. A. R. 4, 1914.

'*Carnal knowledge*'] By 24-5 V. 100, 63: 'Whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.' Where the words 'carnal knowledge' are used in a statute as constituting an offence, this s. applies, *e.g.* to 48-9 V. 69, 4. *Marsden,* 1891, 2 Q. B. 149; 60 L. J. M. C. 171; 17 Cox C. C. 297: C. C. R. Cf. Stephen Dig. Cr. L., Art. 269: 'penetration to any the slightest degree,' &c.

Girl under thirteen years of age] By 48-9 V. 69, Crim. L. Amendment A. 1885, s. 4: 'Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life, or for any term not less than five years. . . .

Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that in the case of an offender whose age does not exceed sixteen years, the court may, instead of sentencing him to any term of imprisonment, order him to be whipped, as prescribed by' 25-6 V. 18, 'and the said Act shall apply, so far as circumstances admit, as if the offender had been convicted in manner in that Act mentioned.'

'This offence created by the statute . . . seems to be of the same character as rape': *per* Hawkins J., *Williams,* 1893.

Even in a 'very bad case' (of which no details are reported) ten years' p. s. were reduced to seven. *Jillson,* 8 Cr. A. R. 12, 1912.

Whipping] is alternative *only;* hence, when Grantham J. ordered a boy of fifteen to receive 20 strokes—before the infliction of which ten days for appeal must elapse—but had no power to detain him beyond the session (which terminated the next day) and could not send him, being under sixteen, to Borstal, he substituted 18 months' imp. w. h. l. *Storey,* 149 C. C. C., Sess. Pap. 103, 1908.

'*Sixteen*'] is computed according to the date of the *trial,* not of the offence. *Cawthron,* 1913, 3 K. B. 168; 82 L. J. K. B. 981; 77 J. P. 460; 23 Cox C. C. 548; 29 T. L. R. 600; 9 Cr. A. R. 48.

Personating husband] S. 4 ends: 'Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape.'

'It is not altogether certain,' says 9 Halsbury, 612 *f.*, 'whether a similar personation by another man of the paramour of a concubine would amount to rape. Before the Act it would probably have been held that it did not. (*Barrow*, 1868. The Irish C. for C. C. R., however, refused to follow that case in *Dee,* 1884, 15 Cox C. C. 579, and the authority of *Barrow* must be considered as to some extent shaken by the observations of the judges in *Flattery.*) In the case supposed the woman would not be protected by s. 3 (2) of 48-9 V. 69, unless she was commonly supposed to be the wife of her paramour.'

Girl between thirteen and sixteen] By s. 5: 'Any person who—

(1) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years; or

(2) Unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile,

shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that it shall be a sufficient defence to any charge under sub-section one of this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

Provided also, that no prosecution shall be commenced for an offence under sub-section one of this section more than *six* months after the commission of the offence.' *Six* here is an amendment (for *three*) by 4 E. 7, 15, 27. *Chandra Dharma* and other cases, 1905, 2 K. B. 335: C. C. R., are now only important as confirming 'the rule . . . that . . . statutes which make alterations in procedure are retrospective.'

'*Idiot or imbecile*'] The former is a 'person who from birth has had no mind'; the latter one 'who once having had a mind of some kind, owing to decay or other mental or physical causes, ceases to have a mind. I think it was intended to limit the protection of the A. to these two classes, who can neither consent nor resist': *per* Grantham J., *F.*, 74 J. P. 384, 1910; see below.

Sentence] See *Cargill.*

It is not a criminal offence for a girl between the ages of thirteen and sixteen to aid and abet or to incite a male person to commit an offence on herself. *Tyrrell*, 1894, 1 Q. B. 710; 63 L. J. M. C. 58; 17 Cox C. C. 716: C. C. R.: c. q.

But though no prosecution may be launched after the statutory period, evidence may still be given of acts before that period (if otherwise admissible), for 'the law of evidence is not affected.' *Shel-*

laker, 1913 (cf. *Probets*, 1912); overruling *Beighton*, 18 Cox C. C. 535, 1897.

Where defendant was committed for trial for rape, the offence having been committed less than three months before such committal, but was subsequently indicted and tried under s. 5 (1) more than three months after the offence, it was held that the proviso had been complied with since by s. 9 a charge of rape includes a charge of the misdemeanour under s. 5. *West*, 1898, 1 Q. B. 174; less fully reported, 18 Cox C. C. 675: C. C. R. Cf. under *Game*.

Ss. 4, 5] *Statutory* corroboration is not required—as it is in ss. 2, 3; cf. *Mash* v. *Darley*—but the risk of acting on the evidence of an uncorroborated girl should be pointed out. *J. A. Graham*, 4 Cr. A. R. 218; 74 J. P. 246, 1910, where the court thought there was corroboration of such evidence, although 'not of the part in which she put the blame on the prisoner.' Perhaps 'the girl consented to a greater extent than she said. . . . If she had connection with the prisoner she was not an entirely truthful girl, but her untruthfulness was in defence of her own character, and women will lie on that point often when the rest of their story is true: that ought to have been pointed out': conviction affirmed. Cf. *Quinn*, 1911. So especially of a girl of ten (or tender) years. *Pitts*, 1912, where for the felony under s. 4 indecent assault was substituted.

It is impossible to prescribe accurately the degree of non-statutory corroboration required. Cf. *Goad*, 2 Cr. A. R. 278, 1909. See *Credibility*, below.

Verdicts—indictment for rape] By s. 9: 'If upon the trial of any indictment for rape, or any offence made felony by section four of this Act, the jury shall be satisfied that the defendant is guilty of an offence under section three, four, or five of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanour of indecent assault.'

So *Incest* (which see), by 8 E. 7, 45, 4 (3), i.; and see *Defectives*.

For direction on indecent assault, see *J. West*, 1910.

See *Indictment*, generally, and below.

The *attempt* may be found by 14-5 V. 100, 9.

Custody of girls under sixteen] By 48-9 V. 69, s. 12: 'Where on the trial of any offence under this Act it is proved to the satisfaction of the court that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress, it shall be in the power of the court to divest such father, mother, guardian, master, or mistress of all authority over her, and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of twenty-one, or any age below this as the court may direct, and the High Court shall have the power from time to time to rescind or vary such order by the appointment of any other person or persons as such guardian, or in any other respect.'

Other criminal proceedings] By s. 16: 'This Act shall not exempt any person from any proceeding for an offence which is punishable at common law, or under any Act of parliament other than this Act, so that a person be not punished twice for the same offence.'

Vexatious Indictments A.—Q. S.] By s. 17, every misdemeanour under this A. is within that A., 'and no indictment under the provisions of this Act shall in England be tried by any court of quarter sessions.'

Spouse-witnesses] By s. 20, on charges under this A., and 24-5 V. 100, 48, 52-5, they are 'competent but not compellable . . . at every stage of such charge except an enquiry before a grand jury.' This A. is in the schedule to the Criminal Evidence A. 1898. Hence *Leach*, 1912 (also) settles that these witnesses are '*not* compellable.' The reference to the 'grand jury' means that such a witness is *incompetent* to appear there.

Child or young person] Offences against these are also within Sched. I. of the Children A. 1908, and so subject to ss. 12-38 thereof.

Definition] Part of 13 E. 1, st. 1 (the 2nd stat. of Westminster, 1285), c. 34 (rpd. for *rape*), is as follows:—'It is provided that if a man from henceforth do ravish a woman, married, maid, or other, where she did not consent, neither before nor after, he shall have judgement of life and of member. (2) And like-wise where a man ravisheth a woman, married, lady, damsel or other, with force, although she consent after, he shall have such judgement as before is said, if he be attainted at the king's suit, and there the king shall have the suit. (3) And of women carried away with the goods of their husbands, the king shall have the suit for the goods so taken away.' This has been held to contain the right definition of rape. *Camplin*, 1 C. & K. 746; 1 Den. C. C. 89 and *Addenda*, p. xvii.; 1 Cox C. C. 220, 1845; *Fletcher*, Bell C. C. 63; 28 L. J. M. C. 85; 8 Cox C. C. 131, 1859; and other cases—all discussed below. Coke defines it 'the unlawfull and carnall knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will.' 3 Inst. 60. Hale, 1 P. C. 628, follows Coke. Hawkins's definition is 'having unlawful and carnal knowledge of a woman by force against her will': P. C. 1, 41, 2; repeated East P. C. 434. In these definitions, the words 'against her will' must be taken to mean no more than 'without her consent,' if the above-mentioned cases are to be taken as correct law. Cf. *Fletcher*, L. R. 1 C. C. R. 39; 35 L. J. M. C. 172; 10 Cox C. C. 248, 1866. Stephen J. in *Clarence*, 1888, defines rape as 'having connection with a woman without her consent.' So the indictment runs. In Dig. Cr. L., Art. 270, he says: 'Rape is the act of having carnal knowledge of a woman without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm; but if such permission is given, the act does not' [except when a husband is personated] 'amount to rape, although such a permission may have been obtained by fraud and although the woman may not have been aware of the nature of the act.' Cf. the same writer, below, under *Females, &c.*

Age of sufferer] See under *Abduction*. The age of the child, if material, must be proved; but see under *Child*. Where the offence was

committed on 5th Feb., 1832, and the father proved that, on his return home on 9th Feb., 1822, after an absence of a few days, he found the child had been born, and was told by the grandmother that she had been born the day before, and an examined copy from the register of baptism showed that she had been baptized on 9th Feb., 1822; this evidence was held insufficient to prove the age, as the grandmother (but not the mother) was alive. *Wedge,* 5 C. & P. 298, 1832.

Where the mother stated 'in chief' that her child was more than ten and under twelve, but on cross-examination her evidence appeared extremely uncertain, yet it was left (with other uncertain evidence) to the jury, who found that the child was under twelve, and there was a conviction, the court refused to quash, as there was some evidence. *Nicholls,* 10 Cox C. C. 476; 16 L. T. 466; 15 W. R. 795, 1867: C. C. R. For a copy of the register of births, see *Weaver,* 1873. A birth certificate *plus* proof that a given person had always been treated as the person therein mentioned, is sufficient evidence of her age: *Bellis,* 6 Cr. A. R. 283, 1911; *J. Rogers,* 24 Cox C. C. 465; 79 J. P. 16; 111 L. T. 1115; 10 Cr. A. R. 276, 1914.

Age of offender] See *Offences by Child.* An infant under fourteen 'is presumed by law unable to commit a rape . . . but he may be a principal in the second degree, as aiding and assisting . . . if it appear by sufficient circumstances that he had a mischievous discretion, as well as in other felonies.' 1 Hale P. C. 630; *Eldershaw,* 3 C. & P. 396, 1828—common assault found; *Groombridge,* 7 C. & P. 582, 1836. Where the precise age was not proved, Patteson J. said, 'I think that the prisoner could not in point of law be guilty of the offence of assault with intent to commit a rape, if he was at the time of the offence under the age of fourteen. And I think also that if he was under that age, no evidence is admissible to show that in point of fact he could commit the offence of rape.' *Philips,* 1839; see *Presumptions;* common assault found. In *Jordan,* 9 C. & P. 118, 1839, where a girl was jointly indicted for abetting a boy, Williams J. held that he, if under fourteen (about which there was a doubt), could not be convicted of carnally knowing, &c., although it was positively proved that he had arrived at puberty. A boy under fourteen cannot be convicted under s. 4: *Waite,* 1892; but he can, though indicted under s. 4 (by s. 9, above), be found guilty of an indecent assault. *Williams,* 1893, where the jury found his age.

Attempts] See that title. If a boy under fourteen cannot be guilty of the *attempt,* he cannot be whipped under this A., the only power to whip being given by s. 4. See *Mayers,* below.

Who may be guilty] A woman, it seems, may be convicted of rape as a principal in the second degree. *Ram, per* Bowen L.J. where a husband and wife were jointly indicted and convicted for rape. Cf. *Jordan,* above, and *Accessories,* below.

For a husband committing a rape on his own wife, see *L. Audley* or *Castlehaven.*

Evidence] See *Banks,* 1916, discussed under various titles.

Indictment] The old indictment for rape contained the words '. . . on her did make an assault and her the said &c. did unlawfully and

carnally know.' It was held in *Guthrie*, L. R. 1 C. C. R. 241; 11 Cox C. C. 522, 1870, that on such an indictment there could be a conviction for common assault. It was held by ten of the judges, that the omission of the words, 'an assault,' &c., was no ground for arresting the judgment. *Allen*, 9 C. & P. 521, 1840.

In indictments under s. 5, above, the words 'make an assault' are generally omitted, and it therefore seems doubtful whether in such cases a verdict of common assault would be good. But see *Bostock*. In *Shott*, 3 C. & K. 206, 1851, it was held that 14-15 V. 100, 12, only applied to merger of a misdemeanour in a felony, *e.g.* false pretences in forgery; it did not mean that the misdemeanour as laid need not be proved; and as there the variance was of substance (the age of a child being laid as over ten and under twelve, but proving to be under ten), amendment (in a common law carnal knowledge case) was refused.

There is a Form, No. 4, appended to Indictments A. 1915.

'*Consent*'] See references in Index. 'It is no mitigation of this offence that the woman at last yielded to the violence, if such consent were forced from her by fear of death or by duress. Nor is it any excuse . . . that the woman consented after the fact, nor that she was a common strumpet; for she is still under the protection of the law and may not be forced; nor that she was first taken with her own consent, if she were afterwards forced against her will; nor that she was a concubine to the ravisher; for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment. All these latter circumstances, however, are material to be left to the jury in favour of the . . . accused, more especially in doubtful cases, and where the woman's testimony is not corroborated by other evidence.' East P. C. 444, after 1 Hale 628, 631; Hawk. P. C. 1, 41, 6-8; *Fletcher*, 1859, and below.

'Mere passive non-resistance cannot always be treated as consent; it is a question for the jury. . . . If a woman, physically and mentally capable, makes no resistance to a man, the jury would probably find consent. If, on the other hand, a woman is of defective mind, there might be no power to give or withhold consent, and yet the woman might not be an imbecile.' *F.*; see above.

Onus] See *Fletcher*, 1859 and 1866, below. The prosecution must disprove consent. *J. A. Bradley*, 1910: c. q. Consent, it seems, does not make the female an accomplice. *Tyrrell*, 1894; but contrast the *Incest* cases.

Evidence] See *Lillyman*.

Defence] It is essential that consent should be put distinctly to the jury; when they were told that it was an 'afterthought,' though in fact it had been set up before the justices (though only in cross-examination), c. q. *Rodda*. There ought to be counsel for defence in these cases: *J. George*, 2 Cr. A. R. 283, 319, 1909: *per* Alverstone L.C.J., who was a party to quashing, though he had refused leave to appeal. Cf. the remarks of Stephen J., 1 Hist. Cr. L. pp. 442, 444. So *Gillingham*, 5 Cr. A. R. 187, 1910; and see *Indecent Assault*.

Barrow, below, was generally questioned in *Flattery*, 2 Q. B. D. 410; 46 L. J. M. C. 130; 13 Cox C. C. 388, 1877: C. C. R., where defendant, under pretence of performing an operation, had connexion

with a girl, she submitting thereto, believing that he was treating her medically. The court on these facts held him to have been rightly convicted of rape, some judges greatly regretting the decision in *Barrow*. Nevertheless, in *O'Shay*, 1898 (a very similar case to *Flattery*), Ridley J., following *Stephen* Dig. Cr. L. art. 270, p. 207, 5th ed., held that 48-9 V. 69, had made *Flattery* no longer law, and that the true rule was that 'rape is overcoming a woman by force,' and that a 'conscious permission,' though obtained by fraud, and although she did not know the nature of the act, does not amount to rape—the single exception being that made by the last par. of s. 4; defendant might be (as he was) convicted of indecent assault, if the jury thought that by pretending to be a doctor the woman was induced to permit what she did.

In *Clarence*, 1888, Stephen J. said, 'The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to, in fact, into a rape are frauds as to the nature of the act itself, and as to the identity of the person who does the act. There is abundant authority to show that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done.' In *Young*, 14 Cox C. C. 114; 38 L. T. 546, 1878: C. C. R., which was almost exactly similar in circumstances to *Barrow*, except that the woman was asleep, and where the jury found that nothing in her conduct led defendant to believe that she consented, the court, on hearing that she was asleep, said that fact put an end to all doubt that the crime was rape.

Personation of a husband] See s. 4 (end), above. It will still be useful, on *Consent*, to mention some of the earlier decisions. Such a defendant, on discovery, desisted. The jury found that he had entered the house with intent to pass for the husband, and to have connexion, &c., but not with the intention of forcing the wife if she made the discovery. Eight to four of the judges held that he was not guilty of rape; several recommended a special verdict in such a case. *Jackson*, R. & R. 487, 1822; *Clarke*, 1 D. & P. C. C. R. 397; 24 L. J. M. C. 25; 6 Cox C. C. 412, 1854.

No force—fraud] See, for absence of intention to use force, *Stanton*, 1 C. & K. 415, 1844, and *Barrow*, L. R. 1 C. C. R. 156; 38 L. J. M. C. 20; 11 Cox C. C. 191, 1868, where, though *technical* force was used, c. q., because as the woman was not asleep nor unconscious, consent was obtained, though by fraud, she believing the man to be her husband, who was, in fact, asleep at her side. But where a man intended to have connexion while the woman was asleep, and attempted to do so, it was ruled that he might be convicted, as he was, of the attempt: *per* Lush J., *Mayers*, 12 Cox C. C. 311, 1872.

Corroboration] See under 48-9 V. 69, 4, 5.

Females—imbecile, drunk, &c.] *Camplin*, 1845, made a girl quite drunk, and when she was insensible had connexion with her. The jury found him guilty, but that he gave her the liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having connexion. It was held by ten judges to three that he was properly convicted of rape. In *Fletcher*, 1859, defendant

had carnal knowledge of a girl of thirteen, who made no resistance, but who, as the jury found, from defect of understanding, was incapable of giving consent. After much argument a conviction for rape was held good. 'The question is,' said L. Campbell C.J., 'what is the real definition of the crime of rape, whether it is the ravishing a woman *against her will* or *without her consent*. If the former is the correct definition, the crime is not in this case proved; if the latter, it is proved. *Camplin's case* seems to me really to settle what the proper definition is; and the decision in that case rests upon the authority of an A.' [13 E. 1, st. 1, c. 34]. 'We are bound by that definition.'

The attention of the court was called to *Fletcher*, 1859, in *Fletcher*, 1866, the two being very similar; here, however, defendant alleged consent on that and other occasions. The court unanimously quashed a conviction, being of opinion that there must be some evidence that the act was against the female's will or without her consent, even if she was (as here) an idiot, and that in the absence of such evidence there was no case to go to the jury. Pollock C.B. argued that 'if mere incapacity to consent,' as in the case of a girl of tender years, 'were sufficient to constitute the crime of rape,' ss. 50, 51, of 24-5 V. 100, now rpd., 'would have been unnecessary,' and he thought that to make mere connexion with an idiot, a crime would equally require an Act. The L. J. report has a *quære* whether this case does not overrule *Fletcher*, 1859. The two cases of *Fletcher* were further considered in *Barratt*, L. R. 2 C. C. R. 81; 43 L. J. M. C. 7; 12 Cox C. C. 498, 1873. There the conviction was for an attempt at rape on a girl of fourteen and a half, who, beyond all doubt, was an idiot. The court, in affirming, stated that the rule laid down in *Fletcher*, 1859, was right, and that it was not intended in *Fletcher*, 1866, to depart from this rule, viz. that it is sufficient to show absence of consent but to show this is essential, but that in the latter there was not sufficient evidence of absence of consent. Blackburn J. pointed out that in *Fletcher*, 1866, the degree of idiocy was much slighter than in *Fletcher*, 1859, or in *Barratt*, and that where there is idiocy, the question must always be one of degree.

'It is submitted that the true rule must be, that where the man is led from the conduct of the woman to believe that he is not committing a crime known to the law, the act of connection cannot under such circumstances amount to a rape. In order to constitute rape there must, it would appear, be an intent to have connection with the woman notwithstanding her resistance.' This opinion appeared in the 7th edition of this work (1868) by Mr. (afterwards Justice) J. F. Stephen. For the substance of what the same writer lays down in his Digest, see above. In *Urry*, Lincoln Spring Assizes, 1873, this passage was approved of by Denman J., whose remarks, and those of Field J. in *Flattery*, and Huddleston B.'s reference to the former in *Young*, above, see.

See further, for the difference between *consent* and *submission*, *Day*, 1841.

Physical condition] 24-5 V. 100, 63.

It has been made a question whether the fact of the hymen not being injured is proof that there has been no penetration. Where it was proved not to have been broken, Ashurst J. left it to the jury to say whether penetration was proved; for that if there were any, however slight, the rape was complete in law. The judges held a

conviction right; 'in such cases, the least degree of penetration is sufficient, though it may not be attended with the deprivation of the marks of virginity.' *Russen*, East P. C. 438, 1777. See *Gammon*, 5 C. & P. 321, 1832, and *Poore's* Medical Jurisprudence, 1901, p. 326, or *Brend's* Handbook, &c., p. 95, 1906; cf. *Beck's* Medical Jurisprudence, 7th ed. 1842, p. 91. In *M'Rue*, 8 C. & P. 641, 1838, where the sufferer was a child under ten, the surgeon stated that her private parts internally were so much inflamed that he was not able to ascertain whether the hymen had been ruptured or not. Three judges concurred: 'It is not necessary, in order to complete the offence, that the hymen should be ruptured, provided that it is clearly proved that there was penetration; but where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape': verdict, guilty of an assault. But in *Hughes*, 2 Moo. C. C. 190, 1841, it was held that penetration, short of rupturing the hymen, is sufficient to constitute rape, and that *Russen*, above, so decided. So, in *Lines*, 1 C. & K. 393, 1844, Parke B. told the jury that if any part of the *membrum virile* was within the *labia* of the *pudendum*, no matter how little, this was sufficient to constitute a penetration, and the jury ought to convict. See *Marsden*, above.

Accessories] See that title. An indictment, charging one both as principal in the first degree, and as aiding, &c. others in a rape, was held, after conviction, to be valid, on the first count charging as principal. It was held that evidence might be given of several rapes on the same woman, at the same time, by defendant and others each assisting in turn, without putting the prosecutor to elect on which count to proceed. *Folkes*, 1 Moo. C. C. 354, 1832. So a count charging A. with rape as a principal in the first, and B. as a principal in the second degree, may be joined with another charging them *vice versâ*—as the judgment is not different on either count. *Gray*, 7 C. & P. 164, 1835.

Credibility of prosecutrix] See *Corroboration*, above. 'The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible, according to the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame, if she presently discovered the offense, made pursuit after the offender, shewed circumstances and signs of the injury, whereof many are of that nature that women only are the most proper examiners and inspectors, if the place wherein the fact was done was remote from people, inhabitants, or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony when proved by others as well as herself.' 1 Hale P. C. 633; cf. East P. C. 445. See under *Hearsay* and *Evidence* under *Assault*. 'But, on the other side, if she concealed the injury for any considerable time after she had an opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned.' *Ib.* See *Lillyman*, and under *Hearsay*, generally, and *Little*, 1883.

Complaint—evidence] A famous caution is given by Hale, on the accusation of rape: 'An accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, tho never so innocent.' 1 P. C. 635. In *Hedges,* 3 Cr. A. R. 262, 1909, a complaint, eight days after, to a mother against a father was accepted by a jury and the C. C. A.: the latter said of defendant's answer to the charge: 'I don't know what I have been doing. I have had a lot of drink lately,' 'An admission made by a man when drunk may not be so weighty as if he was sober, but it is some corroboration.' In *B. Brown,* 1910, absence of complaint was a chief ground for quashing.

What is the earliest 'reasonable opportunity of complaint' depends on the circumstances of the case: *J. Lee,* 7 Cr. A. R. 31, 1911, where a first complaint was not allowed to exclude a second. The same was held in *Wilbourne,* 12 Cr. A. R. 280, 1917, where the C. C. A. would not exclude (though the trial judge had excluded) complaint in answer to another girl's question, 'What is the matter with you?': it did not cease to be voluntary. 'It may very well be that there is a point at which the narration by an outraged girl to other persons of what happened ought to stop': *per* Reading L.C.J.

As a general rule, the only point in which a witness's character can be impeached is his or her credibility; see *Evidence of Witness's Character.* The woman may be cross-examined about her connexion with other men, but such questions only go to her credit, and, it was held by the judges, need not be answered, as tending to disgrace her —there being no exception to the ordinary rule in rape. It was also held that defendant had no right to call evidence that she had had connexion with any particular person. *Hodgson,* R. & R. 211, 1812. But if such questions are answered in the negative, the answer is conclusive. *Holmes,* 1871.

It appears that evidence to show that the prosecutrix is a common prostitute is still admissible: *per* Kelly C.B. in *Holmes,* citing *Barker,* 3 C. & P. 589, 1829, where a question was allowed to show that the prosecutrix had since the alleged rape on her walked with a common prostitute, and another to show general lightness of character and, generally, of being a street walker. Still, a rape may be committed on a common prostitute: *per* Byles J. in *Holmes.*

But the relations between prosecutrix and defendant themselves are in a different category. *Riley,* 1887; *Martin,* 6 C. & P. 562, 1834, where Williams J. criticised the rule in *Hodgson,* above.

Unsworn Evidence] Where after such evidence the jury convicted (the charge being under s. 4) of an indecent assault, the conviction was upheld, notwithstanding that the child's evidence would have been inadmissible had the charge been one of indecent assault. *Wealand,* 20 Q. B. D. 827; 44 L. J. M. C. 44; 16 Cox C. C. 402, 1888: C. C. R. But where there was one count under s. 4, and a second count for indecent assault, and there was no evidence to go to the jury on the first count, it was held that such unsworn evidence was not admissible on the second, and c. q. *Paul,* 25 Q. B. D. 202; 59 L. J. M. C. 138; 17 Cox C. C. 111, 1890: C. C. R., distinguished from *Wealand.* By 8 E. 7, 67, 30, and schedule, such evidence is admissible on many charges, including that of indecent assault against children.

Assault 'with intent to commit felony'] It was formerly very common to indict under 24-5 V. 100, 38, for an intent 'to ravish,' where it was doubtful whether a rape had actually been committed.

A boy under fourteen cannot be found guilty of such an assault: above.

On such an indictment, and for a common assault, Patteson J. held that evidence of defendant having previously taken liberties with the prosecutrix, tendered by the prosecution, was not receivable to show his intent, because all the cases where such evidence had been received were 'of malice,' none 'to shew a lustful intent.' He also held, that, in order to convict on such a charge, the jury must be satisfied, not only that defendant intended to gratify his passions on her person, but that he intended to do so *at all events,* and notwithstanding any resistance on her part. The only evidence was that he took hold of her. *Lloyd,* 7 C. & P. 318, 1836: conviction of a common assault, for which there was a count. On the ruling, *Phips.* p. 168, says: 'it would not afford a safe guide in the present day. . . . Prior liberties, however, would seem slight, if any, evidence of an intent to *ravish, i.e.* notwithstanding any resistance on' the female's 'part.'

If on an indictment for this assault prosecutrix prove a rape actually committed, prisoner may nevertheless be convicted by 14-15 V. 100, 12.

See 43-4 V. 45, 2, for the consent of a child under thirteen: p. 404.

REALTY, THINGS SAVOURING OF—OFFENCES CONNECTED WITH.

See *Fixtures.*

REBELLION.

See *Treason.*

RECEIVING STOLEN PROPERTY WITH GUILTY KNOWLEDGE.

Common law] See *Wright* (J.) on Possession, p. 151, quoted under *Larceny*, and *Cooper, &c.*, 1908, below.

By 6-7 G. 5, 50, 33 (1): 'Every person who receives any property, knowing the same to have been obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour), and on conviction thereof liable (*a*) in the case of felony, to penal servitude for any term not exceeding fourteen years; (*b*) in the case of misdemeanour, to penal servitude for any term not exceeding seven years; (*c*) in either case, if a male under the age of sixteen years, to be once privately whipped in addition to any punishment to which he may be by law liable.'

(2)—With which, and (3), s. 52 of the Post Office A. 1908, is almost verbally identical: 'Every person who receives any mail bag or any postal packet or any chattel or money or valuable security the stealing or taking or embezzling or secreting whereof amounts to a felony under* the Post Office Act, 1908, or* this Act knowing the same to have been so feloniously taken embezzled or secreted and to have been sent or to have been intended to be sent by post shall be guilty of felony and on conviction thereof liable to the same punishment as if he had stolen taken embezzled or secreted the same. (3) Every such person may be indicted and convicted whether the principal offender has or has not been previously convicted or is or is not amenable to justice. [For *sentence*, see note on s. 55 of Post Office A. 1908.] (4) Every person who without lawful excuse knowing the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in the United Kingdom the person committing it would have been guilty of felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside the United Kingdom shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable to penal servitude for any term not exceeding seven years.'

By s. 43: '(1) Whenever any person is being proceeded against for receiving any property knowing it to have been stolen or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings—(*a*) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession; (*b*) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty.

This last-mentioned fact may not be proved unless—(i) seven days' notice in writing has been given to the offender that proof of such

* Words omitted in s. 52 of 1908 A.

previous conviction is intended to be given; (ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession.'

By s. 40 (3): 'In an indictment for feloniously receiving any property under this Act, any number of persons who have at different times so received such property or any part thereof may be charged and tried together.'

By s. 44 (5): 'If on the trial of any two or more persons indicted for jointly receiving any property it is proved that one or more of such persons separately received any part of such property, the jury may convict upon such indictment such of the said persons as are proved to have received any part of such property.'

Indictment] For a form, see No. 9 in *amended* Rules: 1 St. R. & O. 1916, p. 131, under the 1915 A. That A. has rendered many cases obsolete.

Old cases] The questions still are, whether the goods were stolen, and whether defendant received them knowing them to have been stolen. *Jervis*, 6 C. & P. 156, 1833; see also *Wheeler*, 7 C. & P. 170, 1835.

Where anything has been got by false pretences, these need not be set out in an indictment for receiving. *Taylor* v. *R.*, 1895.

Where the goods were stolen by some person unknown, it was formerly the practice to aver to that effect. *Thomas*, 2 East P. C. 781, 1766.

Where A. B. was indicted for stealing a gelding, and C. D. jointly for receiving it, knowing it to have been '*so* feloniously stolen as aforesaid'; and A. B. was acquitted, Patteson J. held that the other defendant could not be convicted on *that* indictment. Whereupon another alleging 'some person unknown' to have been the thief was preferred. *Woolford*, 1 Moo. & R. 384, 1834. But where a man was indicted in one count for stealing goods, and in another for receiving the said goods, '*so* as aforesaid feloniously stolen,' and the jury acquitted him of stealing, but found him guilty of the receiving, on motion in arrest of judgment, on the ground that these findings were repugnant, the judges held the conviction to be good, partly because 'after verdict the court would resort to any possible construction which would uphold the indictment against a purely technical objection.' *Craddock*, 2 Den. C. C. R. 31; 20 L. J. M. C. 31; 4 Cox C. C. 409, 1850. So *Huntley*, Bell C. C. 236; 29 L. J. M. C. 70; 8 Cox C. C. 260, 1860. It is clear that there may be a conviction for receiving goods stolen by oneself.

One count charged F. with obtaining meat from C. by false pretences. The third charged that T., defendant, the meat specified 'then lately before unlawfully, knowingly, and designedly obtained from the said C. by false pretences, unlawfully did receive and have, he the said T., &c., well knowing, &c.' It was contended that the third count was bad since it did not set out the false pretences, nor was there anything in it to identify the false pretence referred to with that set out in the first count. The court, however, held that the count was good since the gist of the offence was the *receipt* of goods *with knowledge* that they had been obtained by some false pretence, and therefore it was sufficient to allege this. *Taylor* v. *R.*, 1895, 1 Q. B. 25; 64 L. J. M. C. 11; 18 Cox C. C. 45

Joint indictment] See 24-5 V. 94, 6; and cf. s. 40 (3), above. A first count charged W. and R. C. with killing a sheep, 'with intent to steal one of the hind legs of the said sheep'; another count charged J. C. with receiving nine pounds' weight of mutton from 'a certain evil-disposed person,' he then knowing that the mutton had been stolen by the latter. Coleridge J. said, 'This count is for receiving stolen goods, and it is joined not with another count against other persons for stealing anything, but with a count for killing with intent to steal, which appears to me an offence quite distinct in its nature from that imputed to the prisoner, J. C. I shall not stop the case, but I will take care that the prisoner, J. C., has any advantage that can arise from the objection, if, upon consideration, I should think it well founded.' They were all convicted. *Wheeler, &c.*, 1835.

One count charged A. and B. with a burglary and with stealing, and C. and D. with receiving different parts of the stolen property; another count charged C. and D. with the substantive felony of jointly receiving the whole of the stolen property, and there were two other counts charging C. and D. *separately* with the substantive felony of receiving part thereof. It was proved that A. and B. had committed the burglary, and stolen the property, but also shown that C. and D. had received it on different occasions, and with no connection with each other. It was objected that as distinct felonies had been committed by C. and D., they ought to have been tried separately: *per* Littledale J. 'There is certainly some inconsistency in this indictment; but the practice in cases of receivers is to plead in this manner.' They were all convicted. *Hartall and others,* 7 C. & P. 475, 1836.

Where two receivers are charged in the same indictment with separate and distinct acts of receiving, it is too late after verdict to object that they should have been indicted separately. There ought to have been an application to make the prosecutor elect. *Hayes and others,* 1838.

Where three persons were jointly charged with a larceny, and two others as accessories, in separately receiving portions of the stolen goods; and the indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony, in separately receiving a portion of the stolen goods; the principals were acquitted, but the receivers were (allowed by Gurney B. to be) convicted on the last two counts of the indictment. *Pulham,* 9 C. & P. 280, 1840.

When there was no evidence of a joint receipt, but one defendant was in the habit of receiving goods from the thief, and selling them to the other—each having a separate house—the court held, that a s. now rpd., corresponding to s. 44 (5), above, extended to cases where offenders separately received the whole of the stolen property, and not only a part or parts. *Reardon and Blore,* L. R. 1 C. C. R. 31; 35 L. J. M. C. 171; 10 Cox C. C. 241, 1866.

When there is a joint trial, great caution is often needful in dealing with the incrimination of one co-defendant by another: *Curnock,* 111 L. T. 816; 24 Cox C. C. 440; 10 Cr. A. R. 207, 1914; and, generally, in distinguishing *each* defence: *Ashworth,* 6 Cr. A. R. 112, 1911: c. q. See *Direction,* below.

First count—larceny] If the verdict is guilty on the *wrong* count, *e.g.* receiving, when the evidence proved the other, it will be quashed. *T. Evans,* 85 L. J. K. B. 1176; 114 L. T. 616; 12 Cr. A. R. 8, 1916.

See above. *Grizzard, &c.* is an instance where four defendants were wrongly convicted, on two counts, of both stealing and receiving.

Possession] There must be proof of possession by the receiver in some sense. Thus, where the persons who stole some fowls, sent them in a hamper, with the sole direction that it would be called for, and defendant, when claiming the hamper as hers at the office, was immediately taken into custody, the C. for C. C. R. held her conviction, as receiver, to be wrong, on the ground that 'whoever had possession of the fowls at the coach office when the prisoner claimed to receive them, never parted with the possession; the prisoner, by *claiming* to receive the fowls, which never were actually or potentially in her possession, never in fact or law received them.' *Hill,* 1 Den. C. C. R. 453; 18 L. J. M. C. 199; 3 Cox C. C. 533, 1849. *Wiley,* 2 Den. C. C. R. 37; 20 L. J. M. C. 4; 4 Cox C. C. 412, 1850, was twice argued. A., B. and C. were jointly indicted for stealing and receiving fowls. It was proved that about half-past four in the morning A. and B. were seen to go with a loaded sack, carried by A., into C.'s father's house, where C., who was a higgler, lived. A. and B. remained in the house about ten minutes, and were then seen to come out of the back door preceded by C. with a candle, A. again carrying the sack on his shoulders, and to go into a stable belonging to the same house; the stable-door was shut by one of them, and on policemen going in they found the sack on the floor tied at the mouth, and the three men standing round it as if they were bargaining, but no words were heard. The bag when opened was found to contain, *inter alia*, the stolen property. On C. being charged with knowingly receiving the poultry, he said, 'he did not think he would have bought the hens.' A. and B. were convicted of stealing, and C. of receiving, on both of two joint indictments. But eight out of twelve of the judges held that C. could not be convicted of receiving, inasmuch as though there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore C. had no possession, either actual or constructive.

Control—exclusive possession unnecessary] But Patteson J., one of the majority, said, 'I don't consider a manual possession or even a touch essential to a receiving; but it seems to me, there must be a control over the goods by the receiver, which there was not here.' Accordingly, where the jury found that a stolen watch was in the hands or pocket of an absconded accomplice, but under *defendant's* absolute control, the C. for C. C. R. held that he might be convicted as a *receiver,* although he had in fact never touched the property, or had manual possession of it. *T. Smith,* D. & P. C. C. 494; 24 L. J. M. C. 135; 6 Cox C. C. 554, 1855—cf. *Sunley,* 1859—where L. Campbell C.J. lays it down for certain that there may be a joint possession in thief and receiver, as he had said in *Wiley,* in which (he had been in the minority, and) he here says the judgment proceeded on *that* principle.

Smith was approved in *Gleed,* where defendant merely handled the thing jointly with the thief: 12 Cr. A. R. 32, 1916. *W. Payne,* 3 Cr. A. R. 259, 1909, makes it clear that there need not be exclusive possession: defendant was a carrier (*only,* as he alleged). If two are indicted together for larceny and receiving, there must be evidence that the thing stolen was not *always* in the *exclusive* possession of

one before the other can be convicted: *Ashworth,* 1911: *e.g.* it was not clear of what he was found guilty. So *Grizzard, &c.*

Joint possession (or none?) must be left to the jury. *Flatman,* 8 Cr. A. R. 256, 1913: c. q.: where there was no direction on this point.

In *G. Watson,* 1916, 2 K. B. 385; 85 L. J. K. B. 1142; 115 L. T. 159; 80 J. P. 391; 25 Cox C. C. 470; 12 Cr. A. R. 62, three men were acquitted on one count (shop-breaking, &c.), two of them convicted on another of receiving, and appellant was found 'guilty of being a negotiator [for sale] and in the full knowledge that the goods were stolen'; this exactly represented the facts, but there was no evidence that the goods were ever in his possession or control. This conviction (?) was quashed on the authority of *Fallon* and because there was misdirection (which for various reasons the court could not cure); if the jury had been directed that if they concluded that 'appellant was in possession . . . either by himself or jointly with the other prisoners in the sense that he had either exclusive or joint control . . . it would be open to them, in law, to convict,' and on the facts the court might not have interfered; helping to dispose of the goods with guilty knowledge is not necessarily receiving.

Thus, mere suspicion is not enough. *A. Lewis,* 4 Cr. A. R. 96, 1910: c. q., though defendant lived with the thief in a house (which he partly owned) where the stolen thing was found, and knowingly consorted with thieves. So where none of stolen property was found, but it was believed that the proceeds (money) were. *Chapple, &c.,* 1840: 'imperfect receiving.'

Defendant passive] Goods were taken on to his premises where he was standing; a policeman followed at once, and defendant did nothing: c. q. as there was no direction on possession or control. *C. T. Crane,* 7 Cr. A. R. 113; 76 J. P. 261, 1912. Very similar was *E. Berger,* 84 L. J. K. B. 541; 31 T. L. R. 159; 11 Cox C. C. 72; 11 Cr. A. R. 72, 1915: c. q. Cf. *E. Foreman,* 9 Cr. A. R. 216, 1913: c. q.

Who is in possession?] H. let a room in his house to G., and in that room stolen things were found: held, that this in itself was not enough for conviction. *Holmes, &c.,* 11 Cr. A. R. 130, 1915: c. q. Cf. *Berger,* 1915.

Master and servant] The latter's guilty knowledge is not the former's for this purpose. *B. Pearson* (No. 2), 1908: c. q.

Evidence] It was enough, even before s. 43 (1) (*a*), above, if the stolen thing *had been* in defendant's possession and he had got rid of it, *e.g.* by pawning. *H. Rowland,* 1909.

Conviction of principal—proof of the larceny] The larceny must be clearly proved, and the jury must be directed on this point: *Sbarra,* 13 Cr. A. R. 118, 1918, where the C. C. A. said: 'The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen and further may prove that he knew it at the time when he received them. It is not a rule of law that there must be other evidence of the theft.' There there was only strong circumstantial evidence of the larceny, and though the thief, a co-defendant, pleaded guilty in the dock, this was not enough evidence against the receiver.

Where the indictment states a previous conviction of the principal, such conviction must be proved regularly under 34-5 V. 112, 18; where the record was 'full of errors,' but there was no doubt there had been a conviction, it was held that 'an erroneous attainder of the principal is sufficient as against the accessory till reversed.' *Baldwin,* R. & R. 241; 3 Campb. 265; Lea. 928, *n.*, 1812. 'This is evidence against the accessary sufficient to put him on his defence; for it is founded on a legal presumption that everything in the former proceeding was rightly and properly transacted; but a presumption of this kind must, I conceive, give way to facts manifestly and clearly proved; as against the accessary the conviction of the principal will not be conclusive, and is as to him *res inter alios acta.* And, therefore, if it shall come out in evidence upon the trial of the accessary, as it sometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged, the accessary may avail himself of this and ought to be acquitted.' Foster C. C. 365.

Thus, where the principal had been convicted, and on the trial of the receiver the conviction was proved, but it appeared on the cross-examination of the prosecutor that, in fact, the person convicted had only been guilty of a breach of trust and not of a felony, defendant, on the authority of Foster, above, was acquitted. *Smith,* 1 Lea. 288, 1783; the same authority was followed in *Prosser, ib.* 290, *n.*, 1784.

For the *confession* of the principal, see that title.

For an indictment stating not the *conviction* but the *guilt* of the principal, see *Turner,* 1832 (at 349).

Evidence] The principal felon is a competent witness for the crown to prove the whole case against the receiver. *Haslam,* Lea. 418, 1786; *Price, Patram, ib.* 419, *n.*, 1787; East P. C. 782.

On a trial for receiving stolen lead, evidence of a police caution about that kind of goods previously is inadmissible: *Mullins,* 1910.

Co-defendant called for crown] See *I. Foster,* 1911.

Accessory before the fact] Though there was no evidence of possession, actual or constructive, but defendant had been in correspondence with his two co-defendants, who were convicted of receiving, about the goods both before and after the theft, *T. H. Goodwin* was rightly convicted on the joint indictment, though there was no count under ss. 1, 2, of 24-5 V. 94. 3 Cr. A. R. 276, 1909. An accessory (before) to burglary so indicted may be a receiver. *Goodspeed.*

After the fact] This cannot be found on a receiving count: *Fallon, G. Watson,* above.

Where on a *common law* indictment the principal was acquitted, two accessories were convicted of larceny, and another of receiving, and it was admitted that the convictions for larceny were bad, the C. C. A. substituted verdicts of receiving in those two cases: *Cooper, &c.,* 1908.

Evidence] It was held, before the matter was regulated by statute, that on the question of guilty knowledge, evidence of receiving other goods, stolen from the same prosecutor, may be given, even though indictments are pending for the other larcenies: see p. 107. The

only limitation was that the *other* occasions must not be so far removed in point of time as to form entirely different transactions. Thus, where it appeared that the articles had been stolen by one defendant *possibly* all at one time, and had come into the other defendant's possession at several distinct times, the judge, after compelling the prosecutor to elect on which act of *receiving* (but *not* of theft) he would proceed, told the jury that they might take into their consideration that the receiver-defendant had the various stolen articles in her possession, and pledged, &c. them at various times, in coming to a determination, whether, when she received the articles then in question, she knew them to have been stolen. *Dunn, &c.*, Moo. C. C. 146, 1826. But where one count charged stealing certain cloth, another receiving it knowingly, it was proved that the cloth was stolen in the night of the 2nd and 3rd March, and found in defendant's possession on the 10th March, and it was tendered, in order to show guilty knowledge, that on his house being searched on 10th March, *other* cloth which had been stolen in the December previous from *others,* was found, and had been in his possession in December, the C. for C. C. R. held that such evidence was inadmissible. Alderson B. said, 'The mere possession of stolen property is evidence *primâ facie* not of receiving but of stealing; and to admit such evidence in the present case would be to allow a prosecutor, in order to make out that a prisoner had *received property,* with a guilty knowledge, which had been stolen in *March,* to show that the prisoner had in the *December* previous *stolen* some other property from another place and belonging to other persons. In other words, we are asked to say, that in order to show that the prisoner had committed one felony, the prosecutor may prove that he committed a totally different felony some time before; such evidence cannot be admissible.' *Oddy,* 2 Den. C. C. R. 264; 20 L. J. M. C. 198; 5 Cox C. C. 210, 1851: c. q. In *Nicholls,* 1 F. & F. 51, 1858, on an indictment for receiving lead knowingly, Cockburn C.J. allowed evidence to be given that on several occasions, between the early part of January and the 11th of February —the date of the stealing—defendant, in company with another person, had sold lead stolen from the same place, and taken a share of the money. The point was regulated by the 'Crimes' A. 1871 (s. 19 now rpd. and replaced by s. 43 (1), L. A., above). But no such evidence ought to be admitted if the offence charged is substantially stealing, and if it has been properly admitted under statute, or to negative accident, it must be withdrawn from the jury, if no larceny is proved. *Girod,* 70 J. P. 514; 22 T. L. R. 720, 1906: C. C. R.

Guilty knowledge and intent] For other stolen articles—part of the same transaction—besides those charged, see *Dunn,* 1826; for the old rule above, cf. *Jones,* 14 Cox C. C. 3, 1877; *Drage,* 14 Cox C. C. 85, 1878; *Carter,* 12 Q. B. D. 522; 53 L. J. M. C. 96; 15 Cox C. C. 448, 1884: C. C. R., where it was held that evidence could not be given of other similar stolen property which defendant had disposed of before the date of the stealing charged; it must be 'found in his possession.' *Jones* was followed in *Bromhead,* 1906, where L. Alverstone C.J. said, 'the mere fact of putting a count for receiving in the indictment will not make . . . evidence' of a previous conviction 'admissible.'

The *intention* of the receiver is not material, provided he knew the goods to be stolen. Where it was objected that there was no evidence of a conversion by the receiver, Gurney B. said, 'If the

receiver takes without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same.' *Davis,* 6 C. & P. 177, 1833. If one receive stolen goods 'for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased' them: *per* Taunton J., *Richardson,* 6 C. & P. 335, 1834.

But it is otherwise where the receipt is innocent: *e.g.* buying a stolen horse, even though it be dishonestly detained (till part of the price paid be restored) after knowledge of the theft: *R. Johnson,* 75 J. P. 464; 27 T. L. R. 489; 6 Cr. A. R. 218, 1911: c. q. Mere recklessness, 'not caring,' is not enough: *Howard,* 11 Cr. A. R. 2, 1914: c. q.

Buying at undervalue] is not conclusive proof of guilty knowledge; the circumstances must be considered, *e.g.* the season or the market: *Holmes and Gregory,* 11 Cr. A. R. 130, 1915: c. q. Trifling value of the chattel may be relevant to the defence: *Millington,* 11 Cr. A. R. 86, 1915: c. q.

What is stolen property—'trap'—resumption of possession] In *Dolan,* D. & P. C. C. 436; 3 C. L. R. 295; 24 L. J. M. C. 59; 1 Jur. N. S. 72; 6 Cox C. C. 449, 1855, the goods alleged to have been received had been found by the owner in the pockets of the thief; but were subsequently returned to him, and he was sent by the owner—in order to catch the receiver—to sell them, 'where he had sold others.' The thief thereupon went to defendant's shop and sold the goods and gave the money to the owner. The thief pleaded guilty, and the receiver was convicted. It was held that the conviction was wrong, L. Campbell C.J. saying, 'If an article once stolen has been restored to the master of that article, and he having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning' of the A.? *Dolan* was followed in the case of *Schmidt,* L. R. 1 C. C. R. 15; 35 L. J. M. C. 94; 10 Cox C. C. 172; 12 Jur. N. S. 149, 1866. There four thieves stole goods from a railway station, forwarded afterwards by one of them by rail. Meanwhile the theft was discovered, and a policeman in the employ of the company opened the parcel containing the stolen goods, and then gave it to a porter, whom he directed to take it to its address, viz. defendant's house. The indictment laid the property in the railway company, and it was held by a majority of the court (three to two) that a conviction could not be sustained, because there was an intentional delivery by the owners (the company) after the goods had been returned them. See also *Hancock,* 14 Cox C. C. 119, 1878: C. C. R., indistinguishable from *Dolan,* which was also followed in *Villensky,* 1892, 2 Q. B. 597; 61 L. J. M. C. 218; 56 J. P. 824; 5 R. 16.

It must be certain that the property has not been abandoned; *e.g.* pig-iron, laid as property of a canal company, picked up from the bed or bank of a canal. *W. White,* 107 L. T. 528; 76 J. P. 384; 23 Cox C. C. 190; 7 Cr. A. R. 266, 1912: c. q. Here the taker, if he believed that the iron was abandoned, committed no offence.

Identity] of the thing stolen with that found in possession must be proved conclusively. *A. Hill,* 1912; *B. Pearson,* 1908 (No. 1): c. q.; *Posnett,* 1913: c. q.; *W. Smith,* 11 Cr. A. R. 19, 1914.

'*Other property*'—*date*] There must be a fixed date alleged in view of s. 43 (1), which reckons two periods from 'the date of the offence charged,' thus settling a doubt raised in *C. Harding,* 1909. Where there was no evidence of a *previous* theft having been committed within the twelve months, c. q.: *Halikiopulo.*

Evidence] The crown is not confined to the bare facts that the 'other' property was stolen and found in defendant's possession; conversations between him and others about it may be given. *G. Smith* and *Carrier,* 13 Cr. A. R. 151, 1918.

When the charge is substantially larceny, though there is a count for receiving, evidence of 'other property' ought not to be given, for the court cannot exclude it, but 'it might induce the jury to convict of stealing on very slight evidence.' *Ballard,* 12 Cr. A. R. 1, 1916. There must be evidence that the 'other property' was stolen, but there may be such proof without a conviction for the larceny. *Ib.* Cf. *Girod.*

S. 43 (1) does not affect the common law right of the prosecution to call the thief to prove that he had sold the stolen goods to defendant *without* any time limitation, if the defence is that there was no dishonest intent. *G. Powell,* 3 Cr. A. R. 1, 1909.

Recent possession—presumption] This may, according to circumstances, support either the view that defendant stole the property *or equally* that he received it *knowing* it to be stolen. *Langmead,* L. & C. 427; 9 Cox C. C. 144, 1864, where such possession *unaccounted for* was held to warrant a conviction for *receiving.* Reasonable explanation, in fact, a *primâ facie* case once made, is the gist of the issue. *Langmead* and *Curnock.* See, generally, under *Presumptions.*

Stolen property having been discovered concealed in an outhouse, the defendants were detected in the act of carrying it away thence at night, and were indicted as *receivers,* a bill for stealing having been ignored. There was no other evidence, and Patteson J. thought it was rather dangerous on this evidence to convict them of receiving. 'It is evidence on which persons are constantly convicted of stealing.' They were all found guilty of stealing, and therefore held to be entitled to be acquitted. *Densley, &c.,* 6 C. & P. 399, 1834. After three weeks, 'possession of a stolen coat is not recent.' *H. Field,* 1910, c. q. But after three months, possession of watches and jewellery may be, though no evidence of shop-breaking (for which c. q.). *Bailey,* 13 Cr. A. R. 27, 1917. But *recency* is generally for the jury. *R. Smith,* 5 Cr. A. R. 77, 1910.

Onus] The prosecution must *always* satisfy the jury of guilt: the *onus* never changes. After the requisite evidence, in the absence of any reasonable explanation, the jury must be directed that they *may,* not must, convict; if an explanation is given which may be true, it is for them to decide; if they think that reasonably it may be true, they ought to acquit, though they are not convinced: *Schama* and *Abramovitch,* 84 L. J. K. B. 396; 112 L. T. 480; 79 J. P. 184; 59 S. J. 288; 31 T. L. R. 88; 11 Cr. A. R. 45, 1914: *per* five judges: c. q.; repeatedly confirmed by the C. C. A., *e.g.* in *A. Sanders,* 14 Cr. A. R. 11, 1919: c. q. It is not quite clear what the court meant by its comment on this case in *H. L. Hamilton,* 1917: c. q.—'it is not of universal application'—and *Badash.* Reasonableness is for the jury, and they must be expressly directed on it: *Hampson:* c. q.;

R. Smith, 1910; even if the explanation is not satisfactory the *onus* is still on the prosecution; it never shifts; there cannot be a conviction merely because defendant does not prove his innocence: *Grinberg,* 12 Cr. A. R. 289; 33 T. L. R. 428, 1917.

Where an answer to one of several questions left to the jury was that defendant's explanation may be 'reasonably true' (though the aggregate answers were 'guilty'), in view of an accomplice being uncorroborated, c. q.: *A. J. Norris,* 12 Cr. A. R. 156, 1916.

It is an absolute mistake to direct that defendant 'must satisfy you that he came by these goods honestly': *Aubrey,* 1915: c. q.

Receiver or thief?] It frequently happens that a doubt arises whether the acts done amount to a receiving, or to a stealing, 'accomplice or receiver in general,' as in the following cases:—from which it appears that if defendant takes part in the transaction, while the larceny by others is continuing, he will be guilty as a principal in the larceny, and not as a receiver. Dyer and Disting were indicted for stealing barilla, on board ship at Plymouth, consigned to Hawker. Hawker employed Dyer, the master of a boat, to land the barilla, and Disting was employed in handling it after it was landed. The jury found that while the barilla was in Dyer's boat some of his servants, without his consent, removed some of the barilla and concealed it in another part of the boat; that Dyer afterwards assisted the persons on board, who had so separated this part, in removing it to carry it off. Graham B. was of opinion 'that though for some purposes, as with respect to those concerned in the actual taking and separation, the offence would be complete as an asportation in point of law, yet, with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat where it was properly deposited for the purpose of being landed, and who assisted in the act of carrying it off [from] thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit, and Dyer having assisted in the act of carrying it off was, therefore, guilty as principal.' *Dyer,* East P. C. 767, 1801. The rest of the barilla having been lodged in Hawker's warehouse, several of his servants conspired to steal a portion of it, and accordingly removed part nearer to the door. Soon afterwards these persons, together with Atwell, &c., who had agreed to purchase part, came and assisted the others (who took it out of the warehouse) in carrying it thence. Being all indicted as principals, it was objected that two were only receivers, the larceny being complete before their participation in the transaction; but Graham B. held, as in the previous case, viz. that the felony might be complete as regards some of the principals, and yet that it was a continuing transaction by those who joined in the same plot before the goods were actually carried away; and all defendants having concurred in, or been present at the act of removing the deposited goods, they were all principals; and they were convicted accordingly. *Atwell,* East P. C. 768, 1801.

But removal of goods has been held to be so complete that one concerned in the further removal was held not to be guilty of the *original larceny.* Hill and Smith, in the absence of defendant, broke open a warehouse, and took out goods into the street near the warehouse. They then fetched defendant, who was apprised of the robbery, and assisted in carrying the property to a cart, which was ready. Bayley J. was of opinion that this was a continuation of a larceny, and constituted a new taking, and that defendant, who was present aiding,

&c. there, was a principal in that part of the felony; but the judges were of opinion that as the property was removed from the owner's premises before he was present, he could not be considered as the principal, and the conviction as such, was wrong. *King*, R. & R. 332, 1817. So in an earlier case of a joint indictment. A man having received articles into his cart, left it standing in the street. M'Makin came up and led away the cart. He then gave it to another man to take it to his (M'Makin's) house, about a quarter of a mile distant. On the cart arriving at the house, Smith, who was at work there, having directed a companion to blow out the light, came up and assisted in removing the articles from the cart. For Smith it was argued that the *asportavit* was complete before he interfered, and *Dyer*, above, was cited. Lawrence J. after consultation, was of this opinion, and directed an acquittal. *M'Makin and Smith*, R. & R. 333, *n.*, 1808. Indictment for stealing two horses. Defendant and Whinroe went to steal them. W. left defendant when they got near the place where the horses were, stole them, and brought them where defendant was waiting for him, and both rode away with them. Bayley J. at first thought that his joining in riding away with the horses might be considered a new larceny; but, on adverting to *King*, above, he thought this opinion wrong, and the judges were of opinion that he was an accessory only, and not a principal, because he was not present at the original taking. *Kelly*, R. & R. 421, 1820.

Joint indictment for larceny. A., a servant, was sent to deliver some goods to C. He did not deliver all to C., having previously given part to B. It being objected that B. ought to have been charged as receiver, Gurney B. said it was a question for the jury whether B. was present at the time of the separation, till which it remained in the master's possession, or received the goods afterwards. A. only was convicted. *Butteris*, 6 C. & P. 147, 1833. Cf. *James*, 1890.

W. stole a watch from A., and while W. and L. were in custody together, W. told L. (as L. told a witness at the trial) that he had 'planted' the watch under a flag in L.'s house. After this L. was discharged from custody, got the watch, and sent his wife to pawn it. It was held on the trial of L. that if L. took the watch in consequence of W.'s information, W. telling L. in order that he might so use the information, L. was indictable as a receiver; but that, if this was an act done by L. in opposition to W., or against his will, it might be a question whether it would be a receiving (of which L. was convicted). *Wade*, and *Leigh*, 1 C. & K. 739, 1844. On the latter supposition it would be a larceny.

M., who was employed in loading oats, by previous concert with K., took oats from two of the sacks and put them in a nosebag in the absence of K., and hid the nosebag. K. returned in a few minutes, and took away the nosebag and its contents, M. then being within four yards of him. The judge held that K. was a receiver, but both were principals in the larceny, as it was all one transaction and each had been present at some part. *Kelly*, and *M'Carthy*, 2 C. & K. 379, 1847.

In *Owen*, 1825, defendant kept walking backwards and forwards before a house, and occasionally looking up; he and the actual thief were seen together at some distance, and part of stolen property found on him. The jury found as a fact that the thief threw the things out of the window, and that *Owen* was waiting to receive them; but the judges held that he was a principal, and that the conviction of him as receiver was wrong. And in *H. Perkins*, 2 Den. C. C. R. 459; 5

Cox C. C. 554, 1852, who was, in fact, convicted of receiving (with the thief), though the facts probably showed a joint theft, the C. for C. C. R. held that a principal in the second degree, *particeps criminis*, could not at the same time be treated as a receiver: c. q. Maule J. said, the judge 'seems to have intended to ask us whether in a case where a prisoner was in a popular sense guilty of receiving, he might be treated as a receiver, notwithstanding the fact that he was a principal in the theft; and it is clear that he cannot.' But in *M'Evin*, 1 Bell C. C. 20, 1858, where one count charged stealing and another receiving, the jury were told that it was open to them to find stealing *or* receiving, and they found receiving, and it was held right—in *Perkins* it having been stated as a fact that defendant was a principal, which here the jury negatived; but where there was not sufficient evidence of receiving—defendant probably in collusion with a barman got change over the counter for a sovereign when he put down only a florin—but there was evidence of being a principal in the second degree, it was held not competent to the jury to find a verdict of receiving, and that being the only count, c. q. *Coggins*, 12 Cox C. C. 517, 1873: C. C. R.

Joint receipt—common law] It was at one time held that where two persons are *indicted* jointly, it is not sufficient to show that one of them received in the absence of the other, and afterwards delivered the thing to him; there must be a joint receipt. *Mary and John Messingham*, 1 Moo. C. C. 257, 1830; *Dovey and Gray*, 2 Den. C. C. R. 86; 4 Cox C. C. 428, 1851, where two persons being convicted, judgment was allowed *only* against defendant who committed the earlier felony.

A. and B. were charged with stealing molasses, and C. and D. with receiving them. A. and B. brought the goods to C.'s warehouse, and left them with D., his servant, who, after some hesitation, accepted them. C. was absent at the time, but shortly after he came home he was clearly aware of the molasses having been left, and there was strong ground for suspecting that he then knew they had been stolen. It was also clear that D., soon after the goods were left with him, was aware they had been unlawfully obtained, as he was found disguising the barrels. Maule J. told the jury that if they were satisfied that C. had directed the goods to be taken into the warehouse, knowing, &c., and that D., in pursuance of that direction, had received them thereinto *knowingly*, they might properly convict them both of a joint receiving, which they did. *Parr, &c.*, 2 Moo. & R. 346, 1841.

Husband and wife] Joint indictment as receivers. The goods were found in their house. Graham B. told the jury that, 'generally speaking, the law does not impute to the wife those offences which she may be supposed to have committed by the coercion of her husband, and particularly where his house is made the receptacle of stolen goods; but if the wife appears to have taken an active and independent part, and to have endeavoured to conceal the stolen goods more effectually than her husband could have done, and by her own acts, she would be responsible as for her own uncontrolled offence.' The judges resolved that as the charge was joint, and it had not been left to the jury to say whether she received the goods in the absence of her husband, the conviction of the wife could not be supported, though she had been the more active. *Archer and others*, 1 Moo. C. C. 143, 1826.

A married woman was indicted for receiving goods stolen by her husband and taken home and given to her. There was only a probability that she knew they were stolen, and nothing to show whether she had or not acted under her husband's control. The C. for C. C. R. held that in these circumstances she could not be convicted of the offence. *Brooks,* 1 D. & P. C. C. 184; 22 L. J. M. C. 121; 6 Cox C. C. 148, 1853; see *Wardroper,* below, and Part III. 3, on *Coercion.*

Husband and wife were jointly indicted for receiving, &c. The jury found both guilty, and that the wife received the goods 'without the controul or knowledge of, and apart from her husband,' and that he 'afterwards *adopted his wife's receipt.*' The C. for C. C. R. thought that on this finding the husband could not be convicted, as it did not necessarily show that he had taken 'any active part' in the matter, or did anything more than barely consent to what his wife had done. *Dring,* D. & B. C. C. 329; 7 Cox C. C. 382; 8 Jur. N. S. 1132, 1857; followed in *Orris,* 1 Cr. A. R. 199, 1908: c. q., where at the most there was a bare acquiescence by a husband in receipt by a guilty wife.

A husband may be convicted of feloniously receiving property which his wife has voluntarily stolen, if he receives it knowing that she has stolen it. *M'Athey,* L. & C. 250; 32 L. J. M. C. 35; 9 Cox C. C. 251, 1862: joint indictment, wife convicted of stealing.

But where the thief delivered goods to defendant's wife, who paid him sixpence on account, and afterwards defendant met the thief, and with a guilty knowledge agreed with him for the price, and paid the balance, it was held, distinguishing *Dring,* that there was no complete receipt by the wife, but that he actively approved of and ratified her partial receipt, and was, therefore, rightly convicted. *Woodward,* L. & C. 122; 31 L. J. M. C. 91; 9 Cox C. C. 95, 1862.

Direction] Where a husband and wife are jointly indicted, the jury should be asked whether the wife received the goods either from, or in the presence of, her husband. And where counsel for the defence suggested that these questions should be put, and they were not put, the c. q. against the wife. Here the goods were received in the husband's house; it was probable, therefore, that the husband was present, from which it would be presumed that the wife was acting under his control, but in his absence she had dealt with the goods in a way that plainly showed she knew they were stolen. It may be that this question need not be put in every case in which the husband and wife are both indicted, but only where the circumstances do not negative the presence of the husband. *Wardroper,* Bell C. C. 249; 29 L. J. M. C. 118; 8 Cox C. C. 284, 1860. Where there was no evidence that the husband was present, nor that the wife was acting under his compulsion, 'the judge ought to tell the jury that there is nothing in the marital relation *per se* to protect a wife, and he ought further to tell the jury that, even if the husband was in the immediate neighbourhood, it was a question for them to decide whether the wife was acting independently.' *Baines,* 1900. The two cases may require to be carefully distinguished. *Pritchard,* 1913: one c. q. See, generally, *Onus,* above, and *Summing Up;* and *n. b. Girod.*

Halikiopulo shows that great care must be taken in instructing the jury where there are other charges, pleas or convictions arising out of the same series of larcenies, on the evidence against each

defendant *individually:* c. q. So where it is clear that defendant could not have been the thief. *H. Field,* 1910: c. q. See pp. 297, 299.

Paramour receiving from a wife] A guilty receipt from a wife of her husband's goods was always a misdemeanour at common law, at any rate, 'a trespass, but in *favorem vitæ* it shall not be adjudged a felony.' Hale, 1 P. C. 514. Whether there could be larceny in such a case is discussed under that title. But in either case a paramour was in a different position. Till the A. of 1882 it was only when the stealing amounted to a felony at common law or by statute that the receiving was by statute a felony. Hence, while the wife was duly convicted of the larceny, the paramour's conviction for *receiving* was quashed because he had been indicted under the Larceny A. 1861, which did not make his act a felony. *Streeter,* 1900, 2 Q. B. 601; 19 Cox C. C. 570; 69 L. J. Q. B. 915; 64 J. P. 537; 83 L. T. 288: C. C. R. Though the direction in *Totterdell,* 1910 (that *receiving* might be found against a paramour), was quite wrong, the C. C. A. declined to interfere. Cf. *Wife and Paramour* under *Larceny,* and p. 770.

Thus an indictment charging such a receipt *as a misdemeanour* is good. The point is settled by s. 33 (1) of the Larceny A. 1916. Whether the receiver is a paramour or not, it should be averred that the property was stolen from her husband, but this is not essential. *Payne,* 1906, 1 K. B. 97; 75 L. J. K. B. 114; 70 J. P. 28; 22 T. L. R. 126; 21 Cox C. C. 121: C. C. R. See *James,* 1902.

Election] See that title and *Hayes,* above. There may be as many counts charging receiving of goods as there are counts charging the stealing thereof, and the prosecutor cannot be put to his election on what count or counts he will proceed. *Beeton,* 1 Den. C. C. R. 414; 18 L. J. M. C. 117; 3 Cox C. C. 451, 1849; *Heywood,* 1864.

It was held that although goods may be stolen by a part owner, yet the receiving of such goods (stolen by a partner) was not within 24-5 V. 96, 91, rpd., on account of the rpd. words, 'either at common law or by virtue of this Act.' *Smith,* L. R. 1 C. C. R. 266; 39 L. J. M. C. 112; 11 Cox C. C. 511, 1870; followed in *Streeter,* 1900.

Defence] See *Theadorus,* and *Onus,* above.

Venue] A. Theft, &c. in United Kingdom.

See s. 39 (1) of the Larceny A. 1916. The rule is no longer that stated by L. Coleridge C.J. in *Carr,* 1882: 'the prisoners cannot be convicted here unless the stealing took place within the jurisdiction of our courts.' One half of a note issued by a bank at S. in Wiltshire was stolen in its transit through the post, and defendant was proved to have received it with guilty knowledge, but it was not proved to have been in his possession in Wiltshire. He posted it in Somersetshire in a letter, addressed it to the bank at S., requesting payment, which letter was duly delivered. It was held that, on an indictment for receiving (under a rpd. st. which permitted the venue wherever the receiver had the property 'in his possession'), where the venue was laid in Wiltshire, he might be convicted, for the possession of the post-office servants, who were his agents to present the note at the bank at S., might be treated as his possession; and that, therefore, he might be tried in Wiltshire. *Cryer,* 26 L. J. M. C. 192; 7 Cox C. C. 335, 1857:

C. C. R. 'Even at common law the venue would perhaps be proper, treating the receiver as an accessory after the fact': *per* Cockburn C.J. See the *Post-office* cases.

Defendants were indicted in Dorset, in several counts for stealing and receiving. M. was convicted only on a count which charged him with the substantive felony of receiving 'at T. in the county of Somerset,' no one being named as the thief. It was held that on this indictment he could not be convicted, as there was no jurisdiction, though by other counts it appeared that the goods were stolen in Dorset. *Martin,* 1849. Cf. *Rogers,* 1868.

Statute] By s. 39 (3) of the Larceny A. 1916: 'Every person who receives in any one part of the United Kingdom any property stolen or otherwise feloniously taken in any other part of the United Kingdom may be dealt with, indicted, tried and punished in that part of the United Kingdom where he so receives the property in the same manner as if it had been originally stolen or taken in that part.'

In *Graham, &c.,* 65 J. P. 248, 1901, defendants ordered various fur articles in Paris, and a jacket was delivered; the seller regarded the transactions as 'cash,' but did not ask for payment till all the furs were delivered; they brought the furs to London, where they were convicted because (1) there was evidence of larceny (by a trick) according to English law, (2) the L. A. 1896, rpd., applied where property was alleged to be stolen by the possessor in England.

B. Theft, &c. not in United Kingdom.

At common law, goods taken, &c. abroad, *e.g.* in Guernsey, are not *stolen;* hence, there cannot be a conviction for receiving them in England. See *Debruel.*

Where the receipt abroad and possession took place before the enactment of a s. (in L. A. 1896, which s. 33 (4), p. 980, replaces), the offence was committed. *Panse,* 61 J. P. 536, 1897.

Triable at Q. S. The exceptions in s. 38 (1), *b,* to such triability seem to have no application to *Receiving.*

RECORDS, ETC., OFFENCES IN RESPECT OF.

See *Written Instruments.*

RECOVERY OF GOODS STOLEN, ETC., CORRUPT.

See s. 34 of the Larceny A. 1916; s. 35 covers the person who sets in motion the offender against s. 34.

REGISTERS, DESTROYING, ETC.

See Index.

Defendant was employed in getting up a pedigree, and for that purpose searched the register of births, &c., in a parish. On one occasion, whilst the curate was looking for another book, and had his back turned, he tore off part of a leaf of a register. The part torn off was not destroyed, and the book was subsequently repaired, and was then as legible as before. The jury found that he tore the book wilfully, and the judges affirmed the conviction, which was under 1 W. 4, 66, 20, rpd. *Bowen*, 1 Den. C. C. 22, 1844.

Destruction, falsification, &c. of registers] By 24-5 V. 98, 36: 'Whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials, which now is or hereafter shall be by law authorised or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, . . . or shall knowingly and unlawfully insert or cause or permit to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and unlawfully give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing such writing or the part of such register whereof such copy or extract shall be so given to be false in any material particular, . . . or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, . . . knowing the same to be false, . . . or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, . . . shall be guilty of felony.' Maximum punishment, penal servitude for life.

S. 37: 'Whosoever shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register, directed or required by law to be transmitted to any registrar or other officer, any false entry of any matter relating to any baptism, marriage, or burial . . . or shall knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or shall unlawfully destroy, deface, or injure, or shall, for any fraudulent purpose, take from its place of deposit, or conceal, any such copy of any register, shall be guilty of felony.' Maximum punishment, penal servitude for life.

In *Asplin*, 12 Cox C. C. 391, 1873, defendant personated the brother of a man at his bigamous marriage and signed his name in the parish register, being the *third* witness, as such brother; he was not aware of the bigamy. Martin B. held that he could be convicted; it does not seem (as stated) that he held that it is not necessary that there

should be an intent to defraud. Perhaps the indictment was under s. 36 (and not 37, as stated by Cox).

Of land] Fraudulently procuring an entry, erasure or alteration to be made in registry of land under 38-9 V. 87, 100, is a misdemeanour.

Non-parochial] See 3-4 V. 92, 8.

REGISTRAR UNLAWFULLY ISSUING CERTIFICATE OF MARRIAGE.

By 6-7 W. 4, 85, 40, this is felony in the cases there specified; by s. 41, a prosecution must be commenced within three years 'after the offence committed.' See *Registers*, above.

REGISTRATION OFFENCES.

See *False Declarations* and *Registers* in Index.

RELIGION, OFFENCES AGAINST.

See *Blasphemy*, under which there are references to some of the Reformation legislation, creating what may be called 'offences against religion,' some of which *Stephen* (Dig. Cr. Law, 5th ed. Arts. 182-4) individually designates *Depraving the Lord's Supper, Depraving the Book of Common Prayer, Clergymen refusing to use the Book of Common Prayer.* These, as that writer says (*ib.*), are 'practically obsolete,' and it is not, therefore, worth while to set out the provisions of the statutes mentioned under *Blasphemy*, all of which, as well as 2-3 E. 6, 1, are summarised by *Stephen*, *ib.*; or see 9 Halsbury, 530, who says that these offences are not triable at Q. S.

Crawle (reported as *Crawle* v. *Crawle*) is a case of conviction on indictment (under a rpd. st.) for not going to church. 1 Vern. 170, 1683. See *Petcherini.*

In the Report, &c. of the Ecclesiastical Courts Commission (1883), vol. i., Historical Appendix (vi.), p. 162, there is 'a collection of cases, illustrative of the manner in which matters relating to the doctrine, ritual, and discipline of the Church of England have been dealt with by the temporal courts since the middle of the fifteenth century,' whence it appears that there has been no indictment under the Act of Uniformity (1 Eliz. 2) since 1795 (Report, p. xlv.).

See *Clergymen, Public Worship,* and *Sacrilege;* and for *anti-Christian* speeches at funerals, see *Burials, &c.*

RESCUE.

See *Escape* and *Prison-Breach*. These three titles should be compared throughout; and cf. *Luttrell's case*.

Where the person rescued is in custody or under arrest for felony or suspicion thereof, the rescuing is felony also. 1 Hale P. C. 606: analogously of a misdemeanour. Hawk. P. C. 2, 21, 6.

'If the party rescued be imprisond for felony, and be rescued before indictment, the indictment must surmise a felony done, as well as an imprisonment for felony, or suspicion thereof; but if the party be indicted and taken by a *capias*, and rescued, then there needs only a recital that he was indicted *prout*, and taken and rescued. But tho the rescuer may be indicted before the principal be convicted and attainted, yet he shall not be arraigned or tried before the principal be attaint.' Hale P. C. 607. In such case, however, he may, as it seems, be indicted and tried for a misdemeanour, though not for a felony. *Ib.* 599.

The custody] It is immaterial whether the custody is that of a private person, or of an officer, or under a warrant of a justice of the peace, for where the arrest of a felon is lawful, the rescue of him is felony. But it seems necessary that the rescuer should have knowledge that the other is under arrest for felony, if he be in the custody of a private person, though if he be in the custody of a constable or sheriff, or in prison, he is 'at his peril to take notice of it.' 1 Hale P. C. 606. So if he breaks *prison* without knowing there are felons there; and, if 'traitors' so escape, it is treason: *ib.* If the imprisonment be so far irregular that the prisoner would not be guilty of prison-breach by making his escape, a rescuer is also excused; and the converse holds. Hawk. P. C. 2, 21, 1, 2.

If the custody be legal, an attempt to rescue is a misdemeanour: *E. of Thanet, &c.*, 27 St. Tr. 821; East P. C. 408; Russ. Cri. 892, 1799: convicted on *ex-officio* information of attempting to rescue from the dock a defendant just acquitted but legally detained on warrant for another charge.

A warrant of a justice to arrest, founded on a certificate of the clerk of the peace, that an indictment against a certain person for a misdemeanour had been found, is good; and, therefore, if on such warrant he be arrested, and afterwards rescued, those who are guilty may be convicted of a misdemeanour. *Stokes*, 5 C. & P. 148, 1831.

In *Almey*, 3 Jur. N. S. 750, 1857, Erle J. held that the forcible rescue of a poacher in illegal custody is indictable, though perhaps *the prisoner* might have lawfully resisted.

Indictment] The word *rescue*, or some equivalent, must appear in the indictment. *Burridge*, 3 P. Wms. 484, 1735; what was held by all the judges in *Stanley*, below, to be 'incorrectly decided,' was the *sentence* in the second trial (see *ib.* 500). Hawk. P. C. 2, 18, 12, cited under *Prison-Breach*, seems to apply to rescue; also b. 2, 21, 3.

Statutes] 16 G. 2, 31, partly rpd., is, it has been held, confined to cases of prisoners expressly committed for treason or felony, and therefore escape from a commitment on *suspicion* only—which was bailable, while treason and felony were not—is not within the A. *Walker,* Lea. 97, 1773; *Greeniff,* Lea. 363, 1784. It was likewise held that that A. did not extend to a case where the escape had been actually effected, but only to the attempt. *Tilley,* Lea. 662, 1795. Delivering any instrument is an offence within the A., though the prisoner had been pardoned for the offence of which he was convicted, on condition of transportation; and a person may be convicted, though there is no evidence that he knew of the specific offence of which the prisoner he assisted had been convicted: *Shaw,* R. & R. 526, 1823, where the record of the conviction of the person aided is set forth and is produced by the proper officer, no evidence is admissible to contradict that record.

By 25 G. 2, 37, 9: 'If any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue or set at liberty, any person out of prison who shall be committed for or found guilty of murder, or rescue, or attempt to rescue any person convicted of murder, going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony . . .'

By 52 G. 3, 156, aiding and assisting prisoners of war to escape is felony, punishable with transportation for life. See *Martin,* R. & R. 196, 1811, which was a trap to catch a person suspected of such assistance, but the judges held a conviction wrong, as there was no real intention to escape.

The offence of rescuing a person in custody for a capital felony was formerly punishable as a felony 'within clergy' at common law (*i.e.* not with death or transportation, but the distinction is now abolished). *Stanley and seven others,* R. & R. 432, 1821. But now, by 1-2 G. 4, 88, 1, 'if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years.'

By 7 W. 4 & 1 V. 91, 1, persons guilty of the offences mentioned in s. 9, above, are liable to be transported for life.

For persons subject to military law escaping or permitting, &c. others to escape, see 44-5 V. 58, 20, 22. For naval prisoners, see 29-30 V. 109, 82.

'RIGGING' THE MARKET.

See under *Conspiracy.*

RIOTS AND ROUTS.

At common law a riot is a misdemeanour: *Fursey*, 1833; *e.g.* if the proclamation (below) is not read.

Statutes are founded on unrpd. but obsolete 13 H. 4, 7.

The Riot A.] By 1 G. 1, stat. 2, c. 5, s. 1: 'If any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the publick peace . . . and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his undersheriff, or by the mayor, bailiff, or bailiffs, or other head officer or justice of the peace of any city or town corporate where such assembly shall be, by proclamation to be made in the Kings name in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, . . . then such remaining or continuing together to the number of twelve or more after such command or request made by proclamation, shall be adjudged felony . . .'

By s. 2, care being taken that the rioters shall hear and silence having been commanded, the proclamation shall be as follows: 'Our sovereign lord the King chargeth and commandeth all persons, being assembled immediately to disperse themselves and peaceably to depart to their habitations or to their lawful business upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King.'

By s. 3, those disobeying the proclamation may be seized, and if, in resisting, they are killed or hurt, those acting lawfully 'shall be free, discharged and indemnified' civilly and criminally.

By s. 5, opposing and hindering the making of the proclamation shall be adjudged felony, without benefit of clergy, and persons assembled to the number of twelve, to whom proclamation should have been made, if the same had not been hindered, not dispersing within an hour after such hindrance, having knowledge thereof, shall be adjudged felons.

By s. 8, prosecution must be commenced within twelve months of the offence.

Persons convicted under these ss. are within the punishment of 7 W. 4 & 1 V. 91, 1, viz. transportation for life; hence this offence is not triable at Q. S. Riot is within 3 G. 4, 114.

Riotously injuring, &c. buildings] By 24-5 V. 97, 11: 'If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down, or destroy any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, or fold, or any

building or erection used in farming land, or in carrying on any trade, or manufacture, or any branch thereof, or any building other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .'

By s. 12: 'If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, stalls, bridge, waggonway, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanour, and being convicted thereof shall be liable to . . . be kept in penal servitude for any term not exceeding seven years . . .'; and on indictment under s. 11, misdemeanour under this s. may be found.

'*Riotously*,' *&c.*] The A. does not explain these words, so resort must be had to the common law definition: 'if *any one* of her Majesty's subjects be terrified, this is a sufficient terror or alarm to substantiate that part of the charge of riot': *per* Patteson J. on identical words in a rpd. A.: *Langford, Phillips, &c.*, Carr. & M. 602; 2 Moo. C. C. 252, 1842, where only one person was terrified.

What is a riot?] In 1708, Holt C.J. said: 'The books are obscure in the definition' and enumerated instances which would not now be considered within it: *Soley*, 11 Mod. 1118. 'A tumultuous disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist one another, against any one who shall oppose them, in the execution of some enterprize of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.' Hawk. P. C. 1, 65, 1. See *Langford*, above.

'In some cases wherein the law authorises force, it is not only lawful but also commendable to make use of it; as . . . perhaps even for a private person to assemble a competent number of people, in order with force to suppress rebels, or enemies, or rioters.' *Ib.* s. 2. So a private man 'may assemble a meet company' in a peaceable manner to remove a common nuisance, or a nuisance to his own land, &c. Thus where a weir had been erected 'cross a common river, where people have a common passage with their boats,' and a number of persons assembled, with spades and other necessary instruments, for removing it, and did remove it by making 'a trench in his land that did erect the weir,' it was held to be neither a forcible entry nor a riot. Dalt. c. 137. So an assembly of a man's friends at his own

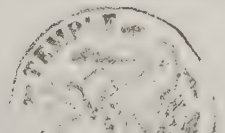
house, for the defence of his person, or the possession of his house, against such as threaten to beat him in the former case, or to make an unlawful entry in the latter, is 'indulged by law.' 5 Burn's Justice, Art. 'Riot,' 30th ed., p. 144.

An unlawful assembling must be proved; hence the difference from an affray; but if persons, being innocently assembled, on a dispute occurring, 'form themselves into parties, with promises of mutual assistance, and then make an affray,' it will be a riot; and, in this manner, any lawful assembly may be converted into a riot; so a person joining rioters is equally guilty 'as if he had at first assembled with them for the same purpose.' Hawk. *ib.* s. 3. But a mere 'quarrel between persons lawfully met' cannot be made a 'riot.' *Anon.*, 6 Mod. 43, 1703.

Evidence must be given 'of some such circumstances either of actual force or violence, or, at least, of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the show of armour, threatening speeches, or turbulent gestures.' *Ib.* s. 5. But it is not necessary that personal violence should be done or offered. Thus, if a number of persons come to a theatre, and make a great noise and disturbance, so as to render the actors entirely inaudible, it will be a riot, though no personal violence is done to any individual, and no injury to the house. *Clifford* v. *Brandon.* But the unlawfulness of the object of three or more persons assembled, even though they actually carry out their unlawful object, does not necessarily constitute a riot, for they may do it peaceably, and without circumstances of force or violence. Hawk. *ib.* See *Interference by Third Person* under *Murder.*

Riot and treason distinguished] See 3 Inst. 910, followed by Hawkins and East, below; *Bradshaw,* 1597, under rpd. 13 El. 1 (Coke being A.-G.), where the *scale* of the disturbance made it treason. It must appear 'that the injury or grievance complained of, and intended to be revenged or remedied by such an assembly must relate to some private quarrel only; as the inclosing of lands in which the inhabitants of a town claim a right of common . . . or suchlike matters relating to the interests or disputes of particular persons no way concerning the public; for wherever the intention of such an assembly is to redress public grievances, as to pull down all inclosures in general, or to reform religion, or to remove evil counsellors from the king, &c., if they attempt with force to execute such their intentions,' the offence will amount to high treason. Hawk. P. C. 1, 65, 6. 'Where the object of the insurrection,' says East, 'is a matter of a private or local nature, affecting, or supposed to affect, only the parties assembled, or confined to particular persons or districts, it will not amount to high treason, although attended with the circumstances of military parade usually alleged in the indictments on this branch of treason. As if the rising be only against a particular market, or to destroy particular inclosures [see *Birt,* below] to remove a local nuisance, to release a particular prisoner, unless imprisoned for high treason, or even to oppose the execution of an Act of parliament, if it only affect the district of the insurgents; as in the case of a turnpike act.' P. C. 75.

Unlawful assembly—rout] The 'intent and purpose of meeting' must be proved, Dalt. c. 136, otherwise the defendants must be acquitted. Where persons assembled together for a purpose (in the manner hereinbefore described) do not proceed to execute their pur-



pose, it is but an unlawful assembly [see that title], not a riot [but see *Woolcock,* below, under the st.]; if, after so assembling, they proceed or *move* to execute the act for which they assembled, but do not execute it, it is termed a rout; but if they not only so assemble but proceed to execute their design, and actually execute it, it is then a riot. Hawk. *ib.* ss. 1, 8, 9; Dalt. *ib.; Birt, &c.,* 5 C. & P. 154, 1831; *Graham and Burns,* 16 Cox C. C. 420, 1888.

All the authorities were reviewed in *Field and others* v. *The Receiver for the Metropolitan Police District,* 1907, 2 K. B. 853; 76 L. J. K. B. 1015; 71 J. P. 494; 5 L. G. R. 1121; 23 T. L. R. 736, where Phillimore J. (in his and Bray J.s judgment), says, 'We deduce that there are five necessary elements of a riot—(1) number of persons, at least three; (2) common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another if necessary against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.'

Three persons] Where only two were found guilty out of several, judgment on them was arrested; nor could they alone be convicted of a *riotous* battery on that indictment: *Sudbury, &c.,* 1 L. Raym. 484; 12 Mod. 262, 1699. But if the indictment alleges that some of the rioters were unknown, that may be enough: *Beach, &c.,* 2 Cr. A. R. 189, 1909.

Common purpose] If the assembly is with the intent to commit even a trespass or a breach of the peace, and to stand by one another against all opposers in the commission, and in the execution of the design a felony is committed, all are equally principals, whatever their individual position: *Howell, &c.,* 9 C. & P. 437, 1839. See *Demolishing,* below.

Suppression] The duty of *magistrates* was exhaustively discussed by Tindal C.J. in charging the grand jury in *Pinney, Mayor of Bristol,* 3 St. Tr. N. S. 1, 1832; and in the trial at bar by special commission (three judges): *ib.* 11; 5 C. & P. 254; 3 B. & Ad. 947: for neglect of duty as mayor during riots; verdict—not guilty: seven days' trial. *Kennett,* Lord Mayor of London, was convicted of such neglect: 5 C. & P. 282, 1781; but died before sentence; personal fear, unless it be reasonable, is not a defence. The right to repel force by force is independent of the A., at any rate, for magistrates: *Kennett* (a view said by *Wraxall,* 1 Memoirs, 339 (ed. 1815), to have been first expressed by Wedderburn A.-G. in 1780). Magistrates not only may but must put down an unlawful assembly. The degree of force they may use in dispersing it must depend on its size, &c., and circumstances. *Neale,* 9 C. & P. 431, 1839. See the cases under *Murder, Homicide,* &c., especially *Featherstone.*

A military officer may, if necessary, act without a magistrate, but this is not generally prudent: *Pinney.* In 1768 *Gillam,* a Surrey justice, who gave the order to the military to fire on rioters in St. George's Fields, when a man present was shot, was indicted for *murder:* 'Proceedings' at Old Bailey, July 11, p. 274: acquittal (1 Adolphus Hist. Eng. 343).

Refusing to aid police] On such an indictment it is necessary to prove that, 1st, the constable saw a breach of the peace committed; 2nd, there was a reasonable necessity for calling on defendant; and 3rd, when duly called on, defendant, without any physical impossibility or lawful excuse, refused to do so. *Brown,* 1841: *per* Alderson B. It is no defence to such an indictment that from the number of rioters the single aid of the defendant would not have been of any use. *Ib.; Pinney,* above.

A person so aiding a constable is protected from assault *eundo, morando, et reduendo. Phelps,* Carr. & M. 180, 1841: *per* Coltman J. See resolutions 5 and 6, *Sissinghurst case.*

Neglect in suppressing disturbance is triable at Q. S.

Proof under the Riot A.] When, in the reading of the proclamation in s. 2, the words 'God save the King' were omitted, it was held that there must be an acquittal: *Child,* 4 C. & P. 442, 1830.

An indictment for remaining assembled one hour after proclamation made, need not charge the original riot to have been in *terrorem populi;* it is sufficient if it pursue the words of the A., for there is a distinction between an indictment for a riot and one framed on this A.: *per* Patteson J., *Warren James,* 5 C. & P. 153, 1831.

When it was not proved that defendant was among the mob during the whole of the hour, but he was proved to have been there at various times during the hour, it was held that it was for the jury on all the circumstances, whether he did substantially continue making part of the assembly for the hour; for, although he might have occasion to separate himself for a minute or two, yet, if in substance he was there during the hour, he would not be thereby excused: *ib.*

A second or subsequent reading does not do away with the effect of the first, and the hour is to be computed from the time of the first: *per* Patteson J., *Woolcock,* 5 C. & P. 516, 1833.

If there be 'such an assembly that there would have been a riot if the parties had carried their purpose into effect, it would be within the Act, and whether there was a cessation or not is a question for the jury.' *Ib.* Cf. *Young* v. *Peck.*

Prosecution] Not merely an aggrieved person but any one, and therefore the police, may take proceedings, when 'an outburst might easily develop into a riot,' *i.e.* owing to the numbers: *Young, &c.* v. *Peck.* Cf. *Woolcock.*

Verdict] On indictment for riot, common assault may be found, if apt words are used: *T. O'Brien,* 75 J. P. 192; 22 Cox C. C. 374; 27 T. L. R. 204; 6 Cr. A. R. 108, 1911, which states that *Sudbury,* above, was decided only on the point of numbers.

Absolutely total demolition is not necessary, if the house is no longer a house. *Langford,* above, where only a chimney was left standing; cf. *Adams,* below.

Though the indictment be only for *beginning* to demolish, pull down, &c., yet in order to secure a conviction under s. 11, it must appear that such a beginning was with intent to demolish the whole. 'The beginning to pull down,' said Parke J.—on identical words, rpd. —'means not simply a demolition of a *part*—but a part with an *intent* to demolish the *whole.* . . . If the prisoners meant to stop where they did [*i.e.* breaking windows and doors], and do no more . . . they are not guilty; but if they intended, when they broke the

windows, &c., to go farther, and destroy the house, then they are guilty. . . . If they had the full means of going farther, and were not interrupted, but left off of their own accord, it is evidence . . . that they meant the work of demolition to stop where it did.' They began by breaking the windows, and having afterwards entered the house, set fire to the furniture; but no part of the house was burnt. Parke J. said: 'If you think that they originally came there *without* intent to demolish, and the setting fire to the furniture was an afterthought, but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning to destroy the house. If they came originally *without* such intent, but had afterwards set fire to the house, then the offence would be arson. If you have doubts whether they originally came with a purpose to demolish, you may use the setting fire to the furniture under such circumstances, and in such manner as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such intent, although they began to demolish in another manner.' *Ashton*, 1 Lew. C. C. 296, 1830. The same rule was laid down in the two following cases:— Defendants about midnight riotously burst open the door of a house, broke some of the furniture and all the windows, and did other damage, after which they went away, though there was nothing to prevent them committing further injury; Littledale J. told the jury that this was not a 'beginning to demolish,' unless they were satisfied that the ultimate object was to demolish the house; and that if they had carried their intentions into full effect, they would in fact have demolished it. That such was not the case here, for that they had gone away, having manifestly completed their purpose, and done all the injury they meant to do. *Thomas*, 4 C. & P. 237, 1830; *Howell*, 1839; and cf. *Batt*. But if they ceased merely because they were prevented by the police, &c., that would be 'beginning': *Howell*. See also *Adams and ten others*, Carr. & M. 299, 1842; cf. *Langford*, above, where Coleridge J. said: 'Before you can find the prisoners guilty, you must be of opinion that they meant to leave the house no house at all in fact. If they intended to leave it still a house, though in a state however dilapidated, they are not guilty under this highly penal statute.' Destroying moveable shop-shutters is not a 'beginning' as they are not part of the freehold: *Howell*. Injuries to *parts* of buildings are now provided for by s. 12.

If in felonious demolition—which burning is [*Howell*]—by rioters, some of them set fire to the house itself, and others carry furniture out of the house, and burn it, it will be for the jury whether the latter were not encouraging and taking part in a general design of destroying the house and furniture; and if so, the jury ought to convict them: *per* Tindal C.J., *Harris and twenty-eight others*, Carr. & M. 661, 1842. If a house be demolished by rioters by fire, one of them who is present while the fire is burning may be convicted for the statutory felony, although he is not proved to have been present when the house was originally set on fire. *Simpson, &c. and sixteen others*, Carr. & M. 669, 1842.

When an election mob pursued a person who took refuge in a public-house, on which they attacked the house, threatening to pull it down unless he was given up, and broke windows, &c., and destroyed much of the furniture, but being unable to find the person, went away, Tindal C.J. ruled, that the case was not within the A. (rpd.), the object not being to destroy the house, but to secure the person.

Price and fifteen others, 5 C. & P. 510, 1833. But in another case Gurney B. ruled that defendants might be convicted of *beginning* to demolish, though their *principal* object might be to injure an unpopular employer inside the house, provided it was *also* their object to demolish the house, on account of its having been used by him. *Batt*, 6 C. & P. 329, 1834.

Murder] See Index.

Bonâ fide *claim of right*] excludes riot: *Langford*, above; but there must be no more violence, &c. than is necessary: *Soley* and *Clifford* v. *Brandon*.

Compensation] See 49-50 V. 38, 2.

Riot is triable at Q. S.

RIVER BANKS, DAMAGING.

See *Sea, &c.*

ROADS, OFFENCES IN OR ABOUT.

See *Highways* and *Nuisance.*

is, says Hawk. P. C. 1, 34, Introdn., 'mixt or complicated larceny' (1) from the person and (2) which puts in fear. For the elements common with *larceny,* see that title.

By 6-7 G. 5, 50 (Larceny A. 1916), 23 (1): 'Every person who (*a*) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person; (*b*) robs any person, and at the time of or immediately before or immediately after such robbery uses any personal violence to any person, shall be guilty of felony'; maximum punishment, penal servitude for life; and a male may also be whipped privately once. In some cases flogging should be inflicted instead of a long term: *e.g. Swenson,* 13 Cr. A. R. 209, 1918, where for seven years' p. s. twenty strokes and twelve months' imp. w. h. l. were substituted. This offence is not triable at Q. S.; the others are.

(2) 'Every person who robs any person shall be guilty of felony': maximum punishment, penal servitude for fourteen years.

(3) 'Every person who assaults any person with intent to rob shall be guilty of felony'; maximum punishment, five years' penal servitude.

The 'Garotting' Act, 26-7 V. 44, applies to this s.

Indictment—verdict] There is a form (No. 8) appended to Indictments A.

By s. 44 (1) of the Larceny A. on indictment for robbery, assault with intent to rob may be found, but not, it may therefore be inferred, *common* assault; this was also expressly held (though with doubt) in *Woodhall,* 12 Cox C. C. 240, 1872, under the rpd. s. which s. 23 (3) replaces. *Boden,* to the contrary, was under a quite different s. (rpd.).

Common law] Robbery, 'properly so called,' is thus defined:—'A felonious taking of money or goods to any value from the person of another, or in his presence against his will, by violence *or* putting him in fear' ['which the law considers as *constructive* violence': 2 Russ. Cri. 1134]. East P. C. 707-8.

The property must be taken while the influence of fear exists; for if the property be taken first, and the menaces or threats be used afterwards, it is not robbery. Prosecutor seeing his purse in defendant's hand demanded it, when the latter, who had just stolen it from his person, answered, 'Villain, if thou speakest of this purse, I will pluck thy house over thine ears,' &c., and then went away; and 'because he took it not with violence or put prosecutor in fear, it was ruled to be but stealth, and not robbery,' but larceny. *Harman,* 2 Roll. Rep. 154; 1 Hale P. C. 534; Lea. 198, *n.,* 1620.

In *Woodward,* 11 Mod. 137, 1707, where several persons got money out of a man by threatening to get a warrant for his arrest and to indict him for perjury, Holt C.J. said that every extortion is an actual

trespass, and to 'make use of a process of law' to 'fright' a man out of his money, indictable.

Felonious intent] in the taking is the same as in larceny. And as there must be a felonious intent with regard to the goods *charged*, it is not enough that there was at the same time an intent to steal other goods. A. assaulted B. on the highway with a felonious intent, and searched his pockets for money, but finding none, pulled off the bridle of B.'s horse, and threw that and some bread which B. had in pannels about the highway, but did not take anything from B. All the judges resolved this to be no robbery, because nothing was taken from B. 'The better reason seems to be that the particular goods taken were not taken with a felonious intent, for surely there was a sufficient taking and separation of the goods from the person.' *Anon.*, East P. C. 662, 1698.

Constructive intent] If the original assault is not made with the intent of *robbing*, but the intent arises before the property is taken, it is sufficient. Defendant assaulted a woman, with intent to ravish her, and she, without any demand made by him, offered him money, which he took, but continued his attempt to ravish. A considerable majority of the judges held this to be robbery, on the ground that she, 'from violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and the prisoner, by taking it, derived that advantage to himself from his felonious conduct; though his original attempt were to commit a rape.' *Blackham*, East P. C. 711, 1787; but this would hardly be followed now; cf. *Edwards*, 1843, below.

Claim of right] Though the goods were taken with violence and menaces, yet under a *bonâ fide* claim it is no robbery, as there is no larceny; see *Hall*, 3 C. & P. 409, 1828, under this title in *Larceny;* see also *Boden*, 1 C. & K. 398, 1844.

The taking] See *Asportation;* 'something must be taken, for an assault with intent to rob is an offence of a different and inferior nature': East P. C. 707. In order to constitute a *taking*, there must be a *possession* of the robber. Therefore, if a man, having a purse tied to his girdle, is assaulted by a thief, and, in the struggle the girdle breaks, and the purse falls to the ground, this is no robbery, because no taking; but if the thief once has it in his hand, though after the girdle breaks he does not touch it, it is a taking and a robbery. 1 Hale P. C. 533, citing *Crompton*, quoted under *Severance*, which passage ends: 'but it is not robbery, for he neither assaulted him nor put him in fear' [Dalton, c. 153: 'these secret and privy takings from my person are no robbery']. See *Peat* and *Lapier*. Though it was formerly (about 1700, 2 East P. C. 703) held that a sudden taking or snatching of any property from a person unawares was sufficient to constitute robbery, 'the contrary doctrine appears to be now established,' viz. that unless there were some struggle to keep the thing, and it were forced from the hand of the owner, it was not robbery, *e.g. Gnosil*, 1 C. & P. 304, 1824, where defendant jerked a watch out of a man's pocket.

Value] Though the *gist* of the offence is the force and terror, the thing taken must have *some* value: 3 Inst. 69: 'be the value thereof

above or under one shilling' [the quantitative distinctions of the common law never applied to robbery]; 1 Hale P. C. 532; East, *ib.*; but it may be 'of the value of a hundredth part of a farthing,' *per* Parke B., *Morris,* 1849. Prosecutor had been decoyed by defendant into a room for the purpose of getting money alleged to be owing from him. There were evident and abundant preparations for terrorising him. Defendant seized a knife and threatened to kill him; he was compelled to sign a promissory note for 2000*l.* on a piece of stamped paper which was ready. It was objected that this was not robbery of the note, under 2 G. 2, 25, rpd., which made theft of *choses in action* larceny, as there was no property in the prosecutor, and so the judges held. They said that it was essential to larceny that the property should be of some value; that this note did not on the face of it import any property in him whatsoever (not even of the ink), and the defendant's delivery of it to him could not be considered as vesting it in him, but if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, and it was well settled that, to constitute 'robbery,' the property must not only be valuable, but it must also be taken from the person and *peaceable possession* of the owner. This was only a case of duress. *Maria Phipoe,* Lea. 673; East P. C. 599, 1795; she was, however, convicted of a misdemeanour. A man was knocked down and his pockets rifled, but the robbers found nothing except a worthless slip of paper; they were convicted of robbery: *Bingley,* 5 C. & P. 602, 1833. Under 7-8 G. 4, 29, rpd., defendants, who had decoyed a man into a house, chained him up and compelled him to write a cheque, &c. (on *their* paper): acquittal directed—following *Phipoe* (absolutely on peaceable possession); *Edwards, &c.,* 6 C. & P. (i.) 515, because they knew he had no property on him and only demanded *orders* for property; (ii.) 521, 1834; but if the demand with menaces merely fails because the threatened person has not the property on him, the offence is the same; and had prosecutor brought the documents ready with him there could have been a conviction.

Stealing from the person] This is not the same as *robbery* from the person: *Thompson,* 1845. See introductory remarks, above, and on *Larceny* and *Severance* thereunder. Where confederates in a crowd 'hustled' a man, and defendant got his hand into a coat, so that a pocket-book in an inside pocket was 'just lifted out,' but, in the movement, returned, on a conviction six judges thought that he was not rightly convicted of stealing *from* the person, because, from first to last, the book remained about the person of prosecutor; four were of a contrary opinion; but they were unanimous that the simple larceny was complete. *Thompson,* 1 Moo. C. C. 78, 1825. In *Simpson,* 1 D. & P. C. C. R. 421; 24 L. J. M. C. 7; 6 Cox C. C. 422, 1854, prosecutor carried his watch in a waistcoat pocket, with a chain attached passing through a button-hole of the waistcoat, being there secured by a watch-key. Defendant snatched the watch, which drew after it the chain, till the key caught in a button, and the watch and chain remained suspended. It was held, following *Lapier,* that there was a sufficient severance (viz. in the instant between the key leaving the button-hole and its catching on the button) for stealing from the person. Jervis C.J. thought that the minority in *Thompson* were right, and Alderson B. said, 'a hair's breadth' removal from the person was enough. Cf. *Walls,* below.

Presence, custody of owner] There is a 'taking in law' as well as 'in fact'—'strictly a taking from the person, but it sufficeth if it be in his presence . . . in case it be done with a putting in fear, as where a carrier drives his pack-horses, and the thief takes his horse or cuts his pack and takes away the goods; so if a thief comes into the presence of A. and with violence, and putting A. in fear, drives away his horse, cattle, or sheep.' 1 Hale P. C. 532, 533. So if one flying from the thief lets fall his hat, and the thief takes it, 'for all is the effect of the same fear.' *Ib.* But the goods must be taken in the presence of the possessor. Thus 'where thieves struck money out of the owner's hand, and by menaces drove him off so that he could not take it up, and then they took it themselves,' the court, after much argument, said that they could not intend that the thieves took up the money 'in the sight or presence of the owner' (though they thought the evidence would have warranted such a finding), and that, as 'the first striking the money out of his hand was' found to be 'without putting him in fear,' there was no robbery. *Francis,* Str. 1015; Comyns, 478; East P. C. 708, 784, 1735. And the same was resolved in *Grey,* 1735, East, *ib.* 'Where robbers, by putting in fear, made a waggoner drive his waggon from the highway in the daytime, but did not rob the goods till night, some have holden it to be a robbery from the first force; but others consider that the waggoner's possession continued till the goods were actually taken, unless the waggon were driven away by the thieves themselves.' East P. C. 707.

But it is otherwise where the goods are in the custody of a third person. Prosecutor gave a bundle to his brother, who was with him, to carry. While on the road, two men assaulted prosecutor; on which, his brother laid down the bundle, and ran to his assistance. One defendant then took up the bundle and made off with it. Vaughan B. was of opinion that the indictment was not maintainable, as the bundle was in the possession of *another* person. If they intended to take the bundle, why did they assault prosecutor, and not the person who had it? Conviction of simple larceny. *Fallows, &c.,* 5 C. & P. 508, 1832.

Against the will of the owner] Several persons conspired to obtain for themselves the statutory reward for apprehending robbers by robbing Salmon, one of themselves; Blee, another of them, pretended to, and two strangers procured by him, but not privy to the conspiracy, did actually rob Salmon, and the two were duly convicted. It was expressly found, on indictment for being accessories *before* to the felony of the two (Blee being a witness for the crown), that Salmon consented to part with his goods under pretence of a robbery, &c. The judges were of opinion that this did not amount to robbery (and, therefore, not to being accessory) in any of the defendants conspiring, because Salmon's property was not taken from him against his will. *M'Daniel, Salmon, &c.,* Fost. C. C. 121; 19 St. Tr. 746, 1755; but they were convicted of the *conspiracy*: 19 St. Tr. 808, 1756. But this is very different from the robbery on Norden, where a man deliberately set a trap to catch *Belchier,* a highwayman, by getting in his way, giving up his money, and then capturing him. Foster, *ib.* 129. St. Tr. *ib.* 807, 1754.

Violence] See above, *Taking* and *Stealing from the person,* and *Grounds, &c.,* below. Where violence is used it is not necessary to prove actual fear. 'I am very clear that the circumstance of actual fear at the time of the robbery needeth not to be strictly proved.

Suppose the true man is knocked down, without any previous warning to awaken his fears, and lieth totally insensible, while the thief rifleth his pockets, is not this a robbery? . . . And if fear be a necessary ingredient, the law *in odium spoliatoris* will presume fear, where there appeareth to be so just a ground for it.' Foster C. C. 128; East P. C. 711.

When a hat and wig were taken from the head of the wearer without his being put in fear, and neither was found about defendant, he was acquitted. *Steward,* 'Proceedings,' &c. at the Old Bailey, April-May, 1690, p. 3. So Hawk. P. C. I. 35, 1. Any struggle renders the taking robbery, as where a gentleman perceived that defendant had laid hold of his sword and himself laid hold of it at the same time and struggled for it. *Davies,* East P. C. 709; Lea. 290, 1713. A boy was carrying a bundle, when defendant ran past him and snatched it suddenly away, but being pursued, let it fall. The court said, 'the evidence in this case does not amount to a robbery'; for though he snatched the bundle, 'it was not with that degree of force and terror that is necessary to constitute this offence.' *Macauley,* 1 Lea. 287, 1783; *Baker, ib.* 290, 1783; *Robins,* 1787; *Horner,* 1790—all *ib.* and cases where there was no struggle and no touching of the person. In *Walls and Hughes,* 2 C. & K. 214, 1845, where defendants asked prosecutor to tell them the time, and he took out his watch, holding it loosely in both hands, and one of them caught hold of the ribbon and key, and snatched the watch away without touching his hand, Patteson J. held that this was not a robbery under rpd. s. 3 of 7 W. 4 & 1 V. 87, which is now replaced by s. 23 (1), above, but 'stealing from the person.'

But the least personal injury makes robbery; as where, in snatching a diamond pin, well fastened in a lady's hair, part of the hair was torn away. *Moore,* Lea. 335, 1784; cf. *Lapier.* A person ran up against another, for the purpose of diverting his attention while he picked his pocket; the judges held, that the force was sufficient to make it a robbery, it having been used with that intent. *Anon.,* 1 Lew. C. C. 300, 1825. Defendant and others 'hung around the prosecutor's person,' and rifled him of his watch, &c. No actual force or menace was used, but they surrounded him so as to render any attempt at resistance hazardous, if not vain. Bayley J. said, 'in order to constitute robbery, there must be either force or menaces. If several persons so surround another as to take away the power of resistance, this is robbery.' *Hughes and Wellings, ib.* 301, 1825.

Defendant laid 'violent hold' of the seals and chains of prosecutor's watch in the street, and succeeding in pulling it out of his fob. The watch was fastened with a steel chain, which went round the neck, and which prevented him from immediately taking it; but, by pulling, and two or three jerks, he broke the chain, and made off with the watch. The judges were unanimous that the conviction for robbery was right, for he could not obtain the watch at once, but had to overcome the resistance the steel chain made, and *actual force* was used for that purpose. *Mason,* R. & R. 419, 1820.

Accident] The force used must be used *with the intent* to accomplish the robbery, and not by accident. Where, therefore, a wound had been accidentally inflicted on the hand of prosecutrix by the thief who was using a knife to detach his booty, it was held that *robbery* could not be sustained, but only simple larceny. *Edwards,* 1 Cox C. C. 32, 1843; contrast *Blackham,* above.

Pretended process of law] A 'runner' having custody of a woman (but no authority to remove her), treated her unnecessarily ill, so that she offered him money to procure his good offices, especially not to take her to prison; this at first he did not take, but ultimately took it from her by force, and more by putting his hand into her pocket, and stopped her mouth. The jury found that his intent was felonious, to get her money, and that he had handcuffed her and forced her into a coach to prevent her resisting, and the judges held this was robbery, for he 'had made use of violence, though under the sanction and pretence of law.' *Gascoigne*, 1 Lea. 280; East P. C. 709, 1783. See *Woodward*, 1707, and *Knewland*.

Grounds of fear] *i.e.* of injury either to (a) person, (b) property, or (c) reputation. *Statutory* offences will be found under *Threats*.

First, generally—no actual threat (of any sort) need be proved. Defendant once held prosecutor by force in the street, and several other times blackmailed him at his house; and prosecutor swore that at the time he parted with the money, he understood the threatened charge to be sodomy, that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance, and that the violence with which defendant had detained him in the street had put him in fear for the safety of his person. The judges were of opinion, that 'to constitute robbery there was no occasion to use weapons or real violence, but that taking money from a man in such a situation as rendered him not a free man, as if a person so robbed were in fear of a conspiracy against his life or character, was such a putting in fear as would make the taking of his money under that terror a robbery,' and that a conviction for robbery was correct. *Jones*, Lea. 139; East P. C. 714, 1776. Stephen J. seems to think this the earliest case of a mere oral threat being so held: 3 Hist. Cr. L. 149. '. . . This is a threat of *personal violence;* for the prosecutor had everything to fear in being dragged through the streets as a culprit charged with an unnatural crime. The threat must necessarily and unavoidably create intimidation. It is equivalent to actual violence, for no violence that can be offered could excite a greater terror in the mind, or make a man sooner part with his money.'

The law, said Willes J., will not 'suffer its object to be evaded by an ambiguity' of expression; for if a man *animo furandi*, say, 'Give me your money—Lend me your money—Make me a present of your money,' or words of the like import, they are equivalent to the most positive order or demand; and if anything be obtained in consequence, it will form the first ingredient in the crime of robbery. 'It is not even' [citing Foster 128, above] 'necessary that there should be *actual danger*, for a robbery may be committed without using an offensive weapon, as by using a tinderbox or candlestick instead of a pistol. A reasonable fear of *danger* caused by the exercise of a *constructive violence* is sufficient; and where such a terror is impressed upon the mind, as does not leave the party a free agent, and in order to get rid of that terror he delivers his money, he may clearly be said to part with it *against his will*. Nor need the degree of constructive violence be such as in its effects necessarily imports a probable injury; for when a villain comes and demands money, no one knows how far he will go.' *Donnally*, Lea. 193 at 196; East P. C. 715, 1779.

The rule deduced by East, 713, 727, 783, who declines 'to draw the exact line,' is: 'On the one hand, the fear is not confined to an apprehension of bodily injury, and on the other hand it must be of

such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence or assault upon the person.'

During the Gordon riots, a boy with a cockade in his hat knocked violently at prosecutor's door, and, on his opening it, said, 'God bless your honour, remember the poor mob.' Prosecutor told him to go along; on which he said he would go and fetch his captain. He went, and soon after the mob came, to the number of 100, armed with sticks, and headed by defendant on horseback, his horse led by the boy. The bystanders said, 'You must give them money.' The boy said, 'Now I have brought my captain,' and some of the mob said, 'God bless this gentleman, he is always generous.' Prosecutor asked defendant 'how much?' and he answered, 'half-a-crown'; on which prosecutor, who had before intended to give only a shilling, gave him half-a-crown; held to be robbery. *Taplin*, East P. C. 712, 1780.

Standard of fear] In *Jackson*, East P. C., Add. xxiv.; Lea. 619, *n.*, 1802, one expression seems to imply that the fear must be such as will operate *in constantem virum*, but it certainly cannot be required, in order to constitute a robbery, in every case, that the terror impressed should be that of which a man of constancy and courage would be sensible. It is a question for the jury whether the circumstances were such as reasonably to create fear; and it can seldom happen that such a presumption may not properly be made. The same point arises in *Threats* by letter—which see—in a more difficult form. In *Walton*, L. & C. 288; 9 Cox C. C. 268, 1863, it was not left to the jury: c. q. In that case (under a statute) defendant obtained money by threatening to execute a distress warrant which he had no authority to do; see this case further under *Threats*.

(a) See *Violence*, above. The judgments in *Donnally*, above, go to show that danger to the person may be apprehended from every assault with intent to rob, and a jury would justly presume that the person assaulted was in such fear. And the same would be the case if the fear was on account of a child with the person robbed: *per* Hotham B. in *Donnally*, above. So in *Reane*, Lea. 616; East P. C. 735, 1794, Eyre C.J. observed, that 'he saw no sensible distinction between a personal violence to the party himself, and the case put, of a man holding another's child over a river, and threatening to throw it in unless he gave him money.' Cf. *Astley*, below.

(b) During tinners' riots in Cornwall, defendant, with a mob of about seventy, came to prosecutor's house, and said they would have from him the same as they had had from his neighbours, viz. a guinea, 'else they would tear down his mow of corn and level his house.' He gave them 5*s*., but defendant 'swore he would have 5*s*. more,' which, being terrified, he gave him. They then opened a cask of cider by force and drank part of it, ate some bread and cheese, and defendant carried away a piece of meat. He was convicted of robbing prosecutor of 10*s*. in his house by assault, and putting him in fear. There was also another count for putting him in fear, and taking from him, in his dwelling-house, a quantity of cider, &c., and it was held robbery in the dwelling-house. *Simons*, East P. C. 731, 1773.

During the Birmingham riots defendants threatened circumstantially to burn prosecutor's house, unless he gave them money, &c., which he did. The jury found that prosecutor did not deliver his money from any [immediate] apprehension of danger to his life or person, but from an apprehension, that if he refused, his house would at *some future time* be pulled down (as many others had been); cf. *Reane,* above. But he had expressed great apprehension about his wife, who was in the house, and as East asks, 'If the threat of burning down a man's dwelling-house by a mob do not in itself convey a threat of personal danger to the occupiers?' A majority of the judges held this to be robbery. *Astley, ib.* 729; *Brown, ib.* 731, 1780; *Spencer,* 1783.

A servant maid was inveigled by one defendant, 'a tout,' into a mock-auction, the door was shut, and she was 'hustled' and not allowed to leave till she had bid; after repeated refusals she bid 'sixpence more,' and a lot was knocked down to her by the other defendant at fourteen shillings, &c. She had not that sum, and was forcibly prevented from leaving, and some attempt was made to seize her bundle (as a pledge). Ultimately a mock-constable was produced, who threatened there and then to take her to Bow Street and thence to Newgate (as one defendant 'ordered'), unless he got a shilling for his trouble, which she gave him. He thereupon pretended that the auctioneer released her, and he and she went away. She herself said that the only fear she was under was that of being arrested, &c. The jury found defendants guilty of 'combination' to obtain her money, that the shilling was given for fear of arrest, &c., and that 'she did not know at the time the extent of the violence that might be committed upon her.' The judges were of opinion that the circumstances did not amount to robbery (but to conspiracy, for which defendants were afterwards indicted). Ashurst J. said that the species of threat here, 'in the opinion of the judges, is not sufficient to raise such a degree of terror in the mind as to constitute the crime of robbery, for it was only a threat to put her into the hands of the law, and an innocent person need not in such circumstances be apprehensive of any danger. She might have known that having done no wrong, the law, if she had been carried to prison, would have taken her under its protection, and set her free. The terror arising from such a source cannot, therefore, be considered of a degree sufficient to induce a person to part with his money. It is the case of a simple duress'; . . . the 'tout,' 'the force which' the 'tout' used 'was merely that of pushing her into the sale-room, and detaining her until she gave the shilling; but as *terror* is, no less than *force*, a component part of . . . robbery, the crime cannot be complete without it.' *Knewland and Wood,* Lea. 721; East P. C. 732, 1796. Cf. *Tomlinson,* 1895.

The reasoning (though not the result) in this case has been criticised (1st ed. of this work), and it has been contrasted with *Gascoigne,* above, where, however, some greater degree of personal violence was used, and the money was taken from the prosecutrix's pocket by defendant himself; but it is clearly immaterial whether the offender takes the money with his own hand, or whether it is delivered to him, in consequence of his menaces.

Forced sale] There may be a putting in fear 'under colour,' *e.g.* of a purchase. If a person, by force or threats, compel another to give him goods, and 'by way of colour' oblige him to take, or offer

less than the value, this is robbery. As where a man took wheat worth 8*s*., and forced the owner to take 13½*d*. for it, threatening to kill her if she refused, it was held by all the judges to be clearly robbery. *Simons*, East, *ib*. 712, 1773. Where defendant in a great mob came to prosecutor, who had some corn, and one of them said if he would not sell they were going to take it away, and defendant said they would give him 30*s*. a load, and if he would not accept that they would take the corn away, on which prosecutor sold it for 30*s*., though it was worth 38*s*., this was held to be robbery. *Spencer*, *ib*., 1783.

Fair price paid] In some cases the amount paid may show that the taking was not felonious; though there may be force or putting in fear *otherwise* sufficient, it is only a trespass. 'A traveller met a fisherman with fish, who refused to sell him any; and he, by force and putting in fear, took away some of his fish, and threw him money much above the value of it; and judgment was respited, because of the doubt whether the intent was felonious.' *The Fisherman's Case*, East, *ib*. 661-2, 1586; cf. Hawk. P. C. 1, 34, 14. 'Such, however, seem properly to be questions for the jury' to say whether, from such a circumstance the 'intention was not fraudulent, and so not felonious,' though, in law, the mere fact that the value is offered, does not prevent the taking being felonious, though it is 'pregnant evidence' to the contrary. East.

(c) The law coincides with that of *Threats to accuse*. In *Knewland*, above, Ashurst J. distinctly says that threats to accuse of sodomy form an exception to the terrors of injury to character (which do not constitute robbery) by reason of its peculiar abominableness. There Heath J. said *Donnally* and *Hickman*, below, 'only go thus far—that to obtain money from a person by accusing him of that which, if proved, would carry with it an *infamous punishment*, is sufficient to support an indictment for robbery; but it has never been decided that a mere charge of [illegal?] imprisonment and extortion of money . . . is sufficient.' Lea. 729.

Donnally threatened 'to take' prosecutor 'before a magistrate' for attempted 'unnatural crime,' unless he gave him money. Prosecutor swore that he was exceedingly alarmed on two occasions, and under that alarm gave the money; that he was not aware what were the consequences of such a charge; but apprehended that it might cost him his life, and so the jury found. The twelve judges having given their opinions *seriatim*, unanimously resolved that defendant was rightly convicted of robbery.

In *Donnally*, therefore, there was apprehension of loss of life as well as of character, but in *Hickman*, Lea. 278; East P. C. 728, 1783, prosecutor's own account was that he *only* feared the stain on his character—*not* personal danger. Nevertheless, all the judges held it robbery. Their resolution was that the case did not '*materially* differ from that of *Donnally*, for that the true definition of robbery is the stealing or taking from the person, or in the presence of another, property of any amount, with such a degree of *force* or *terror* as to induce the party *unwillingly* to part with his property; and whether the *terror* arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally, if not more, terrific than the dread of

personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the judges are unanimously of opinion that upon the principles of law, and the authority of former decisions, a *threat* to accuse a man of having committed the greatest of all crimes is, as in the present case, a sufficient *force* to constitute the crime of robbery by putting in fear.' *Hickman* was followed by all the judges in *Egerton*, 1819, where prosecutor gave *exactly* the same account of his state of mind: in both the blackmailing charge was sodomy, as it was in *Cannon*, R. & R. 146, 1808, where prosecutor admitted that he was not in bodily fear, and he did not believe defendants' pretensions to be police officers, but did believe, when they practically forced him into a coach, that they would take him to a watch-house. Ten judges thought this was sufficient 'forcible constraint'; they were equally divided whether 'mere' apprehension of danger to character was enough, and whether there must not be some force or violence. But as R. & R. say, doubt cannot exist since *Egerton*.

Defendant went twice to the house where prosecutor was in service, and called him a 'Sodomite,' &c. Prosecutor took him each time before a magistrate, who discharged him. Then he followed prosecutor and repeated the expressions, till at last prosecutor, tired of his importunities, and 'being frightened for his reputation, and in fear of losing his situation,' gave him money. He was convicted, a majority of judges holding the case to be within *Hickman*, but three thought *Hickman* was not law. *Elmstead*, 2 Russ. Cri. 1149, 1802. This case is insufficiently reported; L. Ellenborough's view that the principal inducement to part with the money was the fear of a loss of his place, is surely not incompatible with a fear that that loss would follow on the loss of character.

The threat must be to accuse *the person robbed*. Defendant was indicted for robbing the wife of a man whom he threatened to accuse, but Littledale J. declined to extend the principle, and directed an acquittal. *Edward*, 1 Moo. & R. 257; 5 C. & P. 518, 1833.

Duration of the fear] Where the immediate danger is over, it has been doubted when prosecutor has had time between threat and yielding to seek assistance from the law or friends, whether, if he complies, there has been *robbery*. *Jackson, &c.*, 1802, was such a case, where prosecutor went and fetched a friend who was present at the payment of money, and advised him not to pay. The judges, by a majority, held that it was not robbery, though the money was taken in the presence of the prosecutor, and the fear of losing his character was on him at the time. 'Most of the majority thought that, in order to constitute robbery, the money must be parted with from an *immediate* apprehension of present danger *upon the charge being made*, and not, as in this case, after the parties had *separated*, and the prosecutor had time to deliberate upon it . . . &c.; all which carried the appearance more of a composition of a prosecution than it did of a robbery, and seemed more like a calculation whether it were better to lose his money or risk his character. One of the judges, who agreed that it was not robbery, went upon the ground that there was not a *continuing* fear, such as could operate *in constantem virum*, from the time when the money was demanded till it was paid. . . . The minority, who held the case to be robbery, thought the question concluded by the finding of the jury that the prosecutor had parted with his money through fear continuing at the time, which fell in with

the definition of robbery long ago adopted and acted upon, and they said that it would be difficult to draw any other line. That this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or others for assistance, for the money was given to prevent the public disclosure of the charge.' The reference to an ancient definition is, perhaps, repeated East P. C. 714, where thieves make a man swear 'by menace of death' to bring them money: 'the true reason' that this is robbery 'is given by L. Hale and others; *because the fear of that menace still continued upon him at the time he delivered the money.*'

At any rate, it was always held that it must appear that the property was delivered, while the victim was *under the influence* of the fear. Where prosecutor, in order to entrap blackmailers, pretended to parley and negotiate with them, and though he had been alarmed at first, when he actually gave the money, he was under no apprehension at all, the judges were of opinion that it was no robbery, there being no violence nor fear at the time of delivery. Eyre C.J. observed, 'The principle of robbery was violence. The principle he had acted upon in such cases was to leave the question to the jury whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand. Therefore, when the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoner, he negatived the robbery: . . . here there was neither actual nor constructive violence'—on which ground the judges held the conviction wrong. *Reane.* The same point was ruled in *Fuller,* R. & R. 408, 1820, where prosecutor, who had already been blackmailed, made an appointment to meet defendant and have him arrested.

Common law and statute—indictment] See that head and *Accusation* under *Threats*. *Semble* that now, where money is obtained by any *statutory* threat, the indictment must be on the statute. See *Henry, &c.,* 2 Moo. C. C. 118, 1840, where such threats, having been made a distinct felony, under a rpd. st., one who was convicted of having aided another found guilty of robbery with violence, but who, the jury found, though privy to the design to extort by accusation (of sodomy), was not privy to the violence, was held to have been wrongly convicted, as he should have been indicted under that st. But where the money is obtained by threats to accuse other than those specified in an A., the indictment may be for robbery at common law. *Norton,* 8 C. & P. 671, 1838. It has been decided, that assaulting *and* threatening to charge with an infamous crime (which did not come within certain rpd. ss.), with intent thereby to extort money, was an assault with intent to rob, because defendants intended to get the money by the violence of the assault, as well as by the charge, 'which would be a common law robbery.' *Stringer,* 2 Moo. C. C. 261; 1 C. & K. 188, 1842, where the judges doubted whether the *ground* on which *Henry,* above, was decided was correct.

Truth of the charge] It is no defence to a charge of robbery by such threatening, that prosecutor has in fact been guilty of such a crime; but if the money was given voluntarily, without any previous threat, the indictment could not be supported: *Gardner,* 1 C. & P. 479, 1824: acquittal.

ROGUE AND VAGABOND, BEING A.

See *Living on Immoral Earnings, Prostitution* and *Vagrancy.*

By 34-5 V. 112, 15: in 5 G. 4, 83, 4, instead of the words 'highway or place adjacent' is to be read 'or any highway or any place adjacent to a street or highway.'

By 5 E. 7, 13 (Aliens A. 1905), s. 7 (1), an offence under that A. by 'an immigrant or alien' renders him a rogue and vagabond within s. 4.

Indictment was introduced by 2-3 G. 5, 20, 7 (5), and maximum sentence raised to six months' imp. w. h. l. under the 1898 A. by s. 7 (2).

ROUT.

See *Riot.*

is the 'felonious taking of any goods out of any parish church, or other church or chapel': 2 Hale P. C. 365; 'and such goods are not confined to things used for Divine Service.' *Stroud*, Judic. Dict. 'The violation of the sanctity of the place,' said the judges, 'was the thing the statute meant to prevent.' *Rourke*, R. & R. 386, 1819, under a rpd. s.: where the theft was of articles for the *repair* of the *church*: 'capital sentence.'

By 6-7 G. 5, 50, 24: 'Every person who—(1) breaks and enters any place of divine worship and commits any felony therein; or (2) breaks out of any place of divine worship having committed any felony therein; shall be guilty of felony called sacrilege, and on conviction thereof shall be liable to penal servitude for life.'

Not triable at Q. S.

'Place of divine worship'] There is no definition. It is not open to doubt that this phrase (replacing 'any church, chapel, meeting-house or other place of divine worship,' in 24-5 V. 96, 50, rpd.) contemplates every religious society (at any rate, monotheist).

It must be proved that the building was such a place. Where the goods had been stolen from a box in the church tower, which had a separate roof, but no outer door, the only way of going to it being through the body of the church, from which the tower was not separated by a door or partition of any kind, Parke J. was of opinion that this tower was to be taken as a part of the church. *Wheeler*, 3 C. & P. 585, 1829.

The vestry of a parish church was broken open and robbed. It was formed out of what before had been the church porch; but had a door opening into the churchyard, which could only be unlocked, if at all, from the inside. It was held by Coleridge J. that this vestry was part of the fabric of the church. *Evans*, Carr. & M. 298, 1842.

Both these cases were under a rpd. A. which only spoke of *church* or *chapel;* but it is clear that the proof about 'any place of divine worship' must be of the same sort.

Property how laid] *Wortley, &c.*, 1 Den. C. C. 162; 2 Cox C. C. 32, 1846, was an indictment for breaking into a church and stealing a box and money. The box was a very ancient box, firmly fixed by three screws to the outside of a pew in the centre aisle, and over the box was an ancient board, with the inscription, 'Remember the poor.' In the count, which was sustained, the property was laid in the vicar *by name* and 'others' (the churchwardens). Eleven judges 'thought that the box might be presumed, in the absence of any contrary evidence, to have been placed in the church pursuant to the canon (84), *Burn's* Eccl. Law, 369, tit. *Church;* and that the money therein placed was constructively in the possession of the vicar and churchwardens, who jointly are not a corporation, and that they were properly described as individuals in the indictment.'

Frequently the property is laid in the parishioners; sometimes in the rector alone, and sometimes in the churchwardens alone. See 1 Hale P. C. 512; 2 *ib.* 181; East P. C. 651. In a private chapel the property ought perhaps to be laid in the private owner.

SALE OF PUBLIC OFFICES.

See *Offices, &c.*

SEA- AND RIVER-BANKS, WORKS, &c.,

OFFENCES RELATING TO.

By 24-5 V. 97, 30: 'Whosoever shall unlawfully and maliciously break down or cut down or otherwise damage or destroy any sea bank or sea wall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool, or marsh, whereby any land or building shall be or shall be in danger of being overflowed or damaged, or shall unlawfully and maliciously throw, break, or cut down, level, undermine, or otherwise destroy any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse, or other work belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping.'

By s. 31: 'Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping.'

By s. 32: 'Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein, or shall unlawfully and maliciously cut through, break down, or otherwise

destroy the dam or floodgate of any millpond, reservoir, or pool, shall be guilty of a misdemeanour'—punishment as in preceding s.

By the Salmon Fishery A. 1873, 36-7 V. 71, 13, the provisions of s. 32, 'so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words 'or in any salmon river' were inserted in the said s. in lieu of the words 'private rights of fishery' after the words 'noxious material in any such pond or water.' The meaning of this s. is clear though, if its terms be followed literally, s. 32 does not read grammatically (there is also a misquotation of 'private *rights*' for '*right*'). A conviction under s. 13 was confirmed by the C. C. R. on the ground that 'the obvious intention' of a statute must prevail, despite grammatical difficulties. *Vasey*, 1905, 2 K. B. 748; 75 L. J. K. B. 19; 69 J. P. 455; 22 T. L. R. 1; 21 Cox C. C. 49.

SEALS, FORGERY OF, &c.

See Index.

SEAMEN, OFFENCES I. BY.

See under *Ships*.

II. AGAINST.

See generally, *Ships, &c.*

Forcing seamen on shore] By s. 43 of 6 E. 7, 48, Merchant Shipping A. 1906: 'A person belonging to a British ship shall not wrongfully force a seaman on shore and leave him behind, or otherwise cause a seaman to be wrongfully left behind at any place either on shore or at sea in or out of his Majesty's dominions, and if he does so he shall in respect of each offence, be guilty of a misdemeanour.'

Part IV, ss. 28-49, creates several misdemeanours, *e.g.* falsifications by a master of the wages and effects of a seaman 'left behind'; his leaving a seaman behind without obtaining the proper certificate, &c. 'Seamen' *here* includes 'apprentices to the sea service.' Triable at Q. S.

For offences against seamen under the Conspiracy and Protection of Property A., see s. 16.

Forgery, &c.] See s. 154 of 57-8 V. 60.

Punishment] By 57-8 V. 60, Merchant Shipping A. 1894, s. 680, every offence under the A. declared to be a misdemeanour shall be punishable by fine or imprisonment, not exceeding two years with or without hard labour, but may be prosecuted summarily. But notwithstanding this s., s. 17 (1) of the Summary Jurisdiction A. 1879, applies, and where the conditions of that s. are fulfilled defendant has the right to claim to be tried by a jury. *Goldberg*, 1904, 2 K. B. 866; 73 L. J. K. B. 970; 68 J. P. 554; 20 T. L. R. 683; 20 Cox C. C. 699.

Venue] By s. 684, every offence under the A. is deemed to have been committed 'and every cause of complaint to have arisen either where it actually was committed or arose, or in any place in which the offender or person complained against may be.'

This s. is applied by 4 E. 7, 24, 1 (5), the Wireless Telegraphy A. 1904; and by 5 E. 7, 13, 7 (2), the Aliens A. 1905.

SEDITION.

The Latin and English words seem to have been for a long time literary rather than legal. Hence P. & M. 2 Hist. 501, 3, suggest that in Glanvill and Bracton the best translation is *betrayal*. The English word seems first to occur *in a statute* in 13 C. 2, c. 1, preamble and s. 2 (1661); and *about* that time Hale 1 P. C. 77, remarks, 'tho in these old authors treason is sometimes expressed by the name of *sedition*, yet that word is too general and comprehensive of other offenses not capital, as well as of treason, and therefore a charge of sedition against the king, or of exciting sedition, or of speaking, writing or doing anything *seditiously*, doth not amount to a charge of treason'; after citing *Selden's case*, 1629, he adds, 'sedition in a true legal signification doth not import treason.' In 40-1 V. 21, 40, occurs 'conviction for sedition or seditious libel.' Stephen J. did 'not think that any such offence' as 'sedition itself' is known to English law: 2 Hist. Cr. L. c. 24. He classifies seditious offences thus: 1. Words [spoken]; 2. Libels; 3. Conspiracies, all of which are treated respectively under the two latter titles. See also *Arms, Illegal Making of*, and *Unlawful Assembly*.

By 24-5 V. 100, 26: 'Whosoever, being legally liable either as a master or mistress to provide for any apprentice or servant, necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude. . . .'

By 38-9 V. 86, 6: 'Where a master being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he shall, on summary conviction, be liable either to pay a penalty not exceeding 20*l*., or to be imprisoned for a term not exceeding six months with or without hard labour,' but by s. 9 defendant may elect to be tried on indictment.

Guardians, &c. as prosecutors] By s. 73 of 24-5 V. 100: 'Where any complaint shall be made of any offence against s. 26 [above] . . . or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount in point of law to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace, before whom such complaint is heard, shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate, or a duplicate thereof upon the clerk of such guardians, or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs, reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and where there is a board of guardians, the clerk or some other officer of the union or place, and where there is no board of guardians, one of the overseers of the poor may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute.'

It has been held, that a master is not bound by 'the general law' to furnish medical advice for his servant; but that it is otherwise in the case of an apprentice, whom he is bound, during illness, to furnish

with proper medicines. See *W. Smith,* 8 C. & P. 153, 1837. But see now the ss. above.

Manslaughter] Conviction of a mistress for neglecting to supply her servant who, it was contended, was of weak mind, with proper food and lodging. It was held that the question for the jury was, whether there was evidence that the deceased was reduced to such a state of body and mind as to be helpless and unable to take care of herself, and that she was so under the dominion and restraint of her mistress as to be unable to withdraw herself from her control. *J. C. Smith,* 1865: c. q.

See further under *Manslaughter.*

Common law] It is an indictable common law misdemeanour not to provide proper necessaries for any infant unable to provide for itself, whether it be child, apprentice, or servant, if there is a duty to provide for him or her, so as to injure his or her health. *Friend and wife,* R. & R. 20, 1802. See under *Assault.* For proof of the apprenticeship, in the absence of an indenture, see *Crumpton,* Carr. & M. 597, 1842.

Triable at Q. S.

See *Correction* and *Lawful Chastisement* under *Assault.*

II. OFFENCES BY.

See *Embezzlement, Larceny,* and *Agency.*

Under master's instructions] See pp. 839, 842.

SEXUAL OFFENCES.

So far as the law is common to all, it will be found under *Complaint;* cf. *Consent* and *Corroboration.*

SHEEP, OFFENCES IN RESPECT OF.

See *Cattle.*

SHERIFFS, BAILIFFS, &c., OFFENCES BY.

By 50-1 V. 55, Sheriffs A. 1887, s. 29: '(1) If a person being a sheriff, under-sheriff, bailiff or officer of a sheriff, whether within a franchise or without . . . (*a*) conceals or procures the concealment of any felon; or (*b*) refuses to arrest any felon in his bailiwick; or (*c*) lets go at large a prisoner who is not bailable; or (*d*) is guilty of an offence against or breach of the provisions of this Act, he shall (without prejudice to any other punishment under . . . this Act) be guilty of a misdemeanour': maximum punishment, imprisonment for a year *and* a fine, *or* 'if he has not wherewith to pay a fine,' three years' imprisonment.

(2) Any such official or any one 'employed in levying or collecting debts due to the crown by process of any court, or being an officer to whom the return or execution of writs belongs . . . (*a*) withholds a prisoner bailable after he has offered sufficient security; or (*b*) takes or demands any money or reward under any pretext whatever other than the fees or sums 'allowed by' this or any other A.; 'or (*c*) grants a warrant for the execution of any writ before he has actually received that writ; or (*d*) is guilty of' any offence against . . . this Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any superior court; he and any person procuring the commission of any such offence shall, without prejudice to any other punishment' under this A. be liable (i) to summary punishment (as) for *contempt* of the sentencing *court*, or that court may 'cause proceedings' (*e.g.* by indictment) 'to be taken' for his punishment; '*and* (ii) to forfeit two hundred pounds and to pay all damages suffered by any person aggrieved,' *both* to be 'recovered by such person as a debt by an action' in the High Court.

(3) Any High Court judge or any court of record out of which the writ in question issued, may be the *sentencing* court.

(4) The court may order 'either party' to pay the other's costs of such a 'complaint.'

(7) Such *summary* proceedings must be taken 'before the end of the sittings of the court held next after the offence was committed' and any other within two years thereafter.

(8) Nothing in this s. is to render any one 'liable to be punished twice in respect of the same offence.'

'*Offence . . . against this A.*'] *e.g.* a misdemeanour by bailiffs, &c., is created by s. 14 (5), and by s. 17 a sheriff of a county shall not 'act as a justice of the peace for that county'; and there are other provisions in the A. the breach of which by s. 29 (1) (*d*) is indictable.

Corporal punishment] The Sheriffs A. 'is by no means exhaustive of the powers and duties of a sheriff: . . . as the statute [Children

A.] does not designate any person,' the sheriff must carry out the order of the court [to whip]: *Lydford,* 10 Cr. A. R. 62, 1914.

Triable at Q. S.

See *Escape* and s. 16 (1) of the Sheriffs A.; by (2) a sheriff 'is not liable for the escape of any prisoner . . . in any prison subject to the Prison Act, 1877.'

By 39-40 V. 36, 253, these officers and mayors, &c., who have, at the request of the Customs, granted 'special' warrants, under s. 252, are free from all liability in case of escape.

SHIPS, VESSELS, &c.—OFFENCES IN RESPECT OF.

Preventing loading, sailing, &c.] By 33 G. 3, 67, 1: 'If any seamen, keelmen, casters, ship carpenters, or other persons riotously assembled together, to the number of three or more . . . shall unlawfully and with force prevent, hinder, or obstruct the loading or unloading, or the sailing or navigating, of any ship, keel, or other vessel, or shall unlawfully and with force board any ship, keel, or other vessel, with intent to prevent, hinder, or obstruct, the loading or unloading, or the sailing or navigating, of such ship, keel, or other vessel, every seaman, keelman, caster, ship carpenter, and other person, being lawfully convicted of any of the offences aforesaid . . . shall be committed' to prison with hard labour for not less than six or more than twelve months: triable at Q. S. By s. 3, a second offence is felony, punishable by seven to fourteen years' transportation. By s. 4, the Act shall not extend to any act, deed, &c. done in the service, or by the authority, of his Majesty. By s. 7, these offences committed on the high seas shall be within the jurisdiction of the admiralty. By s. 8, the prosecution for any of these offences is to be commenced within twelve calendar months after the offence committed.

Larceny] By 6-7 G. 5, 50, 15: 'Every person who steals—(1) any goods in any vessel, barge, or boat, of any description in any haven, or any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal; or (2) any goods from any dock, wharf, or quay adjacent to any such haven, port, river, canal, creek or basin; or (3) any part of any vessel in distress, wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such vessel; shall be guilty of felony, and on conviction thereof, liable to penal servitude for any term not exceeding fourteen years.'
See under *Arson* and *Explosives*.

Other damage] By 24-5 V. 97, 46: 'Whosoever shall unlawfully and maliciously damage, otherwise than by fire, gunpowder, or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or render the same useless, shall be guilty of felony': maximum punishment, seven years' penal servitude; 'and if a male under the age of sixteen years,' a whipping.

False signals, &c.] By s. 47: 'Whosoever shall unlawfully mask, alter or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, or boat into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, or boat, and for which no punishment is hereinbefore provided, shall be guilty of felony': maximum punishment, penal servitude for life; 'and if a male under the age of sixteen years,' a whipping.

Removing buoys, &c.] By s. 48: 'Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy rope, perch, or mark used or intended for the guidance of seamen, or for the purpose of navigation, shall be guilty of felony'; punishment as in s. 46, above.

Destroying wrecks, &c.] By s. 49: 'Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony'; maximum punishment, penal servitude for fourteen years.

'*Castaway—destroy*' *in s.* 42] Under rpd. ss. it was held that a ship run aground or stranded, and afterwards got off and easily refitted, was not within the ss.: *De Londo*, East P. C. 1098, 1765.

Offences by Seamen.

Endangering life or ship] By 57-8 V. 60, Merchant Shipping A. 1894, 220: 'If a master, seaman, or apprentice belonging to a British ship, by wilful breach of duty, or by neglect of duty, or by reason of drunkenness (*a*) does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of a person belonging to or on board the ship; or (*b*) refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from immediate danger to life or limb, he shall in respect of each offence be guilty of a misdemeanour.'

'*Loss, &c.*'] *Tendency* is enough in both clauses, *e.g.* not putting out fire near an explosive; the result is immaterial; was the act *dangerous* considering all the circumstances?: *Gardner*, 1 F. & F. 669, 1859.

Pilots] By s. 607, the same provision is made with respect to pilots, 'when in charge of a ship.' They are *also* subject to suspension or dismissal.

Punishment] See s. 680, under *Seamen*. See also *Piracy*.

Felonies] By s. 147, a superintendent or officer granting or issuing a seaman's money order with a fraudulent intent shall be guilty of felony and liable to p. s. for three to five years. By s. 535, any person taking wreck, &c., found in British waters into a foreign port and selling it or anything in it there, is guilty of felony, and liable as in s. 147. For forgery of documents under the A., see s. 66, and of the seal, stamp or signature of certain documents, s. 695 (4); maximum punishment, seven years' p. s.; document may be impounded.

Unseaworthy ships] By s. 457 (1), every person who sends 'a British ship to sea in such an unseaworthy state that the life of any

person is likely to be endangered,' is guilty of a misdemeanour, unless he proves either that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving that proof, such person may give evidence in the same manner as any other witness.' (2) 'If the master of a British ship knowingly takes the same to sea,' in the conditions of (1), he is similarly guilty. (3) No prosecution (except in Scotland) under this s. shall be instituted except by or with the consent of the Board of Trade or of the governor of the British possession in which the prosecution takes place. (4) No misdemeanour under this s. shall be punishable on summary conviction.

The indictment need not allege the guilty knowledge or negative the use of reasonable means to make, &c. the ship seaworthy. *Freeman,* 9 Ir. R. C. L. 527, 1875: C. C. R.

Not rendering assistance in collision] By s. 422, the neglect of the master of a vessel to render assistance in the case of collision, or to give to the other vessel the name, port of registry, &c., of his own vessel, is a misdemeanour. By (2), if no reasonable cause for his failure is shown, the collision shall, 'in the absence of proof to the contrary,' be deemed to be due to his neglect. If he is a certificated officer, his certificate may be cancelled or suspended.

Other misdemeanours] By s. 16, the master or owner of a ship using or attempting to use for her navigation a certificate of registry not legally granted; by s. 70, carrying papers and documents with intent to conceal the British or assume a foreign character of the ship; by s. 241 (3), wilfully destroying, or altering, or making false entries in an official log-book; by s. 398, the receiving or making any payment, &c. from the person to whom an apprentice or sea-fishing boy is bound, or from the apprentice or boy in consideration of his being so bound, and the making of such payment; by s. 696 (2), the owner or master obstructing the service of documents. Various *misdemeanours, forgeries,* and other frauds *under this A.* are quoted under *Forgery.*

Other offences] For destroying, &c. cordage, &c., and other offences on the Thames, see 2-3 V. 47, 27, 28; destroying ships in the port of London, 39 G. 3, lxix. s. 104; destroying ships of war, 12 G. 3, 24; getting possession of documents, sketches, plans, &c. for the purpose of wrongfully obtaining information, 1-2 G. 5, 28.

Venue] See, for the Merchant Shipping A., under *Seamen;* under *Larceny* for s. 15, above; and title *Venue* for the other ss.

Offences punishable by penal servitude for life are not triable at Q. S.

SHOOTING.

Loaded arms] See *Assault;* 24-5 V. 100, 18, 19; *Murder—Attempts* and *Smuggling.*

It makes no difference what the gun is loaded with, if it is capable of effecting, and probably would, effect, the intent (killing or grievous bodily harm, under a rpd. st.) charged. This ruling was approved by all the judges: the indictment was for an intent to kill, and the jury found that the pistol was loaded (not only with powder and paper, but) with some other destructive material. *Kitchen,* R. & R. 95, 1805.

Where defendant, by snapping a percussion-cap, discharged a gun-barrel detached from the stock and lock, Patteson J. and other judges held this to be shooting with 'loaded arms,' within 9 G. 4, 31, rpd. *Coates,* 6 C. & P. 394, 1834.

Sending a tin box, filled with gunpowder and peas, so contrived that the person who opened it should thereby fire the powder and kill himself, was held by the judges not to be an attempt to discharge loaded arms within that A. *Mountford,* 1 Moo. C. C. 441, 1835.

Indictment] Where defendant fired into a room in which he supposed a certain person to be, but in point of fact he was not, and could not possibly have been reached by the shot, Gurney B. held that the indictment under that A. could not be supported. *Lovell,* 2 Moo. & R. 39, 1837. An indictment for maliciously shooting at A. B. is supported if he be struck by the shot, though the gun be aimed at a different person. *Jarvis,* 1837. See under *Grievous Bodily Harm.*

Onus] It is not for the defendant *primâ facie* to prove that a gun went off accidentally. *W. Davies,* 1913: c. q.

Attempts] See that title; *Duckworth,* 1892; and *Linneker.* Whether it is indictable to attempt to discharge a firearm which could not be discharged seems doubtful, but where defendant pointed a revolver which was loaded only in *some* of its chambers and pulled the trigger, but the hammer fell on an empty chamber, Charles J. held that this was an attempt to discharge a loaded firearm. *Jackson,* 1890.

SHOPS, &c., OFFENCES IN.

See 6-7 G. 5, 50, 26, 27, 28.

'*Shop*'] It was held that a workshop, such as a carpenter's, &c., was not a 'shop' (within a rpd. A.), 'it must be a shop for the sale of articles.' *Sanders,* 9 Carr. & P. 79, 1839. But it was held by L. Denman C.J. in *Carter,* 1 C. & K. 173, 1843, also under that A., that a person who breaks into an ordinary blacksmith's shop containing a forge, and used as a workshop only, not being inhabited nor attached to any dwelling-house, and who steals goods therein, could be convicted of breaking into a shop, &c.; he declined to be bound by *Sanders.* A cellar used merely for the deposit of goods intended for removal and sale is a 'warehouse' within that A. *Hill,* 2 Moo. & R. 458, 1843. A building forming part of chemical works, was commonly called 'The Machine House,' a weighing-machine being there, where all the goods sent out were weighed, and entered in a book kept there. The work-sheets were also kept in this place; the wages of the men were paid there; the books, &c., at other times were kept in what is called 'the office,' where the general books and accounts were kept. It was held that this building was a 'counting-house' within that A. *Potter,* 2 Den. C. C. R. 235; 23 L. J. M. C. 170, 1857. So is an attorney's office: *In re Creeke,* 11 W. R. 234, 1863. See *Suspects.*

SLANDER

of a private person to be indictable must tend to a breach of the peace or sedition. See *Seditious Libel.*

SLAVE-DEALING.

'There is no precise legal definition of slavery. . . . A man is not a slave if he is taken as a 'free labourer' under local immigration laws, even though he has been kidnapped for the purpose (*Casaca*, 5 App. Cas. 548, 1880: P. C.)': 27 Halsbury, 533. 'The trade in slaves is not by international law piracy or a crime . . . except by treaty . . .' but 'within the Admiralty jurisdiction it is piracy and felony by statute, and all the operations of the trade are illegal': *ib.* 534. See the judgment in *Kwok-A-Sing's case.*

Slave dealing] By s. 9 of 5 G. 4, 113, the carrying away, conveying, or removing of any person upon the high seas, &c. [see under *Piracy*] as a slave or for the purpose of his or her being imported or brought into any place whatsoever as a slave, or being sold or dealt with as such, or the embarking or receiving on board any person for such purpose—or assisting in such acts—is made piracy, felony, and robbery. . . . Non-subjects of the crown in any place within the control of the crown are equally liable. By s. 10, the dealing in slaves, generally, and other offences connected therewith, are made felony.

By 7 W. 4 & 1 V. 91, the punishment of death, imposed by s. 9, is abolished and transportation for life is substituted.

S. 9 applies also to acts done by British subjects in furtherance of that trade anywhere: *per* Maule and Wightman JJ. in *Zulueta.* In order to convict of having employed a vessel for slave trading, it is not necessary to show that the vessel which carried out goods was intended to be used for bringing back slaves in return; it is sufficient if there was a slave adventure, and the vessel was in any way engaged in the advancement thereof. *Ib.*

In 1845, the Felicidade, a Brazilian slaver, surrendered to H.M.S. Wasp. She had no slaves on board. The captain and all his crew, except Majaval, one of the defendants, were taken out of her and put on board the Wasp. The captain was sent back to the Felicidade, which was then manned with sixteen British seamen, under the command of Lieut. Stupart. He was directed to pursue the Echo, a Brazilian ship, having slaves on board, and commanded by *Serva.* The Echo surrendered to Mr. Palmer, a midshipman, who went on board her, and sent Serva and eleven of his crew to the Felicidade. The next morning Lieut. Stupart took command of the Echo, and placed Mr. Palmer and nine British seamen on board the Felicidade, in charge of her and the prisoners. The prisoners shortly after rose on Mr. Palmer and his English crew, killed them all, and ran away with the vessel. She was recaptured by a British vessel, and the prisoners were brought to this country, and tried and convicted at Exeter for murder. According to Platt B. the Felicidade was in the lawful custody of her Majesty's officers, and all on board that vessel were within the admiralty jurisdiction, and the jury ought to find defendants guilty of murder, if satisfied that they plotted

together to slay all the English on board, and run away with the vessel, that, in carrying out their design, Majaval slew Mr. Palmer, and that the others were present, and abetted him. Ultimately the judges, by eleven to two, held the conviction to be wrong on the ground of there being no jurisdiction in an English court to try an offence committed on the Felicidade, and that if, as was argued, the Crown had lawful possession through its officers, there was no evidence to prove that possession. *Serva and others.* Platt B. thought that the British possession was good under a treaty with Brazil.

For evidence in these cases, see 6-7 V. 98, 4, under *Depositions.*

Venue] See p. 647.

SMUGGLING

AND OTHER CUSTOMS OFFENCES.

The Customs Consolidation A. 1876, 39-40 V. 36, is the principal statute.

By s. 189: 'Every person who shall by any means procure or hire, or shall depute or authorise any other person to procure or hire any person or persons to assemble for the purpose of being concerned in the landing, or unshipping, or carrying, conveying, or concealing any goods which are prohibited to be imported, or the duties for which have not been paid or secured, shall be imprisoned for any term not exceeding twelve months; and if any person engaged in the commission of any of the above offences be armed with firearms or other offensive weapons, or whether so armed or not be disguised in any way, or being so armed or disguised shall be found with any goods liable to forfeiture under the Customs Acts within five miles of the sea coast or of any tidal river, [he] shall be imprisoned with or without hard labour, for any term not exceeding three years.'

'The above offences' clearly are those of 'landing, &c. . . . concealing.' See a note to *Stephen's* Dig. Crim. Law, art. 81, p. 58, 5th ed., for a severe criticism of the drafting of this s.

Signalling to smugglers] By s. 190 of 39-40 V. 36: 'No person shall after sunset and before sunrise between the 21st day of September and the 1st day of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time of the year, make, aid, or assist in making any signal in or on board, or from any ship or boat, or on, or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving notice to any person on board any smuggling ship or boat, whether any person so on board of any such ship or boat be or not within distance to notice any such signal; and if any person, contrary to the Customs Acts [see s. 284], shall make, or cause to be made, or aid or assist in making any such signal, he shall be guilty of a misdemeanour . . . and it shall not be necessary to prove on any indictment or information in such case that any ship or boat was actually on the coast, and the offender, being duly convicted, shall . . . either forfeit the penalty of one hundred pounds, or, at the discretion of such court, be . . . kept to hard labour for any term not exceeding one year.' By s. 191: 'If any person be charged with having made or caused to be made, or for aiding or assisting in making any such signal as aforesaid, the burden of proof that such signal, so charged as having been made with intent and for the purpose of giving such notice as aforesaid, was not made with such intent and for such purpose, shall be upon the defendant against whom such charge is made.' By s. 192, any

person may prevent such signals being made, and may enter lands for that purpose.

Felony—shooting at H.M. vessels, &c.] By s. 193: 'If any person shall maliciously shoot at any vessel or boat belonging to her Majesty's navy, or in the service of the revenue, or shall maliciously shoot at, maim, or wound any officer of the army, navy, marines, or coastguard, being duly employed in the prevention of smuggling and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, upon conviction, be adjudged guilty of felony, and shall be liable . . . to penal servitude for' five years, or to imprisonment for three.

It was held, when a custom-house vessel chased a smuggler, and fired into her without hoisting such a pendant and ensign as statute required, the returning of the fire by the smuggler was not malicious within the rpd. A. *Reynolds*, R. & R. 465, 1821. Cf. *Murder; Legality of Process.*

Compensations and rewards] to officers and others employed in preventing smuggling; see ss. 210-216.

Indictment] By s. 255: 'All indictments or suits for any offences or the recovery of any penalties or forfeiture under the Customs Acts shall, except in the cases where summary jurisdiction is given to justices, be preferred or commenced in the name of her Majesty's Attorney-General for England . . . or of some officer of customs or inland revenue.' By s. 256, the Attorney-General may enter a *nolle prosequi*.

An information on the revenue side in the K. B. D. by the A.-G. under s. 186 is not a 'criminal' information within the Criminal Appeal A. s. 20 (2). *Hausmann, &c.*, 3 Cr. A. R. 3; 73 J. P. 516; 26 T. L. R. 3, 1909.

Limitation of time] By s. 257: 'All suits, indictments, or informations brought, or exhibited for any offence against the Customs Acts, in any court or before any justice, shall be brought or exhibited within three years next after the date of the offence committed.'

Venue] By s. 258: 'Any indictment, prosecution, or information which may be instituted or brought under the direction of the commissioners of customs for offences against the Customs Acts, shall and may be inquired of, examined, tried, and determined in any county of England, when the offence is committed in England,' and so of Scotland and Ireland, 'in such manner and form as if the offence had been committed in the said county, where the said indictment or information shall be tried.'

Allegations—Onus] By s. 260: 'The averment that the commissioners of customs or inland revenue have directed or elected that any information or proceedings under the Customs Acts shall be instituted, or that any ship or boat is foreign, or belonging wholly or in part to her Majesty's subjects, or that any person detained or found on board any ship or boat liable to seizure, is or is not a subject of her Majesty . . . or that any person is an officer of customs

or excise, or that any person was employed for the prevention of smuggling, or that the offence was committed within the limits of any port, or where the offence is committed in any port of the United Kingdom, the naming of such port in any information or proceeding shall be deemed to be sufficient, unless the defendant in any such case shall prove to the contrary.'

Proof—Office, &c.] By s. 261: 'If upon any trial a question shall arise whether any person is an officer of the army, navy, marines, or coastguard, duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, his own evidence thereof, or other evidence of his having acted as such, shall be deemed sufficient, without production of his commission or deputation.' By s. 262: Authoritative orders, 'or any letter or instructions referring thereto, which shall have been officially received by any officer of customs or excise for his government and under which he shall have acted as such officer, shall be admitted and taken as sufficient evidence and proof of such order.'

By 42-3 V. 21, 10: 'All persons to the number of three or more who shall assemble for the purpose of unshipping, landing, running, carrying, concealing, or having so assembled shall unship, land, run, carry, convey, or conceal any spirits, tobacco, or any prohibited, restricted, or uncustomed goods, shall each forfeit a penalty not exceeding 500*l.*, nor less than 100*l.*' By s. 12, on any conviction for an offence under the Customs Acts with a sentence of 100*l.* fine, defendant may, for a first offence, be imprisoned for not less than six and not more than nine months, and 'for a subsequent offence' it may be ordered that he 'shall in lieu of payment of the penalty be imprisoned with or without hard labour' between six and twelve months.

Other frauds] See 54-5 V. 38, 21, under *Stamps*.

Assaults on revenue, &c. officers] See 44-5 V. 12, 12.

'*Assemble*'] It must be proved that defendants or others, to the number of three or more, were assembled together *deliberately*, for the purpose of aiding and assisting, &c. Where drunken men came from an ale-house, and hastily set themselves to carry away some Geneva which had been duly seized in a vault in the house of one defendant by the excise as uncustomed, and the officers were beaten, it was considered very doubtful, whether the case came within 19 G. 2, 34, rpd., the words of which 'manifestly allude to the circumstance of great multitudes of people coming down upon the beach of the sea for the purpose of escorting uncustomed goods,' and defendants were acquitted. *Hutchinson and others*, Lea. 339, 1784.

Reasonable proof must be given that the goods were uncustomed. See *Shelley, ib.* 1784.

'*Offensive weapons*'—19 *G.* 2, 34, *rpd.*] See under *Game*. 'Although it was difficult to say what should or should not be called an offensive weapon, it would be going a great deal too far to say that nothing but guns, pistols, daggers, and instruments of war should be so considered; but . . . bludgeons, properly so called, and clubs, and anything that is not in common use for any other purpose but a weapon, are clearly offensive weapons within' this A. *Cosan*, Lea. *ib.*, 1785, following *Ince*, below. Large sticks about three feet long, with large

knobs at the end, with several prongs, the natural growth of the stick, arising out of them, were held not to be offensive weapons; the preamble of the A. showing that they must be what the law calls *dangerous*. *Ince*, *ib.*, 1785. But on an indictment with intent to rob, a common walking-stick has been held to be an offensive weapon. *Johnson*, 1822; and cf. *Fry*, 1837. See also *Sharwin*, East P. C. 421, 1785. A common whip was held not to be an offensive weapon. *Fletcher*, Lea. 23, 1742. And so were '*bats*,' which are poles used by smugglers to carry tubs. *Noakes*, 1832. If in a sudden affray a man snatch up a hatchet 'accidentally,' this does not come within the A. *Rose*, Lea. 342, 1784.

SODOMY, &c.

By 24-5 V. 100, 61: 'Whosoever shall be convicted of the abominable crime of buggery committed either with mankind or with an animal shall be liable to be kept in penal servitude for life.'

If the offence be committed on a boy under fourteen years of age, it is felony in the agent only. 3 Inst. 59; 1 Hale P. C. 670. In *Allen*, 1 Den. C. C. 364; 3 Cox C. C. 270, 1848, defendant induced a boy of twelve to commit this crime on him, and the court were unanimous that the conviction was right. See *Infancy*.

The act with a fowl constitutes the offence: *Brown*, 1889; but the act in a child's mouth does not. *Jacobs*, R. & R. 331, 1817.

The offence would be complete on proof of penetration only: see 24-5 V. 100, 63.

Accomplice] must have guilty knowledge, which is a question for the jury.

In *Cratchley*, 1913: assault with intent to commit sodomy, where a boy of ten was held not to have guilty knowledge and so not to be an accomplice.

Corroboration] A majority of the judges were of opinion that the commission of the crime with a woman was indictable: *Wiseman*, Fortescue, 91, 1718. In *Jellyman*, Patteson J. held that a married woman who consents to her husband committing the crime with her, is an accomplice in the felony, and as such that her evidence requires corroboration, though consent or non-consent is not material to the offence. Communication of a disease may be corroboration: *Tate*, 1908: c. q.

All the cases were reviewed and the law settled in *Baskerville*, 1916.

Not triable at Q. S.

Attempts, assaults to that end, &c.] under 24-5 V. 100, 62, are triable at Q. S.

Solicitations and attempts to solicit are common law misdemeanours triable at Q. S. See *Ransford*, 1874, where the soliciting letter being unread, only an attempt could be found. See *Horton* v. *Mead*.

Indecency] By 48-9 V. 69, 11: 'Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour'; maximum punishment, imprisonment for two years with hard labour. Not triable at Q. S. Where defendant procured the commission of such an act with himself, it was held that the offence was complete. *Jones and another*, 1896, 1 Q. B. 4; 65 L. J. M. C. 28; 18 Cox C. C. 207: C. C. R.

Evidence under this A.] See s. 20 and 61-2 V. 36, s. 4, and Sched.

Acquittal of sodomy is not necessarily acquittal of gross indecency: *W. Barron*, 1914.

Threat to accuse] See under *Threats*.

SOLICITING, I. FOR IMMORAL PURPOSES.

1. *Males*] See *Rogue, &c.*, and 61-2 V. 39, 1 (1), *b*. For sentence, see *C. V. Smith*, 1914.

Behaviour may be enough without speaking or touching, *e.g.* smiling in the face, gestures, &c., and without complaint or evidence of persons *so* solicited: *Horton* v. *Mead*, 1913, 1 K. B. 154; 23 Cox C. C. 279; 82 L. J. K. B. 200; 77 J. P. 129; 108 L. T. 156: distinguishing the case of an unread letter, *Ransford*, because here the solicited must have seen the gestures, &c.; *aliter*, perhaps, if they had been blind.

2. *Females*] By 5 G. 4, 83, 3, 'every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner,' is an 'idle and disorderly person,' and so may become a 'rogue, &c.,' which see under s. 4.

An alien may be recommended for expulsion: 5 E. 7, 13, 3, (1), *a*.

II. TO COMMIT CRIME (GENERALLY).

See *Inciting*.

SOLICITOR, ACTING AS WITHOUT BEING,

is indictable: *G. Buchanan*, 8 Q. B. 883, 1846: instructing counsel in appeal at Q. S. So presumably of one acting as a barrister, but there is no authority.

SOVEREIGN, OFFENCES AGAINST.

See *Assault, Sedition, Treason, &c.*

SPORTS, ILLEGAL.

See *Prize-fight* and Index (*Sports*).

SPRING-GUNS, SETTING.

By 24-5 V. 100, 31: 'Whosoever shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude; and whosoever shall knowingly and wilfully permit any such spring gun, man trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap or engine with such intent as aforesaid: provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin: provided also, that nothing in this section shall be deemed to make it unlawful to set or place, or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set or placed, or caused, or continued to be set or placed, in a dwelling-house, for the protection thereof.'

SPYING.

See *Official Secrets.*

By 29-30 V. 109, 6: 'all spies for the enemy shall be deemed to be persons subject to this' A. (Naval Discipline), 'and shall suffer death' or other punishment. So of traitorous communications with the enemy: trial by court-martial.

STABBING.

See *Wounding.*

STAMPS—OFFENCES RELATING TO.

By 54-5 V. 38, Stamp Duties Management A. 1891, s. 13: 'Every person who does or causes or procures to be done, or knowingly aids, abets, or assists in doing any of the acts following, that is to say:

(3) Fraudulently prints or makes an impression upon any material from a genuine die;

(4) Fraudulently cuts, tears, or in any way removes from any material any stamp with intent that any use should be made of such stamp or of any part thereof;

(5) Fraudulently mutilates any stamp with intent that any use should be made of any part of such stamp;

(6) Fraudulently fixes or places upon any material or upon any stamp any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any way removed from any other material, or out of or from any other stamp;

(7) Fraudulently erases, or otherwise either really or apparently removes from any stamped material, any name, sum, date, or other matter or thing whatsoever thereon written with the intent that any use should be made of the stamp upon such material;

(8) Knowingly sells or exposes for sale, or utters or uses any stamp which has been fraudulently printed or impressed from a genuine die;

(9) Knowingly and without lawful excuse (the proof whereof shall lie on the person accused) has in his possession any stamp which has been fraudulently printed or impressed from a genuine die or any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise either really or apparently removed,

shall be guilty of felony'; maximum punishment, penal servitude for fourteen years. Not triable at Q. S.

A prosecution for removing impressed stamps from one writ served to another, and selling the latter, seems to have failed under a s. very like (4), above, on technical grounds: *T. Field,* Lea. 383, 1785. A similar fraud by a clerk in the stamp office, the first step in which was innocently done in the course of his duty, was held within words similar to (6), above: *G. Smith,* 1 Moo. C. C. 314, 1831.

Forging and selling (*ll.*) stamps with forged cancellation (whether apparently the latter was added subsequently or not) is within this s.: *Lowden,* 1914, 1 K. B. 144; 78 J. P. 111; 23 Cox C. C. 643;, 83 L. J. K. B. 114; 30 T. L. R. 70; 9 Cr. A. R. 195.

By s. 18 (1): 'If any forged stamps are found in the possession of any person appointed to sell and distribute stamps, or being or having been licensed to deal in stamps, that person shall be deemed and taken, unless the contrary is satisfactorily proved, to have had

the same in his possession knowing them to be forged, and with intent to sell, use, or utter them, and shall be liable to the punishment imposed by law upon a person selling, using, uttering, or having in possession forged stamps, knowing the same to be forged.'

By s. 21: 'Any person who practises or is concerned in any fraudulent act, contrivance or device not specially provided for by law, with intent to defraud her Majesty of any duty, shall incur a fine of fifty pounds.'

By s. 27, the expression 'material' includes every sort of material upon which words or figures can be expressed; the expression 'die' includes any plate, type, tool, or implement whatever used under the direction of the commissioners for expressing or denoting any duty or rate of duty, or the fact that any duty or rate of duty or penalty has been paid, or that an instrument is duly stamped, or is not chargeable with any duty, or for denoting any fee, and also any part of any such plate, type, tool, or implement; the expression 'stamp' means as well a stamp impressed by means of a die as an adhesive stamp for denoting any duty or fee.

On an indictment under a rpd. s. for vending counterfeit stamps, the stamps in all respects resembled a genuine stamp, excepting only the centre part, for which, in the forgery, the words 'Jones, Bristol,' were substituted. The fabrication was likely to deceive the eye of a common observer. The judges held that there was rightly a conviction of forgery. *Collicott,* 1812.

For what amounts to 'lawful excuse,' see *Dickens* v. *Gill,* 1896, 2 Q. B. 311; 65 L. J. M. C. 187; 18 Cox C. C. 384, where it was held that the possession by a newspaper proprietor of a die for illustrating in black and white a supplement to his paper, which circulated among stamp collectors, was, however innocent the use he intended to make of it, a possession without lawful excuse.

All the provisions of the A. above and s. 65 of the Post Office A. 1908, have been applied to stamps for (national) insurance (by 1-2 G. 5, 55, 108, the Commissioners having taken the necessary steps), to entertainments duty stamps, and may be applied to income-tax stamps.

STEALING FROM THE PERSON.

See under *Robbery.*

STOCK, OFFENCES RELATING TO.

See Index.

STORES, MILITARY, NAVAL, &c.—OFFENCES CONNECTED WITH.

By s. 2 of the Public Stores A. 1875, 38-9 V. 25, 'the term 'stores' includes all goods and chattels, and any single store or article.'

By s. 3, the A. applies to all stores under the care, &c. of a secretary of state, or the admiralty, or any public department or office, or of any person in the service of her Majesty.

By s. 4, the marks described in the 1st Sched. may be applied in or on stores therein described to denote Crown property; 'and if any person without lawful authority (proof of which authority shall lie on the party accused) applies any of those marks in or on any such stores, he shall be guilty of a misdemeanour'; maximum sentence, two years' imprisonment with hard labour.

By s. 5, obliteration, &c. with intent to conceal Crown's property, of any such mark is a felony; maximum punishment, penal servitude for seven years.

By s. 6: 'A constable of the metropolitan police force may, within the limits for which he is constable, and any constable, if deputed by a public department may, within the limits for which he is constable, stop, search and detain any vessel, boat, or vehicle in or on which there is reason to suspect' that any such stores, stolen or unlawfully obtained, may be found, or any person reasonably suspected of having stolen, &c. them.

By s. 10: 'For the purposes of this Act stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field, or place, open or enclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit, or for the use or benefit of another.'

S. 12 incorporates ss. 98 (amended), 103, 107-112, 115-121, of 24-5 V. 96, and other rpd. ss.

By s. 16: 'Nothing in this Act shall prevent any person from being indicted under this Act or otherwise for any indictable offence made punishable on summary conviction by this Act, or prevent any person from being liable under any other Act, or otherwise to any other or higher penalty or punishment than is provided for any offence by this Act, so that no person be punished twice for the same offence.'

S. 20 of 30-1 V. 128, enables the War Secretary to prosecute and defend actions, civil and criminal, relating to her Majesty's stores.

Guilty possession] For what was held to amount to a guilty possession under rpd. Acts, see *Anon.* (between 1745 and 1763), Foster Crown Cases, App. 439; *Banks*, 1 Esp. 144, 1794; *Willmett*, 3 Cox C. C. 281, 1848, and *Cohen*, 8 Cox C. C. 41, 1858.

Goods are to be in the custody and possession of a person, though they may never have been in his actual possession, or on his premises,

if they have been under his control, and disposed of by him. *Sunley*, 1 Bell C. C. 145; 8 Cox C. C. 179, 1859. Cf. *Receiving*, generally.

Defendant was an ironmonger, and delivered for transport a cask of copper bolts, some of which were marked with a broad arrow. On their being seized he admitted sending them, but said he did not think 'it was marked'; he gave no account from whom he had bought it. The whole consisted of stores not allowed to be sold in the dockyard. The jury found (i.) that he was in possession of bolts marked with the broad arrow, but (ii.) that they had not sufficient evidence before them to show that he knew it, and (iii.) that he had reasonable means of knowing it. The C. for C. C. R. held that he was entitled to be acquitted. *Sleep*, L. & C. 44; 30 L. J. M. C. 170; 8 Cox C. C. 472, 1861. And see also *O'Brien*, 15 L. T. N. S. 419, 1867.

For embezzlement of stores belonging to Chelsea Hospital, see 7 G. 4, 16, 34; of those of Greenwich Hospital, see 28-9 V. 89, 45, to which 38-9 V. 25, above, is applied (by s. 17 of the latter), instead of 27-8 V. 91, rpd.

STRIKE OFFENCES.

See under *Conspiracies in Restraint of Trade*.

SUBORNATION OF PERJURY.

See under *Perjury*.

SUICIDE, ATTEMPTED.

See *Attempts*.

SUSPECTS.

I. Of intending &c. to commit crime.

(a) 'Preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehaviour . . . to give full assurance to the public that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace or their good behaviour.' 4 Bl. Comm. 251. These securities are classified: according as the recognisance is taken (1) 'to keep the peace, either generally towards the King and all his liege people, or particularly also with regard to the person who craves the security'; or (2) to be of good behaviour 'either generally or specially for the time therein limited . . . or for life.' In both cases 'one or more sureties must be found.' *Ib.* The common law power is regulated by 42-3 V. 49, 25.

(b) Other instances are of *possession* of suspicious articles, *e.g.* implements for coining, housebreaking, &c., or of obscenity; some old cases are collected *Dugdale* v. *R.*, but all these matters (except obscenity—see *Obscene, &c.*) in so far as they give rise to offences are now dealt with by statutes which will be found under the respective titles. The subject, from its nature, is connected with *Attempts* to commit crime, under which title a distinction is essayed between overt and suspicious acts.

(c) By 34-5 V. 112, 7, persons twice convicted of 'crime' (within s. 20) are for seven years after the expiry of sentence liable to conviction on suspicion of leading or intending to lead a criminal life, but the suspicious facts are only erected into specific statutory crimes in four cases: (1) on a charge of getting 'a livelihood by dishonest means'; (2) refusing to give or falsely giving a name *or* address when charged criminally; (3) being 'found in any place . . . under such circumstances as to satisfy the court . . . that he was about to commit or to aid . . . any' criminal offence 'or was waiting for an opportunity' to do so; (4) being 'found in or upon any dwelling-house or any building, yard or premises, being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house or other place of business, or in any garden, orchard, pleasure ground or nursery ground, or in any building or erection in any garden, orchard, pleasure ground or nursery ground, without being able to account to the satisfaction of the court . . . for his being' so 'found.' Extended to other ex-convicts by 54-5 V. 69, 6. Maximum sentence is 12 months' imp. w. h. l.

See *F. Miles*, 1909. In *Pavitt*, 6 Cr. A. R. 182; 75 J. P. 432, 1911, the C. C. A. said: 'the punishment provided by the A. is not to be invoked on mere suspicion . . . there must be some positive evidence' that defendant was about to commit an offence within (3); he went from house to house at mid-day hawking picture-cards without a licence (or perhaps begging); 'the only offences that could be suggested to satisfy the indictment were larceny or housebreaking,' of neither of which was there any evidence: q. q.

II. Of crimes actually committed. The law here relevant is that of the *Apprehension* (and *Interrogation*) of individuals—which title see.

TELEGRAPH SYSTEM, OFFENCES AGAINST.

Physical injury] By 24-5 V. 97, 37: 'Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanour': maximum punishment, imprisonment for two years, with hard labour: 'provided that if it shall appear to any justice . . . that it is not expedient to the ends of justice that' an offence against this s. 'should be prosecuted by indictment, the justice may proceed summarily to hear' it. Triable at Q. S.

48-9 V. 49, 3 (1) makes it a misdemeanour (*a*) wilfully or (*b*) by culpable negligence to injure a submarine cable (under 'the Convention' of 1884), or to attempt to do so. (2): Maximum punishment for (*a*), five years' p. s. and a fine; for (*b*), three months' imp. and a fine of 100*l*. (3), (4): Exceptions in case of necessity. (5): Anyone within the dominions of the crown, and any subject without, procuring or aiding, &c., is equally liable. The A. contains some rules of evidence.

Telegrams] By 31-2 V. 110, 20: 'Any person having official duties connected with the Post Office, or acting on behalf of the Postmaster-General, who shall, contrary to his duty, disclose, or in any way make known or intercept the contents or any part of the contents of any telegraphic messages, or any message intrusted to the Postmaster-General for the purpose of transmission, shall in England and Ireland, be guilty of a misdemeanour . . . and shall, upon conviction, be subject to imprisonment for a term not exceeding twelve calendar months; and the Postmaster-General shall make regulations to carry out the intentions of this section, and to prevent the improper use, by any person in his employment or acting on his behalf, of any knowledge he may acquire of the contents of any telegraphic message.'

By s. 21: 'In every case where an offence shall be committed in respect of a telegraphic message sent by or intrusted to the Postmaster-General, it shall be lawful and sufficient, in the indictment . . . to lay the property of such telegraphic message in her Majesty's Postmaster-General . . . and it shall not be necessary in the indictment . . . to allege or to prove upon the trial or otherwise that the telegraphic message was of any value; and in any indictment . . . against' any Post Office employee for any offence under this A., it is enough to allege that defendant 'was employed under the Post Office at the time of the committing of such offence,' without more.

By 32-3 V. 73, the Telegraph A. 1869, s. 23: 'Provided always that nothing in this Act contained shall have the effect of relieving

any officer of the Post Office from any liability which would but for the passing of this Act have attached to a telegraph company, or to any other company or person, to produce in any court of law, when duly required so to do, any such written or printed message or communication.'

By s. 24, these two Acts shall be 'Post Office Acts': see Index.

Evidence] To put in the contents of a telegram sent by defendant, it is necessary that the original message handed to the Post Office should be produced, and some evidence given that it is in his handwriting or sent by his authority; the copy received by a witness cannot be given in evidence until it is proved that the original cannot be produced: *Regan,* 16 Cox C. C. 203, 1887.

Delivery] To prove a telegram sent to a defendant, not produced after proper notice, it is usual to prove the handing in of the form at one office and its receipt at the other, and that the telegram was taken to his house, &c. and left there. On proof of the serving of the notice to produce, the original form may then be put in evidence.

Forgery] By 47-8 V. 76, 11: 'Every person who forges or wilfully and without due authority alters a telegram, or utters a telegram knowing the same to be forged, or wilfully and without due authority altered, or who transmits by telegraph as a telegram, or utters as a telegram any message or communication which he knows to be not a telegram, shall, whether he had or had not an intent to defraud, be guilty of a misdemeanour'; maximum punishment, on indictment, imprisonment with hard labour for twelve months.

Disclosure] 'If any person, being in the employment of a telegraph company as defined by this section, improperly divulges to any person the purport of any telegram, such person shall be guilty of a misdemeanour, and be liable . . . on indictment, to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine not exceeding 200*l.*

For the purposes of this section the expression 'telegram' means a written or printed message, or communication, sent to or delivered at a post office, or the office of a telegraph company for transmission by telegraph, or delivered by the post office or a telegraph company as a message or communication transmitted by telegraph.

The expression 'telegraph company' means any company, corporation, or persons carrying on the business of sending telegrams for the public under whatever authority, or in whatever manner such company, corporation, or persons may act or be constituted.

The expression 'telegraph' has the same meaning as in 'the Telegraph Act, 1869' [s. 3], and the Acts amending the same.'

Where a man sent a telegram announcing that he was dead and signed it with his surname, it was held that an offence against this s. had been committed, as it necessarily purported to come from some one different from the actual sender. *Ex parte Wickham,* 10 T. L. R. 266, 1894: Q. B. D.

Intent] In *Horner,* 22 Cox C. C. 13; 74 J. P. 216, 1910, defendant sent four telegrams to a daily newspaper in the name of one of its journalists, and they were published, but would not have been if the sender had been known. Bray J. held that under this s. there must

be an intent to deceive the recipient. Whether the messages were true or false was for the judge (though in fact he asked the jury that question), but that point only affected the gravity of the offence; evidence to prove falsity and to rebut was given; verdict, contents in main untrue.

'*Instrument*'] A forged telegram is a 'forged instrument' (now) within s. 7 *a* of 3-4 G. 5, 27; see *Riley*, 1896. Cf. *Warner*, 147 C. C. C. Sess. Papers, 385, 1907, where defendant was convicted of obtaining money on a (betting) telegram, knowing it to be forged; either he or an accomplice had tampered with it after delivery.

Not triable at Q. S.

See *Wireless Telegraphy*.

TELEPHONES, OFFENCES RELATING TO.

'For the purposes of the Telegraph Acts, a telephone is a telegraph and a telephonic message is a telegram; it therefore follows that all their provisions apply to telephonic as much as to any other species of statutory telegraphy': 27 Halsbury, 371.

TENANTS AND LODGERS—OFFENCES BY.

Injuries] By 24-5 V. 97, 13 (with which s. 59 must be read): 'Whosoever, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanour.' (No punishment enacted, in order to attach that at common law—fine or imprisonment or both. 2 Russ. Cri. 1791 *t.*)

Larceny] By 6-7 G. 5, 50, 16: 'Every person who being a tenant or lodger or the husband or wife of any tenant or lodger steals any chattel or fixture let to be used by such person in or with any house or lodging shall be guilty of felony, and on conviction thereof liable—(*a*) if the value of such chattel or fixture exceeds the sum of five pounds, to penal servitude for any term not exceeding seven years; (*b*) in all other cases to imprisonment': maximum, for two years, with hard labour; (*c*) in any case, 'if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable.'

See *Fixtures.*

TERRITORIAL WATERS, OFFENCES IN.

See that head under *Venue.*

THEATRICAL CONSPIRACIES AND RIOTS.

See those titles respectively.

THREATS.

Common law] See under *Robbery*.

Intimidation] See under *Conspiracies . . . Trade*.

Murder—by letter] By 24-5 V. 100, 16: 'Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony': maximum punishment, penal servitude for ten years, 'and, if a male under the age of sixteen years, with or without whipping.' In *Syme*, 75 J. P. 535; 27 T. L. R. 562; 55 S. J. 504; 6 Cr. A. R. 257, 1911, the jury found that the words 'I am quite prepared to kill Mr. R.' (in a certain contingency), addressed to a third person, did not mean that defendant intended to murder R., that the threat was 'bluff' and made to attract attention to defendant's grievances; there was held to be 'malice' within the s. because the object of the letter was to make the receiver do, for fear of a murder being committed, what he would not otherwise do. The actual intent to carry out the threat need not exist. But on a similar finding with a misdirection on 'maliciously,' c. q. *M. Johnson*, 1913. Triable at Q. S.

For *Threats* preceding *Robbery*, see that title.

Demanding money, &c.] By 6-7 G. 5, 50, 29: (1) 'Every person who—(i) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing; (ii) utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead) of any crime to which this section applies, with intent to extort or gain thereby any property or valuable thing from any person; (iii) with intent to extort or gain any property or valuable thing accuses or threatens to accuse either that person or any other person (whether living or dead) of any such crime; shall be guilty of felony, and on conviction thereof liable to penal servitude for life, and, if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable.'

(2) 'Every person who with intent to defraud or injure any other person—(*a*) by any unlawful violence to or restraint of the person of another, or (*b*) by accusing or threatening to accuse any person (whether living or dead) of any such crime, or of any felony, compels or induces any person to execute, make, accept, endorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix the name of any person, company, firm, or co-partnership, or the seal of any body corporate, company, or society upon or to any paper or parchment in order that it may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of felony, and on conviction thereof liable to penal servitude for life.' Cf. *Edwards*, 1834.

Triable at Q. S.

'(3) This section applies to any crime punishable with death or penal servitude for not less than seven years, or any assault with intent to commit any rape, or any attempt to commit any rape, or any solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the abominable crime of buggery, either with mankind or with any animal.' See *Norton*, 1838.

A threat of charging *indecency* was not within the rpd. ss., 24-5 V. 96, 46-7. *Gilgannon*, 63 J. P. 457, 1899.

(4) For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person.

Not triable at Q. S.

By s. 30: 'Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding five years.'

By s. 31: 'Every person who with intent (*a*) to extort any valuable thing from any person or (*b*) to induce any person to confer or procure for any person any appointment or office of profit or trust, (1) publishes or threatens to publish any libel upon any other person (whether living or dead); or (2) directly or indirectly threatens to print or publish or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead), shall be guilty of a misdemeanour'; maximum punishment, two years' imp. w. h. l. Not triable at Q. S.

An editor of a newspaper wrote to a manager about reinstating a collector the latter had dismissed, saying that he would deal with the matter in the next issue unless the manager reconsidered his decision. Pickford J. rejected evidence of the manager's harshness in the matter; if the letter meant: 'if you don't reinstate, I will say something unpleasant about you,' or 'if you do reinstate I will say nothing,' the charge is proved: *Plaisted*, 22 Cox C. C. 5, 1909.

Threatening letters] By 24-5 V. 97, 50: 'Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn, or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce, in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony'; maximum punishment, penal servitude for ten years; 'and, if a male under the age of sixteen years, with or without whipping.'

Elections] See *Undue Influence*.

Immoral purposes] See under *Rape*.

See, generally, *Robbery* by attacks on *Repitation*.

Delivery] The sending or delivering of the letter need not be *immediately* by defendant to the addressee; if it be proved to be sent or delivered by his means and directions it is sufficient. So about sending a letter demanding money, Yates J. observed that 'it seemed to be very immaterial whether the letter were sent *directly* to the prosecutor, or were put into a more oblique course of conveyance:

defendant having dropped the letter into a vestry-room, which prosecutor frequented every Sunday morning before service, where the sexton picked it up and delivered it to him. *Lloyd,* East P. C. 1122, 1767, where the note is '*Quære,* whether, if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person who, it is expected, will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending *to such party?* The same evidence was given in *Jepson and Springett's case* [*ib.* 1115, 1798], in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground.' So where the evidence was that the letter was in defendant's handwriting, and that he had sent it to the post-office, whence it was delivered in the usual manner, no objection was made. *Heming,* East P. C. 1116, 1799. Where defendant dropped 'the letter' on the steps of prosecutor's house, and ran away, Abbott C.J. left it to the jury to say, whether they thought he carried the letter and dropped it, meaning that it and its contents should be conveyed to the prosecutor, and if so, directed a verdict of guilty. *Wagstaff,* R. & R. 398, 1819. On an indictment for sending a threatening letter, without any demands whatsoever, to Kirby, it appeared that the threats were, in fact, directed against two persons, Rodwell and Brook. K. received the letter by the post, but did not pass it on, though he communicated its contents to them. The judges held that as K. was not threatened, the judgment must be arrested, but they held that if K. had delivered the letter to R. or B., and a jury should think that defendant intended he should so deliver it, this would be a sending by him to R. or B. *Paddle,* R. & R. 484, 1822.

Affixing a threatening letter on a gate in a public highway, near which the prosecutor would be likely to pass from his house, is some evidence to go to the jury of the sending of a letter to him: *per* Cresswell J., *Williams,* 1 Cox C. C. 16, 1843.

An indictment charged sending a threatening letter to R., and threatening to burn houses, the property of B., who was R.'s tenant; defendant dropped the letter in a public road near R.'s house, A. found it, and gave it to H., who opened it, read it, and gave it to E., who showed it both to B. and R. Fifteen judges held that the conviction was good, as this was a sending within a rpd. st. *Grimwade,* 1 Den. C. C. 30; 1 Cox C. C. 85, 1844.

Anonymity] under the rpd. statutes was of the essence of the offence; under the present ones that is not essential, and an *indirect* sending is expressly provided for.

For the jury] It is for them, and not for the judge, to determine whether the letter is a threatening one, and the judge will not withdraw it from them unless by no possible construction can it be so considered: *per* Maule J., *Carruthers,* 1 Cox C. C. 138, 1844; *Syme,* above; T. 43. So where there is no person in existence of the precise name of the addressee, it is for them whether the person into whose hands it falls was the one for whom it was intended.

So of the *demand,* of the *imputation,* and of the *degree* of terror created—all which see below and *Walton,* 1863.

Demands] There must be evidence that defendant demanded some-

thing; but the demand need not be made in words, it may be made by conduct. Where defendants seized prosecutor, and one of them said, 'Not a word, or I will blow your brains out,' and the other repeated the words, and appeared to be searching for some offensive weapon in his pocket, but on some resistance both ran away without anything more being said, the court said that *an actual demand* was not necessary, and that this was a fact for the jury, in all the circumstances of the case. *Jackson*, Lea. 267; East P. C. 419, 1783. Cf. *Remnant*, 5 T. R. 169, 1793.

A highwayman was indicted for an assault, with an intent to rob; he made no demand of any sort; but held a pistol in his hand towards a coachman on his box; Willes C.J. said, 'A man who is dumb may make a demand of money, as if he stop a person on the highway with a pistol, and put his hand or hat into the carriage or the like; but in this case, as the prisoner only held a pistol at the coachman, but said to him nothing but 'Stop,' that was no demand of his money as the Act requires.' *Parfait*, Lea. 19; East P. C. 416. 1740. The latter justly remarks, that the fact of stopping another on the highway, by presenting a pistol at his breast, is, if unexplained by other circumstances, sufficient evidence of a demand to go to a jury. 'The unfortunate sufferer understands the language but too well; and why must courts of justice be supposed ignorant of that which common experience makes notorious to all men?'

Language—tone, &c.] The demand need not be explicit and the threat may be veiled; defendant represented in effect to his ex-employer, a naturalised German, that he could save him from prosecution (after war broke out) if he gave him a sum of money to 'square' detectives; the pretence was admittedly false; a civil claim of defendant against prosecutor was held to be no defence. *Studer*, 85 L. J. K. B. 1017; 25 Cox C. C. 312; 114 L. T. 424; 11 Cr. A. R. 307, 1915.

Request] 'A mere request, such as asking charity, without imposing any conditions,' does not come within the meaning of the word 'demand.' *Robinson*, Lea. 749; East P. C. 1111, 1796.

Defendant wrote an anonymous letter to prosecutor, offering to reveal a conspiracy against the latter's person and property, and to bring the offenders to justice on his being paid a certain sum. He was indicted for sending a letter demanding money, with menaces. Bolland B. doubted whether the letter contained either a *demand* or a *menace*, and reserved the point for the judges, who held that the conviction was wrong. *Pickford*, 4 C. & P. 227, 1830. Cf. *T. Smith*, 1849, below.

Threatened charge against third person] Where defendant threatened to accuse prosecutor's son of a crime unless prosecutor or the boy's master would buy a mare of him, and did, in fact, bring the charge, which was dismissed, it was held to be a threat with intent to extort within a rpd. s. *Redman*, 35 L. J. M. C. 89; L. R. 1 C. C. R. 12; 10 Cox C. C. 159, 1865.

The threat] See *Grounds of Fear* under *Robbery*. Indictment for sending the following letter, 'threatening to kill,' &c.

'Feb. 9, 1776.—Sir—I am sorry to find a gentleman like you would be guilty of taking M'Allester's life away for the sake of two or three

guineas, but it will not be forgot by one who is but just come home to revenge his cause. This you may depend upon; whenever I meet you I will lay my life for him in this cause. I follow the road, though I have been out of London; but on receiving a letter from M'Allester, before he died, for to seek revenge, I am come to town.—I remain a true friend to M'Allester, J. W.'

The circumstances are not explained. Hotham B. left it to the jury to consider whether this letter contained in its terms an actual threatening to kill, &c., directing them to acquit if they thought the words might import anything less. The judges were of opinion that a conviction was right. *Girdwood,* Lea. 142; East P. C. 1121, 1776.

Indictment for sending the following passage, *inter alia,* in a letter:—

'I am very sorry to acquaint you, that we are determined to set your mill on fire, and likewise to do all the public injury we are able to do you, in all your farms . . .' This was in the handwriting of one of defendants, and was thrown by another into prosecutor's yard, whence it was taken by a servant and delivered to him. The prosecutor had had a share in a mill three years before this letter was written, but had no mill at that time; but he did have a farm with several buildings upon it. It was agreed by the judges, that as prosecutor at the time had no such mill as was threatened, that part of the letter must be disregarded. Of the rest, L. Kenyon C.J. and Buller J. were of opinion that the letter must be understood as also importing a threat to burn prosecutor's farmhouse, buildings, &c., but the other judges not thinking that a necessary construction, the conviction was held wrong. *Jepson and Springett,* East P. C. 1115; Lea. 756, *n.*, 1798.

One count charged sending a letter, threatening to kill and murder; and a second, threatening to burn and destroy a house, stacks, &c. The writing was as follows:—'Starve Gut Butcher, if you don't go on better great will be the consequence; what do you think you must alter (or) must be set on fire,' &c., &c., some of the remainder being equally unintelligible. The jury negatived the threat to kill, &c., but found that the letter threatened to fire houses, &c. L. Denman C.J. had some doubt whether the question ought to have been left to the jury, and whether the letter could be, in point of law, a threatening letter to the effect found, but the judges held the conviction good after verdict. *Tyler,* 1 Moo. C. C. 428, 1835.

For an offence under s. 29 (1) (i), above, it is not essential that the menace should be of injury to person or property, or to accuse of a crime. A threat to accuse of misconduct, immoral, though not criminal, is enough, *e.g.* a threat to tell prosecutor's wife and friends of his 'doings' with another woman. *Tomlinson,* 1895. Cf. *Robertson* and *Robinson,* 1837, below.

Degree of virulence] See *Standard of Fear* under *Robbery.*

In *Smith,* 1 Den. C. C. 510; 19 L. J. M. C. 80; 4 Cox C. C. 42, 1849, the mischief impending was unnamed (burning?), and the writer professed that for a certain sum he could avert it (and that it would ruin a bank). There Wilde C.J. said: 'Whether a threat be criminal or no cannot be taken to depend on the nerves of the individual threatened, but on the general nature of the evil with which he is threatened.' It was not intended to impugn *Pickford,* above; each case must be judged on its circumstances. If this sets up a different standard to that in *Tomlinson,* below, the latter is to be preferred.

At *common law* L. Ellenborough C.J. thought that a threat to denounce a vendor liable to a penalty for selling medicines without a stamp was one which a normal person 'ought to have resisted.' *Southerton;* cf. *Woodward,* 1707. The cases were reviewed in *Boyle, &c.*, below.

Perhaps it is more difficult to gauge legitimate fears where the threatener is not present, as here, than in the case where he is; but in both the only sound general rule seems to be that the jury must decide in each instance. In *Tomlinson,* 1895, 1 Q. B. 706; 64 L. J. M. C. 97; 18 Cox C. C. 75: C. C. R., where Wills J. said of 'the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind,' 'it ought . . . to receive a liberal construction in practice; otherwise grave injustice may be done, for persons who are thus practised upon are not, as a rule, of average firmness; but the threat must not be one that ought to influence nobody.' See *Knewland,* 1796.

Accusations] It was held, that the threatening to accuse need not be a threat to accuse before a judicial tribunal; 'to accuse' means to charge before any third person. *Robinson,* 2 Moo. & R. 14, 1837; cf. *Tomlinson,* 1895. This must be of the nature of those specified in the A. Where the meaning is ambiguous, it is for the jury to decide. It is essential to particularise the specific charge to which the accusation or threat refers. *Middleditch,* 1 Den. C. C. 92; 2 Cox C. C. 313, 1845: c. q., because it was alleged that defendant had accused of solicitation to sodomy, but the evidence (seven judges thought, though five dissented) did not show such a charge (but only one of indecent assault?).

Truth of accusation—'reasonable cause'] This is immaterial, and evidence of such truth will not be admitted: *Hamilton,* 1 C. & K. 212, 1843, because 'reasonable and probable' [now in s. 29] refers to demanding the money, not to the accusation, and the threatener may have 'reasonable . . . cause' to make a demand, *e.g.* a woman betrayed and abandoned. *Miard,* 1 Cox C. C. 22, 1844. It is doubtful whether an honest belief in such a 'cause' would be a defence: *J. Chalmers,* 10 Cox C. C. 450; 15 W. R. 773; 16 L. T. 363, 1867: C. C. R. The prosecutor may be cross-examined whether he is guilty: *per* Willes J., *Menage,* 3 F. & F. 310, 1862; *Cracknell,* 10 Cox C. C. 408, 1866; but the matter cannot be carried further. In *Richards,* 11 Cox C. C. 43, 1868, defendant went to prosecutor, whom he accused of having given a disease to his son, his son in fact having such a disease, and having informed defendant of it; he at that time only demanded payment of the doctor's bill of 25*s.*; but some time afterwards he went again and threatened to give him into custody unless he would compromise it by payment of 100*l.* Blackburn J. said the truth of the accusation was not material for the jury, if, by that accusation defendant intended to extort money, but that it *was* material in considering with what intent he made the accusation. If, believing it, he made the accusation at first without any intent to extort money he would not be guilty; but if afterwards he endeavoured to compromise the matter by taking money, that would not render him guilty of obtaining money by threats (though it might of compounding a felony). The report is very short, and defendant was acquitted, so that it is possible that the learned judge thought that

the demand for the 100*l.* might be wholly unconnected with the accusation. See *E. Dymond,* 1920, in *Addenda.*

Larceny A. 1916, *s.* 30] In this s. the 'proper limit' is marked by the 'intent to steal'; accordingly, the threatened violence must be of a nature 'to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action, which alone constitutes consent. . . . The menace may be made with such gesture and demeanour, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect, and this should be decided by the jury': *per* Wilde B., *Walton,* 1863. In *Boyle, &c.,* 1914, defendants, through an agent, threatened the chairman of a company to attack it in a trade paper, so as to depreciate the shares, unless a certain sum was given them; this menace 'to injure property' was held to be within a *s.* now replaced by *s.* 30.

It is no objection that the money was actually obtained or that it was obtained by a threat to accuse of a fictitious charge.' *Robertson,* L. & C. 483; 34 L. J. M. C. 35; 10 Cox C. C. 9, 1864, where a policeman got money by threatening to arrest prosecutor for speaking to a woman in the street. Cf. *Tomlinson,* 1895.

Infamous crime] See under *Robbery;* the phrase is no longer statutory (except in 33-4 V. 77, 10). The terror of this particular accusation has always been an exception to the rule that fear for one's *character* alone is not enough to support this charge: *per* the judges in *Knewland,* Lea. at 730.

Threatening to procure witnesses to *support* an accusation already made is not within the rpd. st. 'It is one thing to accuse, but another to procure witnesses in support of a charge already made.' This was at most a threat to support a charge by evidence: *per* Bayley J., *Gill,* 1 Lew. C. C. 305, 1827.

Evidence] Declarations subsequently made by defendant—as conduct—are admissible to explain the meaning of an ambiguous letter. Indictment for sending a letter threatening to accuse of an infamous crime. Prosecutor, meeting defendant, asked him what he meant by sending that letter, and by the material words therein, '*transactions five nights following.*' The answer was that prosecutor knew what he meant. This the latter denied, and the former afterwards said, 'I mean, by taking indecent liberties with my person.' This evidence was received; the judges, who were informed that without this (parol) evidence defendant could not have been convicted, unanimously resolved that it had been rightly received: *Tucker,* 1 Moo. C. C. 134, 1826. On the same principle, perhaps, a witness may say what he understood by a letter: *Hendy,* 4 Cox C. C. 243, 1850.

In order to show knowledge of the contents of a letter in one indictment, other later letters also indicted were rightly put in: *A. Graham,* 3 Cr. A. R. 252, 1909, perhaps following *Cooper,* 3 Cox C. C. 547, 1849, where Cresswell J. allowed evidence that perhaps amounted to a *previous* similar threat of accusation by defendant, and left it to the jury whether the previous words did amount to that: followed in *Braynell,* 4 Cox C. C. 402, 1850.

Trade threats] See *Trade.*

Of legal proceedings by brothel-keepers] See *Brothel, &c.*

Indictment] See under *Robbery* and *Accusations,* above. There is a form (No. 11) appended to the Indictments A. 1915 (but under a s. now rpd.).

TICKET-OF-LEAVE MEN, OFFENCES BY.

See *Suspects.*

TITLE DEEDS, LARCENY, &c. OF.

See 6-7 G. 5, 50, 7 (1), under *Larceny,* p. 627, and *Concealment.* For forgery, see 3-4 G. 5, 27, 2 (2), *b,* and 2 (1), *b.*

Production] When a grand jury complained that a witness would not produce certain deeds—not including one of demise, the forgery of which was indicted—'material' for them to see, Park J., with the concurrence of Parke J., thought that 'if these deeds form a part of the evidence of' the witness's title to her 'own estate, you cannot compel' the production; but otherwise, if not: *Hunter,* 1829; see *Phips.* 196. The alleged forged deed being in defendant's possession, the grand jury heard secondary evidence of its contents. At the trial the impugned deed being traced to defendant's attorney, and not being produced after notice, secondary evidence was given.

TRADE OFFENCES.

I. *Prices—interference*] By 7-8 V. 24, 4: 'Nothing in this Act . . . shall . . . apply to the offence of knowingly and fraudulently spreading or conspiring to spread any false rumour with intent to enhance or decry the price of any goods or merchandize or to the offence of preventing or endeavouring to prevent by force or threats any goods, wares or merchandize being brought to any fair or market.' This A. was rpd. by 55-6 V. 19, but the common law misdemeanours mentioned in s. 4 are not abolished. They are generally prosecuted as *Conspiracies* (*e.g.* 'making a market'), which therefore see.

II. *Disputes—strikes—unions*] See *Conspiracies in Restraint of Trade* and under *Falsification of Accounts.*

III. *Misdescription of marks*] See *Merchandise Marks.*

IV. *With the enemy*] Where there was no evidence that defendant proposed to obtain a licence under the proclamation mentioned in s. 1 (2) of 4-5 G. 5, 87, a conviction for *inciting* to trade was upheld: *G. Spencer*, 84 L. J. K. B. 1457; 112 L. T. 479; 24 Cox C. C. 588; 11 Cr. A. R. 30, 1914.

It is for the judge whether 'supplying' or 'obtaining . . . goods, wares or merchandise' within that proclamation covers the given transaction: *Oppenheimer, &c.*, 1915, 2 K. B. 755; 79 J. P. 383; 84 L. J. K. B. 1760; 25 Cox C. C. 39; 31 T. L. R. 369; 11 Cr. A. R. 146.

Any commercial relations between a British subject and an enemy, resulting in goods being forwarded to him from the enemy country, are within the statute. *Ib.*

The A. aims at indirect transactions also, *e.g.* payment to a neutral of a debt owing to the latter by an enemy for the latter's benefit: *Kupfer*, 1915, 2 K. B. 321; 84 L. J. K. B. 1021; 79 J. P. 270; 24 Cox C. C. 705; 32 T. L. R. 223; 11 Cr. A. R. 91.

For proof of *fiat*, see *Metz.*

See also p. 608 and pp. 621-3.

TRAFFIC, OBSTRUCTION OF.

See *Highways* and under *Nuisance.*

TREASON.

There is no legal definition of this crime. 'At common law the crime of high treason had some kinds of limits and bounds to it . . .' Hale, 1 P. C. 76, who, after some instances, adds: 'By these and the like instances . . . it appears how uncertain and arbitrary the crime of treason was before the statute of 25 E. 3, whereby it came to pass that almost every offense, that was, or seem'd to be a breach of the faith and alligeance due to the King, was by construction and consequence and interpretation raised into the offense of high treason': *ib.* 82. Hawkins, however, points out that in his day (1716) 'no offence is to be esteemed high treason unless it be either declared to be such by' 25 E. 3, c. 2, 'or made such by some statute since' 1 Mary, sess. 1, c. 1 (unrepealed).

A.

History] See especially *Pollock and Maitland*, 2 History, B. II. c. 8, § 2, p. 501, 1st edn., and *Stephen*, 2 History C. L. c. 23, p. 245. for the common law before 1351 (and cf. preamble and s. 12 of statute of that year). The law is now in England wholly statutory. and the Statute of Treasons, 1351, 25 E. 3, st. V. c. II. is still 'the standard of high treason.' East P. C. 55.

'It is not with regard to treason as with regard to murder or robbery. It is not written in the law of God or in our hearts; we can take it only from the statutes': *per* L. President, *Hardie*, 1 St. Tr. N. S. 762, 1820. See *Sedition*.

B.

Statutes] 25 E. 3, stat. 5, c. 2, Statute of Treasons (1350-1)*: [It is treason] 'when a man doth 1] compass† or imagine the death of our lord the King or of our lady his Queen [*madame sa compaigne*] or of their eldest son and heir; or 2] if a man do violate the King's Companion [*la compaigne*] [*Wife*—another reading] or the King's eldest daughter unmarried or the wife [of] the King's eldest son and heir; or 3] if a man do levy war against our lord the King in his realm, or 4] be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be probably [or proveably,‡ MS. *pvablement*] attainted of open deed

* The translation is that in I Statutes of the Realm (1810), pp. 109, 110.

† This phrase is an echo of Britton (about 1300), B. 1, C. IX. (viii) 2: *Graunt tresoun est a compasser nostre mort* [*i.e.*, the King's] *ou de nous desheriter de noster reaume* where it may be doubted whether *compasser* means only thought and not action: cf. C. XXIII. 5. The forms of high treason in the repealed part of this c. are also so called by Britton; the whole c. seems to be under the influence of this passage.

‡ Coke, 3 *Inst.* 12, is emphatic that *provablement* means 'provably' and not 'probably.'

[ovt. faite] by [the] people of their condition* . . . and 5] if a man slea the chancellor, treasurer or the King's justices of the one bench or the other, justices in eyre or justices of assise, and all other justices assigned to hear and determine, being in their places, doing their offices: and it is to be understood that in the cases above rehearsed that [*or* it] ought to be judged treason which extends to our lord the King and his royal majesty': the last words mean apparently that it is reasonable to make treasons even those of the above offences which do not affect the King *directly*.

The words omitted were repealed 11 G. 4 & 1 W. 4, 66, 31, and 2 W. 4, 34, 1.

1 Mary, sess. 1, c. 1 (1553): no act or offence is to be treason, petty treason or misprision 'by woordes writing ciphering dedes or otherwise whatsoever' unless it be so by the Statute of Treasons.

1 Ann. st. 2, c. 17 (*or* 21), s. 3, 1701-2: 'If any person or persons . . . shall endeavour to deprive or hinder any person who shall be the next in succession to the Crown for the time being, according to the limitations in an act [1 W. & M. sess. 2, c. 2, the Bill of Rights, 1688] . . . and according to one other act . . . [12-13 W. 3, c. 2, Act of Settlement, 1700-1] from succeeding after the decease of her Majesty . . . to the imperial crown of this realm and the dominions and territories thereunto belonging, according to the limitations in the before mentioned acts, that is to say . . . during the time her Majesty shall have no issue the Princess Sophia† . . . . and after the decease of the said Princess Sophia the next in succession to the Crown for the time being, according to the limitation of the said acts; and the same maliciously, advisedly, and directly shall attempt by any overt act or deed, every such offence shall be adjudged high treason and the offender or offenders therein, their abettors, procurers and comforters, knowing the said offence to be done, being thereof convicted or attainted, according to the laws and statutes of this realm shall be deemed and adjudged traitors, and shall suffer pains of death, and all losses and forfeitures as in cases of high treason.'

6 Ann. c. 7 (*or* 41), Succession to the Crown Act, 1707, s. 1: 'If any person or persons shall maliciously, advisedly and directly, by writing, printing, maintain and affirm . . . that any other person or persons hath or have any right or title to the same [the crown of these realms] otherwise than according to an act of parliament [1 W. & M. sess. 2, c. 2] and one other act . . . [12 & 13 W. 3, c. 2] . . . And the acts lately made in England and Scotland mutually for the union of the two kingdoms; or that the Kings or Queens of this realm with and by the authority of Parliament, are not able to make laws and statutes of sufficient force and validity to limit and bind the Crown, and the descent, limitation, inheritance and government thereof; every such person or persons shall be guilty of high treason and being thereof lawfully convicted shall be adjudged traitors and shall suffer pains of death and all losses and forfeitures as in cases of high treason.'

36 G. 3, c. 7, Treason Act, 1795, s. 1: 'If any person or persons whatsoever . . . shall, within the realm or without, compass, imagine, invent, devise or intend death or destruction or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of . . . the King, his heirs and successors . . .

* See under D. *Procedure*.

† Apparently in apposition to 'any person' above.

and such compassings, imaginations, inventions, devices or intentions or any of them, shall express, utter or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof upon the oaths of two lawful and credible witnesses upon trial, or otherwise convicted or attainted by due course of law, then every such person and persons so as aforesaid offending shall be deemed, declared and adjudged to be a traitor and traitors, and shall suffer pains of death, and also lose and forfeit as in cases of high treason.' S. 5: Accused to have the benefit of 7 (-8) W. 3, 3, and 7 Ann. 21.

S. 6: 'Provided . . . that nothing in this Act contained shall extend or be construed to extend to prevent or affect any prosecution by information or indictment at the common law for any offence within the provisions of this Act, unless the party shall have been first prosecuted under this Act.'

57 G. 3, c. 6, Treason Act, 1817, s. 1: [After reciting s. 1 of 1795 Act, above] 'the hereinbefore recited Provisions which relate to the heirs and successors of His Majesty the Sovereigns of these Realms, shall be and the same are hereby made perpetual.'

S. 4: 'Provided . . . that all . . . persons that shall at any time be accused or indicted or prosecuted for any offence made or declared to be High Treason by this Act shall be entitled to the benefit of that Act [7-8 W. 3, c. 3, Treason Act, 1695-6] . . . and also to the provisions made by another Act [7 An. c. 21, Treason Act, 1708] . . . save and except in cases of High Treason in compassing or imagining the death of any heir or successor of His Majesty . . . and of misprision of such treason, where the overt act or overt acts of such treason which shall be alleged in the indictment for such offence shall be assassination or killing of any heir or successor of His Majesty . . . or any direct attempt against the life of any heir or successor of His Majesty . . . or any direct attempt against the person of any heir or successor of His Majesty . . . whereby the life of such heir or successor . . . may be endangered or the person of such heir or successor . . . may suffer bodily harm.'

S. 5: Proviso as in s. 6, above.

S. 6: Refers to 54 G. 3, 146; 1814: punishment. 36 G. 3, 7, and 57 G. 3, 6, are partly saved by 11-12 V. c. 12.

C. The Offence.

Each species of treason above mentioned requires to be separately considered, but the political form, that of attempting to subvert the dynasty, may be regarded as obsolete.

1357. *A man*] *i.e.* a subject of the Crown; see *Jurisdiction*. Even Perkin Warbeck, an alien and not an invading sovereign, 'could not be punished by the common law' in 1500: Coke, 7 Rep. 6 *b*; *Tucker*, 1 L. Raymond, 1694: attainder reversed.

In *Queen Caroline's* case the House of Lords put to the judges—'whether, if a foreigner, owing no allegiance to the Crown in a foreign country, violates the wife of the King's eldest son and she consents to such violation, she thereby commits High Treason within the meaning and the true construction of the Statute 25 *Edward* 3?' After consultation 'The Lord Chief Justice of the Court of King's Bench [Abbott] delivered the unanimous opinion of the judges present

upon the said Question in the negative and gave his Reasons': *Lords' Journals*. August 17th, 1820. The ground of the answer was that 'unless there were a man who could be legally charged with such a violation, the charge being that he did the act against his allegiance,' there was no treason. 'An act done by a foreigner owing no allegiance to the Crown would not amount to that crime.' *The Trial of the Queen of England* 5: C. T. Kelly, London, 1821.

Proof of being a subject] See *Indictment*, below. Apparently slight *primâ facie* evidence is sufficient, if uncontradicted. In 1571 *Story* admitted the allegation that he was born English but objected that for seven years he had been in the service of the King of Spain, but the court refused to accept the plea. . . . 'If he spoke English,' said Holt L.C.J. in *Vaughan*, at 500, 526, 1696, 'that is some evidence he is an Englishman [*i.e.* a subject] . . . ,' where there was evidence that defendant had admitted that he was an Irishman. The question is clearly for the jury: *ib.* 529.

In that case the indictment alleged that defendant commanded a war ship with fifteen 'French subjects, enemies of the King,' aboard; when it was submitted that the crew were not proved to be French, Holt said (503): 'If they were all Dutchmen and appear in a hostile manner against the King's subjects, they are enemies though we are in league with Holland. . . . They will be subjects in that matter, if they act under his [the King of France's] commission. They are enemies to the King of England and they have made themselves the French King's subjects by that act. . . . If Dutchmen turn rebels to the state and take pay of the French King, they are under the French King's command and so are his subjects. Will you make them pirates when they act under the commission of a sovereign prince? . . . Acting by virtue of a commission from the French King will excuse them from being pirates though not from being traitors to their own state, but to all other princes and states against whom they do any acts of hostility, they are enemies; and their serving under the French King's commission makes them his subjects as to all others but their own prince or state. And though they be not Frenchmen, yet they are' French subjects, 'for it is the French subjection that makes them' so. Cowper, counsel for the Crown, remarking, 'there is a local allegiance while he is in the country or fleets or armies of the French King'; Holt said, 'Dutchmen may be enemies notwithstanding their state is in amity with us, if they act as enemies.' Probably, however, the subject of an ally of this country acting as an enemy could not be guilty of treason in his own country.

1] *Compassing* or imagining the death of the Sovereign:* 'The words . . . refer to the purpose or design of the mind or will, tho the purpose or design take not effect. Compassing or imagining singly of itself is an internal act, and without something to manifest it, could not possibly fall under any judicial cognizance . . . therefore this statute requires such an overt act as may render the compassing or imagining capable of a trial and sentence . . .': 1 Hale P. C. 107. All later authorities accept the view (that the proof of an overt act is a condition precedent of a conviction, for any form of treason under this statute), and it was relied upon by the court in *Vaughan*, 2 Salk. 634, 1696. It follows that a mere confession of a desire or intention

* Compass = to contrive, devise, machinate (a purpose): N. E. D.

to compass the sovereign's death would not be sufficient to secure a conviction. 'Constructive' treason has often taken this form.

See further, *Compassing* under *Accessories,* below.

The only trials of indictments for treason by means of actual attempts on the person of the sovereign, viz. *Hadfield,* 27 St. Tr. 1281, 1800, and *Oxford,* 9 C. & P. 525, 1840, proceeded as trials for attempted murder.

Sovereign] A queen regnant is within the s., but not her consort: 3 Inst. 7.

2] *Violating Royal ladies: Violast* here = *carnaliter cognoscere;* hence, if there be consent, 'it is treason in her.' 3 Inst. 9. Hence *Queen Anne Boleyn* and her alleged paramours were tried for high treason: 1 St. Tr. 409, 1536; while *Queen Catharine Howard,* against whom no post-nuptial unchastity could be proved, was—with *Lady Rochford,* declared to be her accomplice—convicted of and punished for high treason by Act of Attainder, 33 H. 8, c. 21, 1541-2; 3 Statutes of the Realm, 857; 1 St. Tr. 445. The Act recites that *Dereham* and *Culpepper* 'had been lawfullye and truely and according to the lawes of the Realme, convycted and attainted' for proved 'treasons,' and enacts (p. 858), 'That this theyre lawfull indytements and attaindo's (*sic*) . . . may be approved by thauctoritie of this present parliament,' and as they had been executed, condemns the four guilty persons to the usual forfeitures for high treason in the same clause. The statutory confirmation of the trial suggests the doubtful legality of it, probably the evidence of post-nuptial complicity with the Queen was insufficient.

For *Queen Caroline's* case, see above.

Eldest daughter unmarried, i.e. 'at the time of the violation.' 3 Inst. 9.

3] *Levying War:* see *Rebellion,* below. The statute no doubt contemplated actual civil war or rebellion (that in 1745 gave occasion for many trials for treason in 1746; see 18 St. Tr. and *Cameron* (attainted), 19 St. Tr. 733, 1753); but it has been applied mainly to disturbances which may be called political or, at the worst, risings. Since and with the exception of the prolonged Jacobite movement, it is difficult to believe that there was any design on the throne in any of the cases in which this clause was invoked. Hence they deal with *constructive* war. Coke's distinction, 3 Inst. 9, has been generally followed: 'the pretence,' *i.e.* object or purpose of the agitation, must be 'publick and generall and not private in [and?] particular': 'if three or foure or more doe rise to burne, or put down an inclosure in Dale which the lord of the manor of Dale hath made there in that particular place, this or the like is a riot, a rout or an unlawfull assembly, and no treason. But if they had risen of purpose to alter religion established within the realme, or laws, or to go from town to town generally, and to cast downe inclosures, this is a levying of war (though there be no great number of the conspirators) within the purview of this statute.' East, 1 P. C. 75, adds as objects of 'particular' activity the following instances: 'a particular market . . . a local nuisance, to release a particular prisoner, unless imprisoned for high treason, [or even] to oppose the execution of an act of parliament, if it only affect the district of the insurgents, as in the case of a turnpike act' and the *Weavers' case,* 1675.

This was a rising in large numbers, at one point to about 15,000, in and about London against 'engine-looms,' many of which were destroyed in the course of three days; there was considerable violence. Finch, Lord Keeper, summoned the judges, among them Hale, to a consultation on a statement of the facts written by the Attorney-General, Sir W. Jones; five judges thought that the offenders were guilty of treason within this clause; five were not satisfied thereof, and the Attorney-General ultimately only proceeded for riot, for which he obtained convictions: 1 Hale P. C. 143; the latter seems the better opinion: *Foster,* Crown Law, 210. The old law was restated in 1820 by the Lord President, *Hardie,* 1 St. Tr. N. S. 765; See, on the differentiation of riot from treason, *Stephen,* 2 History, p. 271. The fact seems to be that in times of great public excitement—mostly from political causes—partisans have found it convenient to suggest that their opponents are, in law, 'levying war,' but it may be doubted whether, at the present day, any one who had not actually taken up arms against the Government of the Crown, would be indicted or held guilty of this form of treason. It is submitted that the law in *Dammaree, Willis* and *Purchase,* 15 How. St. Tr. 522, 614, 652, 1710, is obsolete.

These defendants had taken part, at a time of great public excitement, in various degrees, in the demolition of several meeting-houses in London, during the course of one night. They were separately tried for high treason by levying war and, except Willis, convicted. All the judges (four) present at the trial of *Dammaree,* 'were of opinion that the prisoner was guilty of . . . high treason . . . for here was a rising with an avowed intention to demolish *all meeting-houses in general;* and this intent they carried into execution as far as they were able. If the meeting-houses of Protestant dissenters had been erected and supported in defiance of all law, a rising in order to destroy such houses *in general* would have fallen under the rule laid down in *Kelyng,* 70 (Loveland's edn. 108; 6 How, St. Tr. 892), with regard to the demolishing all bawdy-houses. [See *Messenger, &c.,* 6 How. St. Tr. 879 in 1668.] But since the meeting-houses of Protestant dissenters are by the Toleration Act [1 W. & M. c. 18, 1688] taken under the protection of the law, the insurrection in the present case was to be considered as a publick declaration by the rabble against that act, and an attempt to render it ineffectual by *numbers and open force': Foster,* Disc. I. 215. *Dammaree* was sentenced to death, but pardoned and restored to the Queen's service. In *Purchase's* case, which certainly 'in point of law and of real guilt, too, came far short of Dammaree's' (*Foster*), a special verdict was found, on which all the judges agreed that *Dammaree* was correctly decided, but three thought that on the *facts* found, Purchase was not guilty of high treason: he was pardoned. These cases may be compared with the much graver facts, also arising from great public excitement, disclosed in *L. George Gordon,* 21 How. St. Tr. 485; 2 Douglas, 591, 781, who was acquitted of high treason after a trial at bar, in which L. Mansfield directed the jury 'that it was the unanimous opinion of the Court that an attempt by intimidation and violence to enforce the repeal of a law [in this case, 18 G. 3, c. 60] was a levying war against the King and high treason.'

It may be doubted whether at the present day the offences in the four last mentioned cases would be prosecuted as treason.

War] 'The fact whether war or not, is triable by the jury, and

publick notoriety is sufficient evidence of the fact.' Foster I. ii. 12, p. 21.

Levying war-numbers] Coleridge L.C.J., Brett M.R., and Grove J. denied that it was necessary 'that there must be a mustering of forces or an irregular mass of men equivalent to a number of troops . . . the means of war varied from age to age, but if a thing was done with the same object and with the same violent means as would be a levying of war in the days of the earlier statutes, it was none the less compassing and intending levying war [within s. 3 of 11-2 V. 12, Treason Felony Act, 1848] now because the scientific means by which it was directed had put it into the power of two or three men to do what could not have been done years ago by hundreds and perhaps thousands': *Gallagher, &c.*, 15 Cox C. C. 291, 1883, where four defendants were found to be in possession of explosives.

In his realm] *Realm* in the original statute certainly meant no more than England. 'English statutes prior to the Union with Scotland [1707] have no effect in that country . . . the Act of Union [1800] has not extended to Ireland any English or British Act passed before 1800 which did not previously apply to Ireland': *Craies*, Statute Law, pp. 414, 415, 2nd edn., 1911. Outside England, therefore, this *head* of the law of treason must be sought in the common law of the territory or in other statutes; 'acts, treason in England' under this statute were made treason in Ireland by Irish 10 H. 7, 22; Poyning's Act: *Smith O'Brien*, 2 H. L. C. 465; 7 St. Tr. N. S. 1, 1848.

Coke says: 'This [levying] was high treason by the common law, for no subject can levie warre within the realme without authority from the King, for to him it only belongeth.'

Conspiracy to levy war] If any 'do actually appear in arms,' others who agreed with them to do so are equally guilty, 'for there are no accessaries in treason': *per* Kelyng L.C.J. 19, who reports this resolution of two other judges, himself and the law officers, after a (little known) rising in Yorkshire in 1664 (apparently referred to by East P. C. 73: 'upon this principle the Yorkshire and Northumberland rioters, who opposed the militia laws, were convicted of high treason and several of them were executed'; more in detail in *Clarendon's* Continuation of his Life, p. 279). Kelyng was one of the judges at the trial.

In *Darrel*, 10 Mod. 322, 1716, the K. B. held that 'a conspiring to levy war in order to dethrone the King, which is the civil death of the King, is an overt act to prove the compassing' that death. 'But a conspiring to levy war generally is not an overt act to prove' compassing his death 'because there may be such a levying as may be treasonable without any intention of deposing the King, as pulling down enclosures, etc'; Kelyng, 20, was preferred to 4 Inst. 6. See *Overt Acts*, below.

4] *The King's enemies*] may be (i) states with whom he is at war; (ii) a. individual subjects of such states; b. individuals not subjects of such states. 'Individuals being identified with the state to which they belong and it being, besides, a special principle of the laws of war that the subjects of a state are the enemies of its enemy, it might *primâ facie* be expected that the whole of the subjects of a state would in all cases be the enemies of a state at war with it.'

Hall, International Law, c. 6, 490, 6th edn. And this is the general rule. But, for reasons which must be sought in treatises on the subject, 'enemy character' does *not* 'exactly correspond with the fact of national character': *ib.* 491. Cf. Holt's remarks in *Vaughan*, above. But the

Adherence] which constitutes treason must be that either of (i) subjects of the King or (ii) non-subjects in a special relation to him.

(i) Who are the subjects of the King? See *Jurisdiction*. Subjects, 'though in open war or rebellion, are not the King's enemies but traytors': 3 Inst. 11.

Possibly a British subject, ambassador to the British Crown from a foreign state, cannot be tried for treason: see below and under *Jurisdiction; à fortiori*, of a *foreigner*.

(ii) a. *Alien friends*] 'The third [kind of ligeance] is *ligeantia localis*, wrought by the law; and that is when an alien that is in amity cometh into England, because as long as he is within England he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance.' 7 Co. Rep. 5 b. (citing at 6 a. the case of *Sherley*, a Frenchman, Dyer, 145, 1557; *Brooke*, Abridg. Treason, 32 f. 277), and 3 Inst. 4. Coke also mentions *de Gama* and *Tinoco*, Portuguese, convicted of treason in 1594; but it appears, 1 Hale P. C. 59, 92, that they were subjects of the King of Spain, who was at war with this country; they came hither 'under Queen Elizabeth's safe conduct' and lived here 'under her protection.' Co. Hale, Hawkins, Foster and East adopt Coke's law. So in any of the King's dominions. *Maclane*, 26 St. Tr. at 823, 1797: in Canada: not a British subject and not so indicted.

Hawkins, P. C. I. 17, 5, mentions an opinion that for treason *against the King's life* an ambassador may be condemned and executed; for other crimes, he may be sent home.

b. *Alien enemies*] 1. Such a person *voluntarily* remaining in the King's dominions after the outbreak of war between this country and his may be guilty of treason: 1 Hale P. C. 92, see above; *De la Motte*, 21 St. Tr. 687, 1781, indicted as 'a subject' (in the sense explained at 709 and in *Maclane*, at 824). If such a person assists invaders, even his own countrymen in those dominions, he is guilty. The Judicial Committee of the P. C. considered 'that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the sovereign who extended it': *per* Loreburn C., *De Jager* v. *Attorney-General of Natal*, 1907, A. C. 326, who also said: 'The protection of a state does not cease merely because the state forces . . . are temporarily withdrawn' and the enemy occupies the territory. In that case defendant pleaded that he was 'legally compellable' to 'join the Boer forces' and act 'as commandant . . . commissioner . . . and justice,' and had he been in their military service when his countrymen arrived it is difficult to see how he could have been convicted. He clearly could not, had he been under compulsion. Cf. *Coercion* and *Superior Orders* under *Murder*.

An alien *in the service of the Crown*, who becomes an enemy by the outbreak of war, but remains in that service, can clearly be guilty of treason.

2. *Compulsion*] 'The only force that doth excuse is a force upon the person and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence to shew an actual force and that he quitted the [enemy's] service as soon as he could agreeably to the rule . . . in *Oldcastle's* case [1417]': *per* Lee L.C.J. in *MacGrowther*, Foster's Report, 14; 18 St. Tr. 391, 1746: a Scotsman living in Scotland. Fear of loss of property does not excuse: *ib.*

3. *Prisoners of war*] There is little authority on this point; the principle, not in treason but in other offences, was discussed before twelve judges in *Depardo*, 1 Taunt. 26, 1807; but none was laid down. For *other* offences it may now be considered settled; as L. Campbell said in *Sattler:* 'A prisoner of war committing murder would be triable'; *Oppenheim*, 2 International Law, 335, says, 'and punished after the conclusion of peace, just as a prisoner who runs into debt during captivity may be sued after the conclusion of peace.' Foster J., C. C. 188 *n.*, thought it highly improper to convict a prisoner of war capitally for larceny on a *local* statute: *Molières*, 1758; and he evidently thought a prisoner of war could not commit treason: *ib.*

Heath J., however, said, in *Sparenburgh* v. *Bannatyne*, 1 Bos. & P. 171; 4 R. R. 772, 1797: 'a prisoner of war . . . if he conspires against the life of the King, it is high treason'; but the *dictum* was merely by way of illustration and hardly touching the issue. He seems to have thought that this liability flowed from his being 'here under protection from the King,' not noticing that, as Rooke J. puts it, *ib.*, more accurately, he 'is, *to certain purposes*, under the King's protection,' *i.e.* he cannot be murdered or robbed with impunity.

So, *ib.*, Eyre C.J. says, 'the permanent character of an alien enemy arises from the party being under the allegiance of the state at war with us; the allegiance being permanent, the character is permanent, and on that ground he is alien enemy, whether in or out of prison.'

It is submitted that the 'protection' which involves even temporary allegiance is that *voluntarily* sought and not that imposed on an unwilling enemy.

Outbreak of war—interned—detained] Whether persons in this condition are 'prisoners of war' was expressly discussed in *Vine St., &c. Superintendent, Ex parte Liebmann*, 1916, 1 K. B. 268; 85 L. J. K. B. 210; 113 L. T. 971; 80 J. P. 49; 32 T. L. R. 3: K. B. D., where two judges held that if the Crown, on the ground of public policy, interns an alien enemy 'as a prisoner of war,' though the phrase is not there used in the ordinary sense of a captured combatant, yet, in view of the part civilians were in fact playing for the enemy, the court must consider such a person as a prisoner of war. But whether it follows that he could not commit treason did not appear.

On the whole it seems that an alien prisoner of war cannot be guilty of treason.

'If a merchant, subject of a foreign prince in hostility with our King, come hither after the war begun, without the King's licence or safe conduct, such a person may be dealt with as an enemy, viz. taken and ransomed': Mag. Chart. c. 30 [41]; 1 Hale P. C. 59. That chapter provides for the treatment of alien merchants surprised here by the outbreak of war. At the present day no distinction would be made between merchants and other alien enemies in this respect; it cannot be doubted that any such alien enjoying the favour of the

Crown to the extent of being at liberty could be guilty of treason, but, presumably, any such person avowedly treated as an enemy—perhaps, interned—Hale's 'taken' (above)—could not. Cf. *Tucker*, 2 Salk. 630, 1694.

Foster, 185, mentions a resolution of 'all the judges' in 1707 that an alien 'having a family and effects here,' if he leave them 'during a war with his native country [and] go thither and there adhere to the King's enemies *for purposes of hostility*,' is guilty of treason; so East P. C. at 52.

Adhering] *Gregg* was indicted on this ground; 14 St. Tr. 1373, 1708; he was a clerk in the Secretary of State's office and had sent information to French ministers during a war with France.

The King's allies] Assisting the King's enemies 'only against the King's allies' is 'adhering' within the statute: *per* Holt L.C.J., *Vaughan*, 13 St. Tr. 530, 1696. This mere *dictum* is adopted by Foster, 220, but there seems to be no other authority for it.

Giving aid and comfort] *Alice Lisle* was indicted for treason, for having 'comforted,' &c. a 'traitor': 11 St. Tr. 305, 1685. 'Furnishing rebels or enemies with money, arms, ammunition or other necessaries will, *primâ facie* [*i.e.* if done voluntarily] make a man a traitor. . . . And the bare sending money or provisions . . . or sending intelligence to rebels or enemies . . . will make a man a traitor, though the money or intelligence should happen to be intercepted.' Foster, 217. So a Royal Proclamation of August 5, 1914, gave notice to all the King's 'subjects and all persons resident or being in' the King's 'dominions during the continuance of the state of war' (declared the day before) against Germany that 'it constitutes adherence to' the King's 'enemies for any of' such persons 'to contribute to or participate in or assist in the floating of any 'loan raised on behalf of' Germany, 'or to advance money to or enter into any contract or dealings whatsoever with . . . or otherwise to aid abet or assist' the German government: 1 Emergency Legislation, 177, 1914.

Endeavouring to procure men to enter the military service of the belligerent or assist them to do so is within this clause: *Ahlers*, 1915, 1 K. B. 616; 84 L. J. K. B. 901; 12 L. T. 558; 79 J. P. 255; 21 T. L. R. 141; 11 Cr. Ap. R. 63: c. q.

. . . *enemies in his realm . . . in the realm**] One of these phrases is, perhaps, a 'dittography,' but, at any rate, 'these three words [in his realm] seem surplusage': *Kenny*, Outlines of Criminal Law, 1914, 269 *n.*, citing *Lynch*, 20 Cox C. C. at 477, 1903; reported also 72 L. J. K. B. at 174; 67 J. P. at 44; 51 W. R. at 622; 88 L. T. at 30; 19 T. L. R. 172: trial at bar, where the point was argued. Coke, 3 Inst. 10, certainly seems so to have understood the passage, for he omits them in citing it in the commentary, saying: 'This is here explained, viz. in giving aide and comfort to the King's enemies within the realme or without.' In any case, this is the common law which the statute here declares. Co. Litt. 261 b.

Such doubt as there was was set at rest by the judgments in *Casement*, 1917, 1 K. B. 98; 86 L. J. K. B. 467; 115 L. T. 277; 25 Cox C. C. 480; 60 S. J. 656; 32 T. L. R. 667; 12 Cr. A. R. 99:

* The translation here interchanges 'his' and 'the' of the original.

printed transcript of shorthand report and MSS. in Inner Temple Library. The overt acts alleged were inciting in Germany British subjects there to join the forces of that country then at war with this; circulating literature there among His Majesty's subjects with the same end; procuring about fifty such subjects so to join and taking part in an armed expedition, as an act of war, from that country to Ireland. After much argument, it was held by three judges in the K. B. D. and by the C. C. A. (five judges) that the words 'giving . . . comfort' were to be read as in a parenthesis so that 'or elsewhere' was to be read after 'in his realm,' that adherence outside the realm is treasonable at common law and by statute and that there may be adherence within the realm by aid and comfort without.

5] No case under this head is known. Such an offence would probably not be prosecuted as high treason at the present day.

Accessories] Coke, 3 Inst. 138, says, 'it is a sure rule' that in high treason no one can be an accessory, only a principal; 'if any man knowing' another 'to be a traytor doth receive, comfort and aide him he is guilty of treason.' Hale, 1 P. C. 233, 613, puts the general rule thus: 'all such as counsel, conspire, aid or abet . . . any treason, whether present or absent, are all principals.' (Both discuss, and Foster follows them, in this connection, prison-breach to rescue a 'traitor'—a point now of no importance.) 'That which will not make an accessary to felony after the fact will not make a man principal in treason': *ib.* 239; paraphrased by Foster, 343, 'every act which in . . . felony will render a man an accessary will in . . . treason make him a principal,' and 'nothing short of such an act will.' He is emphatic in maintaining that the aid, comfort, receipt, etc. after the fact amounts to treason only when *in fact* the primary principal has committed treason, not *e.g.* when a suspected person is 'harboured' by a friend till 'the storm is blown over'; and so he understood Coke. Hale, 2 P. C. 223, says that even in the case of an accessory before, the principal must be convicted first. But statutes making accessories *before* principals, often do not make *receivers, i.e.* accessories *after*, guilty of treason: Hale, 1 P. C. 614.

'*Compassing*'] Foster, 346, followed by 4 Blackstone, 35, makes an important exception—without citing authority: in 'every instance of incitement, consent, approbation or previous abetment in . . . compassing of the death of the King, etc. . . . every such treason is in its own nature, independently of all other circumstances or events, a complete overt act of compassing; though the fact . . . should never be . . . so much as attempted'; *e.g.* B., incited by A. to a 'treason of this kind,' denounces A. 'This incitement' by A. 'is a complete overt act of treason' depending in no way on B.'s behaviour.

'*War treason*'] is an offence, punishable with death, by inhabitants of an invaded or occupied territory, or enemy subjects—not members of armed forces—resorting thither or to the territory of the belligerent, giving information to his enemy and doing other hostile acts: Manual of Military Law, War Office, 1914, Arts. 166-7, 445, 449, 450; there must be a trial. The offence, as such, is not recognised by the civil courts, but cf. *Prisoners of War*, above; nor is the phrase otherwise known to the law. See 33 L. Q. R. 276, 1917, in reply to 2 Grotius Society Papers, 161, 1916, which denied the existence of such an offence.

Informing the enemy] See *M.*

Distinction from riots] See that title.

Spouses] See under *Coercion by Husband* and *Competency of Witnesses.*

D. Procedure.

1351. '*Open deed*'] '*per apertum factum* . . . by an open act which must be manifestly proved': Co. 3 Inst. 12, where also is to be found 'overt act,' now the usual term.

'*Of their condition*'] '*per pares*': *ib.* 14.

1543. *Offence out of the King's dominions*] 35 H. 8, 2, 1, 1543-4: 'All manner of offences being alredye made or declared or hereafter to be made or declared by any the lawes and statutes of this realme, to be treasons, mysprisions of treasons or concelements of treasons,' and done, &c. by any person 'out of this realme of Englande,' are to be tried in the King's Bench or before special commissioners—in either case in such shire, as the royal commission shall appoint, just as if the offence had been committed in that shire. Hence *Lynch* and *Casement* were tried in the K. B. D. Peers so indicted are to be tried as was then customary. (So by 1 Eliz. 1, 18 (or 34), 1558-9, of any treason made or revived by that Act.) To the same effect as s. 1 is s. 4 of 5-6 Ed. 6, c. 11, 1551-2, which concludes: 'all process of outlawrie hereafter to be made and had within this realme, agaynst any offendors in treason, beinge resiant or inhabitaunt out of the lymittes of this realme or in any the partes beyonde the sea, at the tyme of the outlawrie pronounced agaynste them' is to be as effectual as if they were within the realm.

S. 6. See under F. *Punishment.*

1554. *Trial according to common law*] 1 & 2 P. & M. c. 10, 1554, s. 6: 'All trialls hereafter to be hadd, awarded or made for any persone shall be hadd and used oneley according to the due order and course of the common lawes of this realme.' This 'was intended in favour of the subject not in the least to his prejudice.' Foster, 237.

1661. *Corroboration—two witnesses*] 13 C. 2, st. 1, c. 1, 1661, s. 5: 'No person or persons shall be indicted, arraigned, condemned, convicted or attainted for any of the treasons . . . aforesaid* [in repealed s. 1] unless the same offender or offenders be thereof accused by the testimony and deposition of two lawful and credible witnesses upon oath which witnesses at the time of the said offender or offenders' arraignment shall be brought in person before him or them, face to face, and shall openly avow and maintain upon oath what they have to say against him or them concerning the treason or offences contained in the said indictment, unless the party or parties arraigned shall willingly without violence confess the same.'

Thus, corroboration in treason is on a different footing from that in other offences. See s. 2 of the 1695 A.

This *number* first appears in rpd. s. 22 of 1 E. 6, 12, 1547; again

* It seems that, owing to repeal, there are no longer any 'treasons within the Act.'

in rpd. s. 12 of 5-6 E. 6, 11, 1552: 'two lawful accusers.' According to T. Raymond J. (Rep. 408), who was present, in 1680, during the trial of *L. Stafford*, 7 St. Tr. 1293 (see 1525), Finch C. thought that 'all over the Christian world . . . none can be condemned of Heresie but by two lawful and credible witnesses . . . and anciently Heresie was treason.' (Cf. rpd. 25 H. 8, 14, s. 6, 1533-4; ultimately traceable to Numbers xxxv. 30, and Deut. xvii. 6, and xix. 15.)

Since *Lord Stafford* (defendant insisting that 'there ought to be two to each overt act') the meaning of the rule has been established: Foster, 237; East P. C. 129; the unanimous opinions of the ten judges assisting the House of Lords (Finch C. and Lord High Steward apparently concurring: 7 St. Tr. 1545; cf. 1520, 1522, 1525-7) are giving *seriatim*, 1527, including Raymond's, whose Report (407) gives the following summary: the 'charge was That he [defendant] hired persons to kill the King. And upon the evidence it appeared that Stephen Dugdale swore that the prisoner proffered him 500*l.* to do it; and Oats, another witness, swore that the prisoner received a commission to be pay-master to an army to be raised by the Roman Catholics; and Turbervile swore that another five or six years before time, the prisoner, at Paris, profered him a good reward to kill the King. And upon this evidence the question was put to all the judges then attending . . . Whether this were sufficient evidence for convicting the offender by the Statutes of 1 E. 6, c. 12, and 5 E. 6, c. 11, which require(s) two witnesses for convicting of a traitor and for finding an indictment; and here is but one witness to each fact.' The judges' conclusion was: 'That when the prisoner is charged with the offence of killing the King, and the evidence is That he at several times laboured it, and by several ways, and to each particular time and fact there is but one witness, and yet every of the said facts conduces directly to the effecting and perpetration of the fact and treason charged upon the prisoner; such evidence is sufficient within the statute. But otherwise it had been if the facts had been tending to another several treason; and the reason given why such evidence was good, was because otherwise it would be a most difficult thing and almost impossible to convict any one of High Treason for compassing the death of the King, for such compassings are seldom acted in the presence of two witnesses at one time present.' So Kelyng J., C. C. 9, to the same effect, in the trial of the *Regicides;* cf. *Vane*, 6 St. Tr. at 176, 1662.

Since 1680, 'the point hath been settled, and in the succeeding trials of that reign and the next, although many irregular things were done savouring of the times, this rule still kept its ground; and in all the trials after the revolution, before the Act,' 7 W. 3, 'it was strictly observed.' Foster, 237.

Probably no better general rule can be laid down of the *extent* of each witness's corroboration of the other than that suggested by Raymond, viz. the evidence of each must 'conduce directly' to the proof of commission of the crime, *i.e.* to the satisfaction of the jury who, as in every case, must take into consideration all the proved circumstances not withdrawn from them; consequently whether any alleged fact is corroborative must depend on the circumstances of each case.

Peers] S. 7. To be tried by peers; if convicted, not to sit again in Parliament, but

Pardon] is to restore any peer or commoner *in toto*.

1695. 7-8 W. 3, 3, Trial for Treason Act, 1695-6; qualified by 39-40 G. 3, 93, 1800.

Copy of indictment and price] S. 1: Any one indicted of treason or misprision 'shall have a true copy of the whole indictment [but not the names of the witnesses: rpd. S. L. R. A., 1888, Pt. II.] delivered unto them or any of them five days att the least before hee or they shall bee tryed for the same, whereby to enable them and any of them respectively to advise with Counsell thereupon to plead and make their defence his or their

Attorney] or attorneys, agent or agents, or any of them requiring the same *and paying the officer his reasonable fees for writing thereof not exceeding five shillings for the copy of every such indictment.*' The words in italics are virtually repealed by Rule 13 (1) of 5-6 G. 5, 90, Indictments A. 1915; 'on request' defendant may have a copy 'free of charge.' *Vane* was not allowed to see or have a copy of the indictment or even to hear it read in Latin: 6 St. Tr. 173, 176, 1662.

Defence by counsel] 'And that every such person soe accused and indicted, arraigned or tryed for any such treason . . . or for misprision . . . shall bee received and admitted to make his and their full defence by counsel learned in the law

Right to call witnesses] and to make any proof that hee or they can produce by lawfull witnesse or witnesses who shall then be upon oath for his and their just defence in that behalfe.

Assignment of counsel] And in case any person or persons so accused or indicted shall desire counsel, the Court before whom such person or persons shall be tryed or some judge of that Court shall and is hereby authorised and required immediately upon his or their request to assign to such person and persons such and soe many counsel not exceeding two as the person or persons shall desire, to whom such counsel shall have free access at all seasonable houres any law or usage to the contrary notwithstanding.'

Coke, 3 Inst. 137, is at pains to explain the common law refusal of counsel on a plea of not guilty in treason or felony; due, he says, to the fact that that plea 'goeth to the fact best known to the party'—a truly mediæval idea. He reinforces that reason by two more modern reasons: 1. 'in case of life, the evidence to convince him [defendant] should be so manifest, as it could not be contradicted'; 2. 'the Court ought to see' *omnia rite agi*—the origin of the more modern theory that the Court defends an otherwise undefended prisoner. *Vane* was denied counsel: 6 St. Tr. 173, 176, 1662; but *L. Stafford*, 7 St. Tr. 1525-6 (1680: impeachment), was allowed three; *R. Johnson*, Str. 824, 1728, was assigned four, three of whom 'were heard on the reply'; Foster, Cr. L. 46: there outlawry had followed a charge of treason 'in diminishing the current coin' by 'filing and washing' it, and the Court distinctly said, Barnard. 90, 111, that on a charge of *this* treason, the statute did not allow counsel; but he had a right to counsel on the outlawry. Nevertheless counsel were 'admitted to speak' for him on the trial for treason: *ib.* 123. The Court can only assign two, but more may appear: *Casement*, Proceedings (Transcript), May 25, 1916.

This s. is the sole statutory authority for a defendant in treason being represented by counsel, or by a

Solicitor] by implication in the words referring to 'attorneys,' above: *per* Tindal C.J., *Frost*, 4 St. Tr. N. S. 97; 9 C. & P. 131, 133, 134, 1839. In 1649 *Lilburne*, 4 St. Tr. 1296, asked for 'counsel and solicitors,' but counsel was refused till a point of law arose and the solicitor was not allowed to stand near him; 1315. In 1651 *Love*, tried by the Commonwealth High Court of Justice without a jury, stated that counsel had refused to 'come to him' unless they were assigned by the court, apparently believing that it was illegal; the court, without assigning any, ordered that *anyone* should have access to the defendant: 5 St. Tr. 135. The practice is for the court to assign the solicitor chosen by defendant and counsel nominated by the solicitor or defendant: *Frost; Lynch*, shorthand notes, 7, 1902. A judge at chambers has the same power: *Watson*, 32 St. Tr. 20, 1817. The court will not recognise more than two counsel for defendant: *Frost*, 4 St. Tr. N. S. 105; 9 C. & P. 134; but in *Casement*, 1917, 1 K. B. 114, a third was heard as *amicus curiæ;* cf. 4 St. Tr. N. S. 461-2.

But in proceedings after trial—virtually appeals and so in C. C. A. —these rules about legal representatives do not apply: *Frost*, 461 & 165 respectively; 2 Moo. C. C. 145: case stated for the opinion of the fifteen judges.

Though represented, defendant is sometimes allowed the privilege of 'addressing to the jury what might be expedient': *Watson*, at 20 & 538; before 'counsel for the Crown has replied': *per* Ellenborough L.C.J.

S. 2: 'Noe person or persons whatsoever shall bee indicted tryed or attainted of high treason* whereby any corruption of blood may or shall bee made to any such offender or offenders or to any the heir or heirs of any such offender or offenders* or of misprision of such treason but by and upon the oaths and testimony of two lawfull witnesses either both of them to the same overt act or one of them to one and another of them to another overt act of the same treason unlesse the party indicted and arraigned or tryed shall willingly without violence in open court confesse the same or shall stand mute or refuse to pleas or in cases of high treason shall

Challenge] peremptorily challenge above the number of thirty-five of the jury any law statute or usage to the contrary notwithstanding.' Defendants tried jointly have thirty-five challenges between them: *Charnock*, 3 Salk. 81, 1696. See *Challenges*, below.

S. 3: Outlawry preserved.

Evidence of more treasons than one] S. 4: 'If two or more distinct treasons of divers heads or kinds shall be alledged in one bill of indictment, one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons shall not be deemed or taken to be two witnesses to the same treason within the meaning of this Act.'

Limitation of time for indictment] S. 5: It must be found 'within three years next after the treason or offence [misprision] done or committed.'

(Ss. 2, 3, 4 and 5 extended to Ireland by 1-2 G. 4, 24, 1.)

* This consequence was abolished by 33-4 V. 23, 1.

Exception] S. 6: Except where the charge is 'designing, endeavouring or attempting any assassination on the body of the King by poison or otherwise,' in which case there is no limitation.

Copy of jury panels] S. 7: 'Every person and persons who shall bee accused indicted [or] tryed for such treason . . . or for misprision . . . shall have copies of the pannel of the jurors who are to try them duely returned by the sheriff and delivered unto them and every of them soe accused and indicted respectively two days at the least before hee or they shall bee tryed for the same.'

In *Lynch*, Shorthand Notes, 7, 1902, L. Alverstone C.J. directed the sheriffs of London and Middlesex, the trial being in K. B. D., 'to supply to the Director of Public Prosecutions lists of the persons qualified to serve on the jury to be returned by them to try the crime of high treason, in order that it (*sic*) may be served on the defendant.' The same course was followed in *Casement*; the order included a copy of the indictment: Inner Temple MS.

Defendant's witnesses compellable] 'All persons soe accused and indicted for any such treason . . . shall have the like processe of the court where they shall be tryed to compell their witnesses to appeare for them att any such tryal or tryals as is usually granted to compell witnesses to appeare against them,' *i.e.* a *subpœna;* possibly also a recognisance; see 4-5 W. & M. 18, 2, rpd.

Overt acts—evidence] S. 8: 'Noe evidence shall bee admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever.'

Foster, 245, on *Layer's* case, says: 'His corresponding with the Pretender, though not laid and though made treason by the 12th and 13th of K. William [13-4, c. 3], was given in evidence; for it directly tended to prove one overt act that was laid, viz. his conspiring to depose the King and to place the Pretender on the throne.' For Foster's rule, see below; 'corresponding' here is hardly used in its present sense: see 16 St. Tr. 220-1, and cf. 149, 296, 299, 319.

Motion to quash indictment] on certain technical grounds, to be made before evidence given, s. 9, *i.e.* before plea pleaded: *Rookwood*, 13 St. Tr. 160-176, 1696.

Trial of peers] S. 10: 'All the peers [excepting defendant] who have a right to sit and vote in Parliament' are to be summoned twenty days at least before the trial; 'every such peere first takeing the oaths.'

Proviso for impeachment] S. 11 (or 12). Nothing in this Act 'shall anyways extend to or be construed to extend to any impeachment or other proceedings in Parliament in any kind whatsoever.'

1702. *Defendant's witnesses*] 1 An. st. 2, c. 9, 3, 1702: 'shall first take an oath to depose the truth the whole truth and nothing but the truth in such manner as the witnesses for the Queen are by law obliged to do.'

1708. *Documents to be delivered*] 7 An. 21, s. 14 (or 11), 1708, enacts that, on indictment for treason or misprision 'a list of the witnesses that shall be produced on the tryal . . . (*and of the jury*)

mentioning the names, profession and place of abode of the said witnesses (*and jurors*) be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for' those offences 'with such list(*s*) shall be delivered to the party indicted, ten days before the trial and in presence of two or more credible witnesses: any law . . . notwithstanding.' Words bracketed in italics repealed 6 G. 4, 50, 62. List and copy must be delivered *together: Frost*, above; but if they are not, such informality is waived by pleading to the indictment: *ib.;* and only a ground for postponement: *ib.* and *Burke*, 10 Cox C. C. 521, 1867: copy alleged not to be 'true.'

1746. *Impeachment—counsel*] 20 G. 2, 30, 1746-7, provides for the assignment of two 'council . . . at any time after the articles of impeachment shall be exhibited by the commons.'

1800. *Attack on person of sovereign—trial*] 39-40 G. 3, 93, 1800: 'In all cases of high treason in compassing or imagining the death of the King, and of misprision of such treason, where the overt act or overt acts of such treason which shall be alledged in the indictment for such offence shall be [1] assassination or killing of the King, or [2] any direct attempt against his life, or [3] any direct attempt against his person whereby his life may be endangered, or [4] his person may suffer bodily harm,' the trial shall take place 'in every respect and upon the like evidence as if' defendant 'stood charged with murder; and none of the provisions' of 7-8 W. 3, c. 3, and 7 A. c. 21, 'touching trials . . . shall extend to any indictment for high treason in compassing and imagining the death of the King or for misprision of such treason, where the overt act or overt acts of such treason alleged in the indictment shall be such as aforesaid,' but judgment and execution are to be 'as in other cases of high treason.'

Challenges] Consequently under this Act or 5-6 V. 51, defendant has only twenty peremptory challenges.

In 1800, on a trial for murder, a defendant did not enjoy the rights conceded by the two Acts here quoted to persons on trial for treason (or misprision) in England and Scotland respectively.

1825. *Copy of pettit jury panel and indictment*] 6 G. 4, 50, 21, 1825: On indictment for treason or misprision (a) in any court other than the King's Bench, 'a list of the pettit jury mentioning the names, profession and place of abode of the jurors shall be given at the same time that the copy of the indictment is delivered to the party indicted, which shall be ten days before the arraignment, and in the presence of two or more credible witnesses'; (b) 'in the . . . King's Bench the same of the indictment,' but 'the list of the pettit jury, made out as aforesaid, may be delivered . . . at any time after the arraignment, so as the same be delivered ten days before the day of trial.'

Saving for the Act of 1800] Provided 'that nothing herein contained shall anyways extend to any indictment [*dealt with in that Act, of which the words are recited*] or to any' for offences exempted from s. 3 of 6 G. 3, 53, 1765—the words of which are set out—which

offences are now felonies, by virtue of (i) rpd. 2 W. 4, 34, 3, 1832, or (ii) rpd. 11 G. 4 & 1 W. 4, 66, 2, 1830.

1842. *Attempt on person of sovereign*] 5-6 V. 51, 1, Treason Act, 1842: 'In all cases of high treason in compassing or imagining any bodily harm tending to the death or destruction, maiming or wounding, of the Queen,' and in misprision 'where the overt act or overt acts of such treason alleged in the indictment shall be any attempt to injure in any manner whatsoever the person of the Queen,' defendant is to be 'indicted, arraigned, tried and attainted . . . as if . . . charged with murder' 'and upon the like evidence,' and on indictment for any such offence or for

'*Compassing or imagining the death or destruction of the Queen*'] the provisions of the Acts of 1695, 1708, and 1825 are not to apply.

Judgment and execution] 'as in other cases of high treason.'

Assault on the sovereign] S. 2. See *Assault.*

Punishment of treason, &c.] Not altered 'in any respect': s. 3.

Challenges] See 39-40 G. 3, 93.

1848. *Bail*] 11-12 V. 42, Indictable Offences A. 1848, s. 3: 'no justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to bail except by order of one of Her Majesty's Secretaries of State or by Her Majesty's Court of Queen's Bench, or a judge thereof in vacation.'

Stone was 'under confinement for two years' before his trial for treason: Ann. Reg. 1796, p. 111; 25 St. Tr. 1207.

Court-martial] See under *Mutiny, &c.*

1441. *Other statutes in force*] 20 H. 6, c. 9, 1441-2: 'ladies of great estate in respect to their husbands, peers of the land, married or sole, that is to say, duchesses, countesses or baronesses,' are to be tried 'before such judges and peers of the realm as other peers of the realm should be, if they were indicted or impeached,' and 'in like manner and form.'

1495. 11 H. 7, 1, 1495: person serving King 'for the time being,' in war or otherwise, not to be tried for treason.

1541. 33 H. 8, 20, 3, 1541-2: Attainders at common law or under statute declared of equal force with attainders 'by auctoritie of Parliament'; Crown to be in the same position in respect of forfeitures.

1551. 5-6 E. 6, c. 11, 1551-2: Treason committed out of the realm.

Joinder of treasons] 'On an indictment containing counts for feloniously compassing to depose the Queen and also counts for feloniously compassing to levy war against the Queen to force her to change her measures and counsels, the Court will not put the Crown to its election, the two charges not being repugnant or likely to embarrass the prisoner in his defence': *Mitchel,* 6 St. Tr. N. S. 599: head-note; 3 Cox C. C. 1, 1848: *per* Lefroy B. and Moore J.,

under 11-2 V. 12, thus: different kinds of treasons and different overt acts may be joined.

The test for the Court to apply must always be, is the joinder 'likely to embarrass the prisoner?'—a principle which is embodied in s. 5 (1)—see also R. 3 and s. 4 of—the Indictments A. 1915, which, however, does not mention treason.

Evidence—spouses] See that title.

Venue] See under *Conspiracy*. In *Meany*, Ir. R. 1 C. L. 500; 10 Cox C. C. 506, 1867: C. C. R., it was held by seven judges against four, that defendant, a British subject, arrested in England, could be tried in Dublin for treason felony in respect of treasonable acts done in the United States in conspiracy with confederates doing treasonable acts in Dublin, but not indicted with him. Defendant was in America when all the overt acts were alleged.

E. Overt Acts.

See this title under *Conspiracy* and *Agency*, and see *Meany*, above.

A conspiracy to depose the sovereign is a sufficient overt act of 'compassing,' &c. that end: *Mulcahy* v. *R.*

Statute] S. 8 of 7-8 W. 3, 3, above.

In *L. Preston*, 12 St. Tr. 728, 1691, the judges said that, assuming defendant's treasonable design in going into France, and his guilty knowledge of certain papers, then his taking water in Middlesex was an overt act which might be proved—though he denied that there was any evidence of his intention to go to France, or of his connection with the papers (and so none of the intention with which he took water). Thus Stephen J. points out (7th edn. of this work, p. 393), 'the overt act of treason for which' he and others were executed 'was hiring a boat at Surrey Stairs.'

Conspiracy] is often alleged with and as constituting the treason.

Charnock and others, 12 St. Tr. 1377, 1696, were indicted apparently for 'compassing,' &c., under 25 E. 3 and other statutes; one 'good overt act by law' alleged was (as summarised by the S.-G.) that 'they did at &c. on &c. consult and agree to carry on such a design,' 1443; another was that of a collecting, &c. horses and ammunitions, 1381; but on that no evidence at all was offered. Holt L.C.J. directed the jury, 1452, 'that bare words are not treason is very true in some cases; for loose words spoken without any relation to any act or design are not treason or an overt act; but arguments and words of persuasion to engage in such design or resolution and directing or proposing the best way for effecting it are overt acts of high treason as much as if two agree together to kill the king, though the agreement be verbal only and not reduced to writing; likewise, consulting together for such a purpose, is an overt act of treason . . . there is no way of discovering these compassings or imaginations . . . but by some external act that may be sufficient to manifest such an intention and purpose' (repeated substantially *Vaughan*, 13 St. Tr. 496, 1696).

This doctrine has long been settled law. Much of the old learning on this point—on which see *Stephen*, 2 Hist. C. L. c. 23—has, however, become obsolete owing to statutes since Anne's reign. Some

earlier judgments have perhaps been misunderstood, through failure to appreciate the law as it stood at their date—express references to which may, possibly, have been omitted by reporters; *e.g.* Holt's summing up in *Freind*, 13 St. Tr. 61, 1696, becomes intelligible if it be remembered that 13 C. 2, 1, was then in force and was interpreted in the light of remarks by Coke and Hale on the principal statute.

Overt act of compassing, &c.] See *Accessories*, above. For a time it was a favourite legal device to hold any disloyalty as a threat against the life of the sovereign: *Darrel*, above. Thus in *Story*, 1571, Dyer C.J., a contemporary, reports (298 *a*, 300 *b*): 'A subject of this realm, being beyond sea, practised with the prince or governor [Alva] of the said country [Flanders, then a Spanish dominion] to invade this realm with a great power; and in his practising declared by what means, and how and in what place the invasion might best be; and that if such invasion should be, there were many subjects there who would assist and adhere to him. (But yet there is no such invasion afterwards.) What offences are these practices; and how and where they shall be tried; and if the practising there be for the death or destruction of the prince what offence that is in the subject . . . were the questions. And these offences are holden by the justices to be treason; for an invasion with power cannot be, but of necessity it will trench to the destruction or great peril of the person of the prince . . .' Accordingly *Story* was 'arraigned of high treason in' the Queen's Bench 'upon an indictment there taken by a jury to enquire in Middlesex, for the three causes of treason [as reported above] . . . committed and perpetrated at Antwerp, in parts of Brabant'; found guilty and executed.

In the Earls of Essex and Southampton, 1 St. Tr. at 1355, 1600, the judges who advised the House of Lords formally expressed the opinion: 'That in every rebellion the law intendeth as a consequent the compassing the death and deprivation of the King, as foreseeing that the rebel will never suffer the King to live or reign who might punish or take revenge of his treason and rebellion'; the latter they defined *ib.* 'That in case where a subject attempteth to put himself into such strength as the King shall not be able to resist him, and to force and compel the King to govern otherwise than according to his own royal authority and direction, it is manifest rebellion.'

Inciting, &c. invasion of foreign force] There seems to be no other case than *Story* on the point of soliciting *a government;* but see *Mulcahy* and *Davitt* under s. 3 of the Treason Felony A.: 'moving' and 'stirring' foreigners; and cf. *Casement.*

'Constructive' treason has dwindled away, as 'overt acts' have been recognised either as the crimes to which they more obviously point or indexes of the intent to commit them. Thus, the prosecutions of 1794 (Stephen, cited above) would, on the same facts, not to-day be for treason.

Letters, messages] Posting or sending letters with intelligence intended to be useful to the enemy, is an overt act of 'adhering' whether the letters reach them or not: *Gregg*, 14 St. Tr. 1376, 1708, relied upon in *Hensey*, 19 St. Tr. 1344, 1372, 1758: *per* L. Mansfield, where the despatch of such letters was distinctly held to be in law an overt act of (i) 'compassing' and (ii) 'adhering,' but it is obvious that, in fact, the latter treason may be intended without the former, as

the K. B. said in *Darrel*, 10 Mod. R. 322, 1716: 'compassing' and 'levying war.'

It seems to follow that a *spoken* message of the kind in question may be the overt act.

It is no defence that the message is to deter the enemy from invasion, if the intention is to assist the enemy, *e.g.* to prevent their plans failing: *Stone*, 25 St. Tr. 1427, 1431; 6 Term R. 529, 530, 1796. So it was held that if an intent to inform and not to mislead the enemy is proved, it is immaterial whether the 'information' conveyed is correct or not: *M.*, 11 Cr. A. R. 207; 32 T. L. R. 1, 1915.

Proof of overt acts] The limits of this sort of evidence have sometimes been wide. But in *Vaughan*, at 500, 1696, where 'cruizing on the King's subjects in a vessel called 'The Loyal Clencarty'' was alleged, Holt resisted the attempt of the Crown lawyers to prove hostility 'in a custom-house barge.' Foster, 246, highly approves this decision, but contrasts it with that in other cases and himself suggests the rule laid down by himself and two other judges in *Deacon*, *ib.* 9, and 18 St. Tr. 365, 1746, that 'no overt act amounting to *a distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it amounteth to a direct proof of any of the overt acts which are laid, it may be given in evidence of such overt acts.' Now such evidence would be treated like any other tendered to prove *Similar acts*, which see.

Layer was indicted on overt acts in Essex (only), and his counsel admitting that evidence of overt acts in another county was admissible, objected that the foundation for this (in modern parlance) should be laid by proof of the alleged acts first, but was overruled: 164, 174, 176.

Indictment—British subject] The conclusion of a count 'against the peace of' the Crown is an allegation that defendant is a British subject; it is not necessary to allege it; if the evidence shows that he is not, objection may then be taken: *Jameson*, 1896, following *Sawyer*, R. & R. 294 (1815: murder in Lisbon), where the allegation that the deceased was 'in the peace of the King' was held to import that she was a subject of the King. See above under 1351 statute.

Mens rea] is essential to make an overt act guilty. The provision of arms being alleged as such, the defence was that they were sold 'in the way of business with no idea of their destination'; Cockburn C.J. directed the jury: if defendant, a gunmaker, 'did no more than make and supply them and merely shut his eyes to their destination' [this must mean, from what follows, asked no questions] 'that is not sufficient to convict him. But . . . if he, knowing the object, though himself not caring about it, yet, for the sake of sordid gain lent himself to that object, he would be guilty': *Davitt* and *Wilson*, 11 Cox C. C. 676, 1870, under Treason Felony A. 1848.

F. Punishment.

Hanging] By the combined effect of 54 G. 3, 146, 1, 1814, and 33-4 V. 23, 31, 1870; or

Beheading] by s. 2 of the former Act with s. 31 of the latter.

Women] must be hanged: 30 G. 3, 48, 1790; forfeitures, &c. remained as before.

Forfeiture] By 5-6 E. 6, 11, 6: Outlawry of convicted traitors outside the realm is to be as effectual as if they were within it; estates of inheritance are forfeited; wives lose dower on attainder of husband for treason. But this kind of forfeiture, except that 'consequent upon outlawry,' is abolished by 33-4 V. 23, 1.

TREASON FELONY.

By 11-12 V. 12, 3: 'If any person whatsoever . . . [A] shall, within the United Kingdom or without, compass, imagine, invent, devise or intend [*a*] to deprive or depose . . . the Queen, her heirs or successors from the style, honour or royal name of the imperial crown of the United Kingdom or of any other of Her Majesty's dominions and countries or [*b* 1] to levy war against Her Majesty, her heirs or successors within any part of the United Kingdom in order by force or constraint to compel her or them to change her or their measures or counsels or [*b* 2] in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament or [*c*] to move or stir any foreigner or stranger with force to invade the United Kingdom or any other Her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs, or successors; and [B] such compassings, imaginations, inventions, devices or intentions, or any of them, shall express, utter or declare by publishing any printing or writing or by any overt act or deed; every person so offending shall be guilty of felony': maximum punishment, penal servitude for life.

By s. 6, nothing in this A. is to affect the first St. of Treason.

By s. 7, if the facts indicted or found amount to treason, a verdict of felony is good; the same by 5 G. 5, 34, 1 (6), of felonies under the Defence of the Realm Regulations.

By s. 8, every principal in the second degree and every accessory *before* are punishable as principals, but accessories *after* are only liable to two years' imp. w. h. l. (maximum).

Courts-martial] See under *Mutiny*.

See further under *Treason*.

Coercion by husband] See p. 1118.

TREASURE TROVE, CONCEALING,

is a common law misdemeanour: 3 Inst. 133; see *Wreck*. There may be [as in murder] an indictment and conviction before the coroner makes his inquisition, by 50-1 V. 71, 36: 9 Halsbury, 521, citing *Toole,* Ir. R. 2 Ch. 36; 11 Cox C. C. 75: 1867, C. C. R. 'The offence consists in intentional concealment': *ib.*, citing *Thomas and Willett,* L. & C. 313, 1863, where the finder believing the treasure to be brass, sold it as such to two persons, one of whom knew it was gold and the other buyer sold it as gold; this and his denying that he had done so was held evidence of his *knowingly* concealing. 'I am inclined to think,' said Martin B., 'that the first person who conceals the treasure is guilty and not those into whose possession it comes subsequently. If, therefore,' here the finder 'had known that the treasure was gold, I should have doubted whether the prisoners could have been convicted.'

Not, 'it seems,' triable at Q. S., being 'an offence against the prerogative of the King': *ib.*, *s.*

TREATING.

See under *Bribery*.

TREES, &c.—OFFENCES RELATING TO.

Stealing, &c.] By 6-7 G. 5, 50, 8 (2): Whoever 'steals, or with intent to steal, cuts, breaks, roots up, or otherwise destroys or damages the whole or any part of any tree, sapling, or shrub, or underwood, growing (*a*) in any place whatsoever, the value of the article stolen or the injury done being to the amount of one shilling at the least, after two previous summary convictions of any such offence; or (*b*) in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, the value of the article stolen or the injury done exceeding the amount of one pound; or (*c*) in any place whatsoever, the value of the article stolen or the injury done exceeding the amount of five pounds; (3) Steals, or with intent to steal, destroys or damages any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse, or conservatory, after a previous summary conviction of any such offence, shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny.' For the meaning of the words 'adjoining' or 'belonging to,' see *Hodges*, 1829. A pear tree was held not to be 'fruit or vegetable production.'

'*Cut or otherwise destroy*'] in a rpd. s. There was no destruction where there was not 'absolute and positive ruin' of the plant; though it was very much bruised, there was no evidence whether it died or not from the injury and so none of destruction. *Boucher*, 5 Jur. 709, 1841.

See also *Arson*.

Hopbinds] By 24-5 V. 97, 19: 'Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops shall be guilty of felony': maximum punishment, penal servitude for fourteen years; and, if a male under the age of sixteen years, a whipping.

Ss. 20-3 seem to cover the same ground as s. 8 (2), (3), above, in respect of *damage* without stealing or intent to steal; s. 23 has 'with intent to destroy,' and corresponds to (3), above.

Where a tenant the night before the expiration of his tenancy cut down trees, and perhaps the jury found that he believed that he had a right to do so, the C. C. A. would not say that if the jury did not negative malice (under s. 20, which says 'maliciously'), there could not be a conviction. *Rutter*.

See, generally, under *Malicious Injury, II.*

Value] The actual injury to the trees *themselves*—without 'consequential' damage—must be to the value mentioned in the s. Where, therefore, there was an indictment for having done damage to trees in a hedge amounting to more than 5*l.*, and it appeared that the injury to the trees themselves amounted to 1*l.* only, but that it would be

necessary to stub up the old hedge and replace it, the expense of which would be 4*l.* 14*s.* *more,* the conviction was held to be wrong. *Whiteman,* D. & P. C. C. 353; 23 L. J. M. C. 120; 6 Cox C. C. 370, 1854: c. q.

It is sufficient to prove that the aggregate value of trees damaged at one time, *i.e.* in one practically continuous transaction, amounts to the statutory value. *Shepherd,* L. R. 1 C. C. R. 118; 37 L. J. M. C. 45; 11 Cox C. C. 119, 1868, under a s. now replaced by 8 (2) *c,* above: c. q. Cf. *Jones,* 1830.

See also *Fixtures* and *Vegetable Produce.*

TRESPASS

'is a wrongful act of commission done in disturbance of the possession of property of another or against the person of another against his will. . . . Certain trespasses are both actionable and criminal': 27 Halsbury, 844-5. It is, however, extremely rare for both forms of prosecution to be employed in respect of the same acts.

TRUSTEES, FRAUDS BY.

Definition] By 6-7 G. 5, 50, 46 (1): 'The expression 'trustee' means a trustee on some express trust created by some deed, will, or instrument in writing, and includes the heir, or personal representative of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official receiver, assignee, liquidator, or other like officer acting under any present or future Act relating to joint stock companies or bankruptcy.'

'The object of the proviso ['in writing'] was to prevent implied trusts being included in the penal provisions of the [rpd.] A.': *per* nine judges, *Fletcher*, 31 L. J. M. C. 206; 9 Cox C. C. 189; 8 Jur. N. S. 649; 6 L. T. 545; 10 W. R. 753, 1862: C. C. R.: there defendant was secretary, treasurer and trustee of a savings bank under the rules of the society, 'the written instrument'; the fact that under the rules he had in one capacity to receive money from himself in another did not prevent his being a trustee.

Conversion] By s. 21: 'Every person who, being a trustee, as' above 'defined, of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, with intent to defraud, converts or appropriates the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise disposes of or destroys such property, or any part thereof, shall be guilty of a misdemeanour, and on conviction thereof liable to penal servitude for any term not exceeding seven years.' A proviso follows, that no prosecution under this s. shall be commenced (*a*) without the sanction of the Attorney-General, &c.; (*b*) 'by any person who has taken any civil proceedings against such trustee without the sanction also of the court or judge before whom such civil proceedings have been had or are pending.'

For 'property,' see under *Larceny*.

A trader gave his bankers against an advance, a hypothecation-letter of goods consigned to him, with the endorsed bills of lading; these he obtained to get delivery *for the bank*, but he converted the goods to his own use and did not repay the bank. Day J. held that he was within (a s. which is now) this s. *Townshend*, 15 Cox C. C. 466, 1884.

This s. is not subject to s. 45.

Evidence] This s. is subject to s. 43 (2), (3).

A debtor's statement of affairs under (now) 4-5 G. 5, 59, 14 (1), and Rule 189 (of 1915), is not within s. 166 on a charge under this s. *Pike*, 1902, 1 K. B. 552; 71 L. J. K. B. 287; 86 L. T. 205; 20 Cox C. C. 164: C. C. R.

When there was an admission by a trustee under a will before a similar disclosure on oath in a county court, within 24-5 V. 96, 85,

he was not allowed the benefit of that s. at the trial: *J. S. Oliver*, 3 Cr. A. R. 246, 1909. See also *G. Davies*, 1913.

Indictment] It is sufficient to allege 'trustee' without more: *Piper*, 65 J. P. 10, 1901.

Not triable at Q. S.: s. 38 (1), *b*.

See also s. 86 of 24-5 V. 96.

TUMULTUOUS DISTURBANCE.

See *Riot, Rout* and *Unlawful Assembly*.

Petitioning] 13 Car. 2, st. 1, c. 5, s. 1 (2), is conveniently summarised 9 Halsbury, 470: 'Any one is guilty of a misdemeanour who repairs to the King or to both or either of the Houses of Parliament upon pretence of presenting or delivering any petition, &c., accompanied with an 'excessive' number of persons, or at one time with more than ten persons'; maximum penalty, one hundred pounds' fine and three months' imprisonment.

Certain restrictions on petitioning the Crown, &c., in the same s. have never been acted on, are obsolete and 'only unrepealed . . . because forgotten.' *Craies*, Statute Law, 2nd edn., p. 362. So *Stephen*, Dig. Cr. L. xxxi. 1st edn. Triable in K. B., at assizes or Q. S.: prosecution must be begun within six months of the offence; two 'credible' witnesses must prove the charge. In *L. George Gordon*, the Crown contended that defendant had assembled a multitude around the Houses of Parliament to force the repeal of 18 G. 3, 60. The defence argued that this s. was virtually repealed by the Bill of Rights, but this L. Mansfield denied: 2 Dougl. K. B. 592.

Sub-s. 1 of this s.—very much limiting the right of petitioning the Crown or the Parliament, though unrepealed (stated by *Stephen*, Dig. Cr. L. Art. 86)—is certainly 'a dead letter.' Blackstone treated it as operative.

TURNPIKE GATES, INJURIES TO.

By 24-5 V. 97, 34: 'Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate or toll bar, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate or toll bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act of parliament relating thereto, or any house, building or weighing engine erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanour.' For punishment, see s. 51.

UNDUE INFLUENCE, EXERCISING.

See this subject under (i) *Bribery;* (ii) *Coercion by Husband.*

UNLAWFUL ASSEMBLY OR MEETING.

'Any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies amongst the king's subjects, seems properly to be called an *unlawful assembly;* as where great numbers complaining of a common grievance meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests, for no one can foresee what may be the event of such an assembly.' Hawk. P. C. I. 65, s. 9, contesting a narrower definition. 'If persons assemble to obstruct the officers of the law, all parties so assembling are guilty of an unlawful assembly, whether a riot takes place or not,' and if a homicide takes place in consequence, any obstructer may be 'personally responsible': *per* Fitzgerald J., *M'Naughten,* 14 Cox C. C. 576, 1881: Q. B. D. Ir. See *Orton,* 1878. The circumstances which constitute an unlawful assembly were much discussed in *Redford* v. *Birley,* 3 Stark. N. P. C. 76, 1822, where Holroyd J. said an unlawful assembly is where persons 'meet together in a manner and under circumstances which the law does not allow, but makes it criminal in those persons meeting together in such a manner, knowingly, and with such purposes as are in point of law criminal.' He then cited and adopted the language of Bayley J. in *Hunt,* 1820: 'All persons assembled to sow sedition, and bring into contempt the constitution, are in an unlawful assembly'; and also that used by him with regard to drillings; viz.: 'If the object of the drilling is to secure the attention of the persons drilled to disaffected speeches, and give confidence by an appearance of strength to those willing to join them, that would be illegal; or if they were to say, 'We will have what we want, whether it is agreeable to law or not,' a meeting for that purpose, however it may be masked, if it is really for a purpose of that kind, would be illegal. . . . If from the general appearance, and all its accompanying circumstances, it is calculated to excite terror, alarm, and consternation, it is generally criminal and unlawful,' that is, Holroyd J. explains, 'in all those persons who go for purposes of that kind, disregarding the probable effect and the probable alarm and consternation; and whoever gives countenance thereto is amenable as a criminal party.' Alderson B. said that 'any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly,' and the jury should take into their consideration 'the way in which the meetings were held, the hour . . . at which the parties met, and

the language used by the persons assembled, and by those who addressed them'; also 'whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace for . . . the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage.' *Vincent, &c.*, 1839. In order to be unlawful, 'the circumstances of terror' must 'exist in the assembly itself, either in its object or mode of carrying it out'; for if the assembly is for a lawful purpose, and there is no intention of carrying it out unlawfully, the persons composing it would not be guilty of an unlawful or 'tumultuous' assembly, although they knew that their assembly would be opposed, and had good reason to suppose that a breach of the peace would be committed by those who opposed it.

'The Salvation Army,' of above one hundred persons, forming a procession headed by flags and music, marched through the streets of Weston-super-Mare, as they had done previously. They were met by an organised band calling themselves 'the Skeleton Army,' who also were in the habit of parading the streets, and were 'antagonistic to the Salvation Army.' The two bodies met, and, as on several previous occasions, a general fight, and great uproar and disorder ensued. It was held by Field and Cave JJ. that the 'captain' or other 'officers' of the Salvation Army could not be convicted of unlawful assembly. *Beatty* v. *Gilbanks*, 9 Q. B. D. 308; 51 L. J. M. C. 117; 47 L. T. 194; 31 W. R. 275; 15 Cox C. C. 138; 46 J. P. 789, 1882. Cf. *Graham*, 1888; and see *Wise* v. *Dunning*, 20 Cox C. C. 121, 1901.

It was similarly held in another Salvation Army case that in order to prove an unlawful assembly it is not sufficient to show that what is done (procession, &c.) is calculated to and does excite others to a breach of the peace, if the assemblers did not know that their acts would lead to a breach of the peace. *Clarkson*, 17 Cox C. C. 483; 66 L. T. 297; 56 J. P. 375, 1892: C. C. R. As this case was decided purely on the absence of evidence, it is difficult to appreciate its relation to *Beatty* v. *Gilbanks*. It is always a question for the jury: *per* Charles J., *Graham, &c.*, 1888.

Statute] By 57 G. 3, 19, 23, it is unlawful to convene or hold a meeting of more than fifty persons 'in any street, square or open space' in Westminster or Middlesex within a mile of Westminster Hall (except in the parish of St. Paul's, Covent Garden) with the object of petitioning, &c. the crown or parliament 'for alteration of matters in church or state' on any day on which either House is sitting (unless it be a meeting to elect a member of parliament): a meeting in violation of this s. is an unlawful assembly. Whether the exception applies to a meeting to promote a candidature, *quære*. See *Tumultuous Petitioning* and under *Going Armed, Dewhurst, &c.*, where it was further held that everyone who, after becoming aware of unlawful purposes, remains (except to combat them) is guilty of taking part, and that some purposes of a meeting may be lawful and some not, and the same of periods of the meeting.

By 60 G. 3 & 1 G. 4, 1, 1, anyone present at meetings, &c. for the purpose of drilling and military training, without lawful authority, and anyone so drilling or training others is liable to two years' imprisonment or the *latter* offender to seven years' transportation. By s. 2, any justice or constable or peace officer may disperse such

a meeting and arrest anyone present. By s. 7, a prosecution must be commenced within six months 'after the offence committed.'

Judgment was reversed for a defective indictment under s. 1: *Gogarty*, L. R. 1 Ir. Jur. 203; 3 Cox C. C. 306, 1849: Q. B. Ir.: error.

Triable at Q. S.

UNLAWFUL COMBINATION.

See *Oaths.*

UNLAWFUL OATH.

See *Oaths.*

UNLAWFUL SOCIETY.

See *Oaths.*

UNNATURAL OFFENCE.

See *Sodomy.*

UNWHOLESOME FOOD, SELLING.

See p. 630, and some cases under *False Pretences.*

UTTERING, CRIMINAL.

See under *Forgery* and *Coining.*

VAGRANCY.

See *Rogue and Vagabond* and *Living on Immoral Earnings.*

VEGETABLE PRODUCE, OFFENCES IN RESPECT OF.

See under *Arson, Fixtures* and *Trees*. 'Trees, growing crops, fruit and similar vegetable produce are not, while they are still annexed to the land, the subjects of larceny; but it is larceny at common law to take them after they have been severed from the land either by the owner or by any other person, even the thief himself, provided in the case of the thief that the severance and the taking are not one continuous act': 9 Halsbury, 637.

VETERINARY SURGEON, OFFENCES BY.

See *Medical Men*.

VIOLENCE.

See specific titles and Index and 6-7 G. 5, 50, 29 (2).

WAR OFFENCES

(*i.e.* not criminal in time of peace). See under *Treason*.
See 5 G. 5, 8, the Defence of the Realm Consolidation A. 1914, and the amending A. 1915, 5 G. 5, 34; and *Kupfer* and *M*.

WATER, LARCENY OF.

'Water in a pond or running in a channel is, it seems, not the subject of larceny': 9 Halsbury, 643; but that supplied by companies to consumers in the usual way is.

WEAPONS, CRIMINAL USE OF.

See under specific crimes of *Violence*.

WEIGHTS AND MEASURES, OFFENCES RELATING TO.

See under *Cheating* and *False Pretences.*

WILLS, LARCENY OF.

See under *Written Instruments.*

WIRELESS TELEGRAPHY, UNLICENSED.

By 4 E. 7, 24, 1 (3): 'If any person establishes a wireless telegraph station without a licence in that behalf he shall be guilty of a misdemeanour'; maximum punishment *on indictment,* 100*l.* fine or twelve months' imp. w. h. l., and in either case forfeiture of the apparatus.

By (4), search warrants may be issued after 'information on oath,' to inspect and to seize suspected installations.

WITNESS, TAMPERING WITH, &c.

See *Perversion of Justice.* It was not doubted by the K. B. that 'spiriting' away a witness (summoned even by Commissioners of Excise) was a common law misdemeanour: *Steventon* (an attorney) *and others,* 2 East, 362, 1802.

Triable at Q. S.

WOODS, ARSON OF.

See 24-5 V. 97, 16.

WORKMEN, OFFENCES BY.

See *Conspiracies in Restraint, &c.* 'Workman' is defined there and under *Employers*. Cf. pp. 839, 842.

Embezzling, &c. materials] See 17 G. 3, 56, under *Embezzlement*, where it is shown that for certain manufactures and *except* as respects certain other 'manufactures, trades, occupations and employments,' that A. is still alive. Hence s. 1, which for a *second offence* imposes a (maximum) sentence of three months' imp. w. h. l. and a public whipping, still founds a claim to trial by jury.

WORKS OF ART, MEMORIALS OF THE DEAD, &c.—INJURIES TO.

By 24-5 V. 97, 39: 'Whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust, or vase, or any other article or thing kept for the purposes of art, science, or literature, or as an object of curiosity in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, library, or other repository is either at all times or from time to time open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art, in any church, chapel, meeting-house, or other place of divine worship, or in any building belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish or place, or to any university, or college, or hall of any university, or to any inn of court, or in any street, square, churchyard, burial-ground, public garden, or ground, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanour'; maximum punishment, imprisonment for six months, with hard labour, 'and, if a male under the age of sixteen years, with or without whipping.'

WOUNDING.

Statutes] See under *Assault*.

Where the indictment is for *wounding*, it must appear that the skin was broken; a mere contusion is not sufficient. Where prosecutor was struck with a *bludgeon*, and the skin was broken, and blood flowed, Patteson J. said that it was not material what the instrument used was, and held the case to be within a rpd. A. *Payne*, 4 C. & P. 558, 1838. Littledale J. directed an acquittal when it appeared that the skin was not broken or incised: *Anon.*, about 1829, in *Wood*, 1 Moo. C. C. 280; 4 C. & P. 381, 1830. On the strength of that case, where there was (a savage assault but) no proof of an incised wound, the judge told the jury that he was clear that it need not be an incised wound; on verdict of guilty, this was reserved for the judges, who, from the continuity of the skin not being broken, resolved, by a large majority, that there was no wound, and that the conviction was wrong. See also *Moriarty* v. *Brooks*, 6 C. & P. 684, 1834. So 'a scratch is not a wound within the [rpd.] statute; there must at least be a division of the external surface of the body': *per* Parke B., *Beckett*, 1 Moo. & R. 526, 1836. So it was held by Coleridge, Bosanquet, and Coltman JJ., that 'to constitute a wound it is necessary that there should be a separation of the whole skin, and a separation of the cuticle or upper skin only is not sufficient.' *M'Loughlin*, 8 C. & P. 635, 1838. But where a blow given with a hammer broke the lower jaw in two places, and the skin was broken internally, but not externally, and there was not much blood, L. Denman C.J. and Parke J. held this a wounding within another rpd. A. *L. Smith*, 8 C. & P. 173, 1837. Where a heavy hammer, thrown at prosecutor, struck him on the face, and broke the skin for an inch and a half, on a conviction, the judges 'being asked whether the injury was 'a stab' or 'a cut' or a 'wound' within the rpd. A., held that the conviction for *wounding* was right. *Withers*, 1 Moo. C. C. 294; 4 C. & P. 446, 1831. Where prosecutor was struck on the outside of his hat with an air-gun, and the hard rim of his hat driven into his head, but the gun did not come directly in contact therewith, the judges held this to be a wounding within that A. *Sheard*, 7 C. & P. 816; 2 Moo. C. C. 13, 1837. A kick may 'wound': *Duffill*, 1 Cox C. C. 49, 1843.

Throwing vitriol in the face of prosecutor with intent, &c., was held not to be a wounding within that statute, though the jury found expressly that a wound was the result of the act, on the ground that no instrument was used nor an immediate wound produced. *Murrow*, 1 Moo. C. C. 456, 1835. See also *Gray*, 1857.

Cattle] See that title.

PART III.

GENERAL MATTERS OF DEFENCE

OR

IRRESPONSIBILITY FOR CRIME.

For *Infancy*, see under *Children*.

1. MENTAL UNSOUNDNESS.

'It is for the defence to prove insanity, not for the prosecution to prove sanity': *De Vere*, 2 Cr. A. R. 20, 1909; *J. W. Smith*, 1910. So *Ireland*, 4 Cr. A. R. 87, 1910: wounding with intent to cause grievous bodily harm, where defendant did not set up this defence; cf. *Coleman*, 1911; *Abramovitch*, 1912; and *Coelho*, 1914. See p. 283.

Procedure] See *Defence*, Part I. Either the Crown or the defence and, of course, the judge (at common law: *Burton*, 1863, reporter's note) may call evidence of defendant's mental condition; in *Machardy*, 1911, 2 K. B. 1144; 80 L. J. K. B. 1215; 76 J. P. 6; 28 T. L. R. 2; 22 Cox C. C. 614; 105 L. T. 556; 55 S. J. 754; 6 Cr. A. R. 272: arson, insanity was not set up, and though the judge directed the jury against it, they found it; the five judges held that there was no appeal merely against the finding of insanity (nor on a case stated, *H. Taylor*, 11 Cr. A. R. 198, 1915) and stated their opinion that here there was no evidence of insanity and that the proper verdict would have been guilty.

Authorities] 'The defence of insanity is one involving great difficulties of various kinds, and the rules which have occasionally been laid down by the judges with regard to the nature and degree of aberration of mind which will excuse a person from punishment are by no means consistent with each other, or, as it should seem, with correct principle.' This passage appeared in the first edition of this work in 1835, and so before *M'Naughten's case* (and in the 7th, by Stephen J., and other edns. after that case), which has certainly led to greater, if not total, uniformity in the views of the judges. Some advance has undoubtedly been made owing to the progress of science. The standing difficulty is the absence of high authority at once medical and legal. 'Of late years the accumulated result of a careful observation of insane patients in various countries has thrown clearer light upon the mental processes of the insane, and has brought back medical opinion into closer accord with the views of lawyers,' says the latest writer on the subject, *Prof. Kenny*, Outlines of Crim. Law, ch. 4, 1917.

Common law and statutes—classifications] '*Non compos mentis* is of foure sorts:—1 *Ideota,* which from his nativitie, by a perpetuall infirmitie, is *non compos mentis.* 2 Hee that by sicknesse, griefe, or other accident, wholly loseth his memorie and understanding. 3 A lunatique that hath sometime his understanding, and sometime not, *aliquando gaudet lucidis intervallis,* and therefore he is called *non compos mentis,* so long as he hath not understanding. Lastly, hee that by his owne vitious act for a time depriveth himselfe of his memorie and understanding, as he that is drunken.' Co. Litt. 247 *a;* 4 R. 124 *b.* An idiot cannot be received as a witness. Com. Dig. Testmoigne (A. 1), citing Co. Litt. 6 *b.*

The Mental Deficiency A. 1913] The following are 'defectives' 'within the meaning of this Act,' s. 1:—

'(*a*) Idiots, that is to say, persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers;

(*b*) Imbeciles, that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or in the case of children, of being taught to do so;

(*c*) Feebleminded persons, that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision and control for their own protection or for the protection of others or, in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools;

(*d*) Moral imbeciles, that is to say, persons who from an early age display some permanent mental defect coupled with strong, vicious or criminal propensities on which punishment has had little or no deterrent effect.'

Nature of the evidence] It is 'a mistake to suppose that in order to satisfy a jury of insanity, scientific evidence must be adduced.' Insanity may also be inferred from behaviour and other facts in evidence: *per* Brett L.J., *Dart,* 14 Cox C. C. 143, 1878; 88 Sess. Pap. 696: attempt to murder: where there was no medical evidence: not guilty. In *Atherley,* 3 Cr. A. R. 166, 1909, L. Alverstone C.J. thought that 'in view of the nature of the crime' there was 'a great deal to be said in favour of a defence of insanity' (want of motive), but as the jury had rejected it the C. C. A. did not interfere. 'When irresponsibility is raised as a defence it is most important to ascertain the mental condition before and after the commission of the act, and it will be found in more than one case that very pointed questions are asked to find out whether a man knew or did not know what he was doing at the time': *per* L. Alverstone C.J., *Jesshope,* 5 Cr. A. R. 3, 1910: murder.

Cases.

A. *Before* 1843.

Verdict—not insane] Indictment for shooting at L. Onslow; defendant was undoubtedly to a certain extent deranged, and had greatly misconceived the conduct of L. Onslow, but he had formed a regular

WRECK, OFFENCES RELATING TO.

See *Ships* and in Index. At common law, 'he who takes away treasure-trove or . . . a wreck, waif or stray, before they have been seized by the persons who have a right thereto, is not guilty of felony': Hawk. P. C. I. 33, 38.

WRITTEN, &c. INSTRUMENTS, LARCENY, &c. OF.

Valuable securities] By 24-5 V. 96, 27: 'Whosoever shall for any fraudulent purpose destroy, cancel, or obliterate the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature and in the same degree and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security.'

Real property deeds] By s. 28: 'Whosoever shall for any fraudulent purpose destroy, cancel, obliterate, or conceal the whole or any part of any document of title to lands shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude' for three years.

For proviso see s. 29. Larceny is punishable by s. 7 (1) of the Larceny A. 1916, by *five* years' p. s.

Wills] By s. 29: 'Whosoever shall, either during the life of the testator or after his death, for any fraudulent purpose destroy, cancel, obliterate, or conceal the whole or any part of any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony, and being convicted thereof, shall be liable to penal servitude for life.' Then follows a proviso that neither this nor s. 28 is to affect any other 'remedy.'

Evidence—disclosure] The s. concludes: 'but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party

aggrieved, or if he shall have first disclosed the same in any compulsory examination, or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.'

By s. 6 of the Larceny A. 1916: 'Every person who steals any will, codicil or other testamentary instrument either of a dead or of a living person shall be guilty of felony and on conviction thereof liable to penal servitude for life.'

Records, &c.] By s. 30 of 24-5 V. 96: 'Whosoever shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole or any part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order, or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under her Majesty, and being or remaining in any office appertaining to any court of justice, or in any of her Majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for the term of three years; and it shall not in any indictment for such offence be necessary to allege that the article in respect of which the offence is committed is the property of any person.'

Larceny of these documents (omitting 'bill' and 'answer') is punishable by s. 7 (2), (3) of the Larceny A. 1916, with *five* years' p. s.

What instruments are within the statute] At common law, larceny could not be committed of 'chattels real,' and therefore not 'of a box or chest of charters that concern land': *Wody's* case, 9 B. (49 H. 6 *or*) 10 E. 4, p. 14, pl. 9, 1470-1; 'and the box or chest, though it be of great value, yet shall it be of the same nature the charters be of: *et omne majus dignum trahit ad se minus.*' 3 Inst. 109; 1 Hale P. C. 510. See below and cf. *Fixtures*. Thus it was held that stealing a commission, directed to commissioners to ascertain boundaries, was not a felony, the commission concerning the realty. *Westbeer*, Lea. 12; East P. C. 596; 2 Str. 1134, 1739: a modern extension 'to records concerning the land, though not of title': *Wright* on Possession, p. 233, who adds: '*Quære*, whether the rule extends to heirlooms or to copies or counterparts.' But the parchment on which the records of a court of justice are inscribed, if it do not relate to the realty, may be the subject of larceny. *Walker*, 1827, distinguished from *Westbeer*.

Choses in action] 'Bonds, bills, and notes, which concern mere *choses in action*, were also at common law held not to be such goods whereof larceny might be committed; being of no intrinsic value, and not importing any property *in possession* of the person from whom they are taken.' 4 Bl. Com. 234; East P. C. 597. Mortgage deeds, being subsisting securities for the payment of money, are 'choses in action,' and not 'goods and chattels.' Where, therefore, defendant was indicted for stealing 'goods and chattels' in a house, and the

jury found that his intent was to steal mortgage deeds only, c. q. *Powell,* 1852: it was unnecessary to decide whether the deeds savoured of the realty, &c., because being 'subsisting securities for the payment of money they are clearly *choses in action.*' A policy of assurance is a *chose in action. Ex p. Ibbetson, In re Moore,* 8 Ch. D. 519, 1878: C. A.

Paper—Stamps] The value of documents 'as paper or stamps was held to be merged in their evidentiary character.' But this rule is subject even at common law to the limitation that if the document is so intrinsically imperfect as to be inoperative, it is not a chose in action, but is remitted to its material character as a mere paper, parchment or stamp,' and may be stolen. *Wright* on Possession, p. 233.

See *Choses in Action* under *Larceny.*

A pawnbroker's duplicate ticket is a 'warrant for the delivery of goods' or a thing valuable in itself, for which there may be a conviction of stealing. *Morrison,* 1 Bell C. C. 158; 28 L. J. M. C. 210; 8 Cox C. C. 194; 5 Jur. N. S. 604, 1859. It may be so described or as 'a pawnbroker's ticket' or as 'a piece of paper.' A railway ticket, if taken to defraud the company, may be the subject of larceny. *Beecham,* 5 Cox C. C. 181, 1851, where one count charged stealing three pieces of pasteboard, value one penny.

Several counts charged stealing a number of promissory notes, and others stealing so many pieces of paper, stamped, &c. The notes consisted of country bank-notes, which, after being paid in London, were sent down to the country to be re-issued, *with the same stamps,* and were stolen on the road. It was objected that these were no longer promissory notes, the sums of money mentioned in them having been paid, and that depriving the bankers of the privilege of re-issuing them which they possessed, could not be considered as larceny. The judges, however, held that the conviction on the counts for stealing the paper and stamps was good, the paper and stamps, 'particularly the latter,' being valuable to the owners. *Clark,* R. & R. 181, 1810. In a similar case, defendant having been convicted on different counts of stealing valuable securities called promissory notes, and also of stealing so many pieces of paper stamped, &c., the judges held the conviction right. Some of them doubted whether the notes could properly be called 'valuable securities': but if not, they all thought they were goods and chattels. *Vysa,* 1 Moo. C. C. 218, 1829. 'In *Vyse,*' said Jervis C.J. in *Powell,* 1852, at 410, 'the notes had been paid, and though re-issuable, were not at the time of the larceny securities for the payment of money. The paper and stamp on which they were written were, therefore, properly described as goods and chattels.'

If the halves of promissory notes are stolen, they could be described as goods and chattels. *Mead,* 4 C. & P. 535, 1831.

Imperfect instruments] 'In order that the statutes' which have excepted specified instruments from the common law 'shall apply, the instrument must be so far complete and operative as to satisfy the statutory denomination . . . alleged . . .': Wright, p. 234, who points out that in some of the following cases there was no count at common law. A., in answer to an advertisement, asked defendant to raise 500*l.* for him. The latter promised to do so at 6 per cent., and produced ten blank 6*s.* stamps, and procured A. to write across each of them, 'Payable at Messrs. Praed & Co., 189, Fleet Street, London'; A. did not sign his name. Defendant said nothing more, but the

papers were filled up as bills of exchange for 500*l.* each, and put into circulation. It was held by three judges that these stamped papers were neither 'bills of exchange,' nor 'orders for the payment of money,' nor 'securities for money'; and that larceny of the paper and the stamps could not be sustained, they not being the property of A., nor ever (probably) in his possession. *Minter Hart,* 6 C. & P. 106, 1833; see also *Phipoe.* Where defendants were indicted under a rpd. s. for having by blackmailing threats induced prosecutor to sign the following dated document, 'I hereby agree to pay you 100*l.* on the 27th inst. to prevent any action against me,' it was held that, although not negotiable, yet it was a valuable security, because, if the transaction had been genuine, it would have been a valid agreement on which prosecutor might have been sued. *John and wife,* 13 Cox C. C. 100, 1875.

A cheque on a banker, not stamped, has been held not to be a *bill* or *draft,* within the rpd. A., being of no value, nor in any way available. *Pooley; Yates,* 1827. But where defendant was indicted in one count for stealing a cheque, and in another, a piece of paper, he having converted to his own use a cheque belonging to his employers, which was possibly void as a cheque under the then law, it was held that even if the cheque was void, he was properly convicted for stealing a piece of paper. *Perry,* 1 Den. C. C. 69; 1 C. & K. 725; 1 Cox C. C. 222, 1845. See *Walsh,* 1812, and *Metcalf,* 1835; also *Heath,* 1838.

An indictment under s. 27, above, must particularise the kind of valuable security stolen, and any material variance, if not amended, will be fatal. *Lowrie,* L. R. 1 C. C. R. 61; 36 L. J. M. C. 24; 15 L. T. 632; 10 Cox C. C. 388, 1867, where the document was an agreement by defendant that another should receive money due to defendant at some future time; 'an equitable assignment of money when it became due': *per* Blackburn J.

Notice to produce] See that title and *Hunter,* 1829.

'*Fraudulent purpose*'] Warrants of execution, 'process of a court of record,' had issued against defendant, and were in the hands of the bailiff, who remained in possession. Defendant forcibly took the warrants out of his hands and kept them. He then forcibly turned the bailiff out, believing that his authority was gone. It was held he was not guilty of larceny, but of taking with a 'fraudulent purpose' under s. 30; for he had acted as he did in order to deprive the bailiff, as he thought, of his *authority,* and that was in fraud of the execution creditor and in fraud of the law, and constituted a 'fraudulent purpose,' but it was not *animo furandi* nor *lucri causa: per* Cockburn C.J. *Bailey,* L. R. 1 C. C. R. 347; 41 L. J. M. C. 61; 12 Cox C. C. 129, 1872.

Concealment] See that title.

design to shoot him, and prepared the means of effecting it. Tracy J. observed that the defence of insanity must be clearly made out; that 'it is not every frantic and idle humour of a man,' or 'something unaccountable' in his actions, that will 'exempt him from justice and the punishment of the law; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing no more than an infant, than a brute, or a wild beast.' *Arnold*, 1724, 1 Collinson on Lunatics (1812), 475; 16 St. Tr. at 764.

Earl Ferrers was tried by the House of Lords for the murder of his steward. It was proved that he was occasionally insane, and fancied his steward to be in the interest of certain supposed enemies. The steward being in the parlour with him, he ordered him to go down on his knees, and shot him with a pistol, and then directed his servants to put him to bed. He afterwards sent for a surgeon, but declared he was not sorry; and that it was a premeditated act; and he would have dragged the steward out of the bed, had he not confessed himself a villain. Many witnesses stated that they considered him insane, and it appeared that several of his relations had been confined as lunatics. It was contended for the prosecution, 'upon the authorities of Coke and Hale, that complete possession of reason was unnecessary' in order to render a man answerable for his acts; it was sufficient if he could 'discriminate between moral good and evil. As it appeared when he committed the offence he had capacity sufficient to form a design and know its consequences, he was found guilty.' Collinson, *ib.* 477; 19 St. Tr. 885, 1760.

Indictment on July 2, 1812, for shooting at and wounding W. B.; defence, insanity arising from epilepsy. Defendant had been attacked with a fit on the 9th July, 1811, and was brought home apparently lifeless. A great alteration had been produced in his conduct, which became eccentric, and it was necessary to watch him, lest he should destroy himself. The keeper of an asylum deposed that in insanity caused by epilepsy, the patient often imbibed violent antipathies against even his dearest friends, for causes wholly imaginary, which no persuasion could remove, though he was rational on other topics. He had no doubt of defendant's insanity. A commission of lunacy was produced, dated 17th June, 1812, with a finding that he had been insane from the 30th of March. Le Blanc J. concluded his summing up by observing that it was for the jury to determine whether he, when he committed the offence, 'was or was not incapable of distinguishing right from wrong, or under the influence of any illusion in respect of the prosecutor, which rendered his mind at the moment insensible of the nature of the act he was about to commit, since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discovering that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty.' *Bowler*, Collinson, *ib.* 673, *n.*; his execution was said by Alderson B. in *Oxford*, 1840, to be 'very barbarous.'

Indictment for high treason. The defence, made by Mr. Brougham, was insanity. Defendant had been accounted (a witness deposed) from a child a person of very weak intellect, so that it surprised many in his neighbourhood that he had been accepted as a soldier. He had been captured by the French, and had enlisted in the French

Army, displaying considerable deliberation and reason in doing so; thus, he stated to a comrade that it was much more agreeable to be at liberty, and have plenty of money, than to remain confined in a dungeon. The attorney-general in reply, said, that before the defence 'could have any weight in rebutting a charge so clearly made out, the jury must be perfectly satisfied that at the time when the crime was committed the prisoner did not really know right from wrong.' He was convicted. *Parker*, Collinson, *ib.* 477, 1812.

The direction of Mansfield C.J. to the jury in *Bellingham*, 1812, seems not altogether in accordance with the correct rules on the subject—as Campbell A.G. seems to imply in *Oxford*, at 533. The direction was that, 'in order to support this defence, it ought to be proved by the most distinct and unquestionable evidence, that the criminal was incapable of judging between right and wrong. It must, in fact, be proved beyond all doubt, that, at the time he committed the atrocious act, *he did not consider that murder was a crime against the laws of God and nature*. There was no other proof of insanity which would excuse murder or any other crime. Some human creatures were void of all power of reasoning from their birth; such could not be guilty of any crime. There was another species of madness in which persons were subject to temporary paroxysms, in which they were guilty of acts of extravagance; this was called lunacy. If these persons were to commit a crime when they were not affected with the malady, they would be, to all intents and purposes, amenable to justice. So long as they could distinguish good from evil, so long would they be answerable for their conduct. There was a third species of insanity in which the patient fancied the existence of injury, and sought an opportunity of gratifying revenge by some hostile act. If such person were capable, *in other respects*, of distinguishing right from wrong, there was no excuse for any act of atrocity which he might commit under this description of derangement.' Verdict, guilty. Collinson, *ib.* 636; *Shelford* on Lunatics, 2nd ed. (1847) 592. In *Offord*, 5 C. & P. 168, 1831, where there was an acquittal of murder, L. Lyndhurst C.B. expressed his complete accordance with that direction, which, however, 'does not appear to make a sufficient allowance for the incapacity of judging between right and wrong *upon the very matter in question*, as in all cases of *monomania*' (7th edn. of this work by Stephen J.).

Verdict—insane] *Hadfield* was tried before a special commission in 1800 for high treason, in shooting at the king in Drury Lane Theatre on May 15, and the defence was insanity. It was proved that he had been a private soldier in a dragoon regiment, and in the year 1793 received many severe wounds in battle near Lille, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to this country, he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind, and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 11th May, 1800, his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning he suddenly jumped

out of bed, and, alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bedpost, and that God had ordered him to do so; and, on his wife screaming and his friends coming in, he ran into a cupboard, and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day, he used many incoherent and blasphemous expressions. On the morning of the 15th he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. He spoke very highly of the king, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the Society of Odd Fellows; and after repeating his irreligious expressions, left the house and went to the theatre. He sat in his place nearly three-quarters of an hour before the king entered; at the moment when the audience rose on his Majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; when he fired, his situation appeared favourable for taking aim, for he was standing upon the second seat from the orchestra in the pit; he took a deliberate aim, by looking down the barrel as a man usually does when taking aim. On his apprehension, amongst other expressions, he said 'he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer he supposed.' These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that his plan was to get rid of it by other means; he did not intend anything against the life of the king; he knew the attempt only would answer his purpose. His counsel [Erskine] put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for the jury 'to be satisfied that the act in question was the immediate unqualified offspring of the disease. And L. Kenyon held, that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed, yet, there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted,' and he was acquitted accordingly, on the ground of insanity. *Hadfield*, Shelford (as above), 593; 27 St. Tr. 1281; Collinson (as above), 480.

Defendant was indicted for setting fire to York Cathedral. The defence was that he was insane ('he was much under the influence of dreams, and in court he gave an incoherent account of a dream that had induced him to commit the act, commanding him to destroy the cathedral on account of the misconduct of the clergy. Several medical witnesses stated their opinions that he was insane, and that when labouring under his delusion he could not distinguish right from wrong. One surgeon said that such persons, though incapable on a particular subject of distinguishing right from wrong, seek to avoid the danger consequent upon their actions, and that they frequently run away and display great cunning in escaping punishment'—earlier

edns. of this work); he was, perhaps, what is now called a religious mono-maniac, and there were physical reasons why he was not 'right in his head.' The jury acquitted him as insane, though the gaol surgeon thought he had capacity to distinguish between right and wrong. *Martin,* Annual Register, vol. 71, at 23, 301, 1829.

Indictment for treason alleged as an overt act, discharge of loaded pistol at Queen Victoria, the defence being insanity; L. Denman C.J. (with Patteson J. and Alderson B.) said, 'Persons *primâ facie* must be taken to be of sound mind till the contrary is shewn. But a person may commit a criminal act and yet not be responsible. If some controlling disease was, in truth, the acting power within him, which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule. . . . On the part of the defence it is contended that the prisoner . . . was *non compos mentis,* that is (as it has been said), unable to distinguish right from wrong, or in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong.' After remarking 'there may be cases in which medical testimony may be essential, but I cannot agree with the notion that moral insanity can be better judged of by medical men than by others,' L. Denman continued, 'Something has been said about the power to contract and to make a will. But I think that those things do not supply any test. The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind and was really unconscious at the time he was committing the act, that it was a crime.' *Oxford,* 9 C. & P. 525, 1840: 'not guilty —insane.'

Defendant was indicted for shooting at his wife with intent to murder her; counsel set up for him the defence of insanity. He, however, objected to such a defence, asserting that he was not insane; and he was allowed to suggest questions to be put by the judge both to the witnesses for the prosecution and for the defence—and, in fact, put them himself. *Pearce,* 9 C. & P. 667, 1840, where the judge said: 'This case cannot be conducted in two ways—first, by the prisoner's counsel and then by the prisoner himself.' Verdict: 'Not guilty on the ground of insanity.'

B. 1843.

Opinions of the judges] In consequence of the acquittal in 1843, at the Central Criminal Court, of *Daniel M'Naughten,* on the ground of insanity, for shooting Mr. Drummond, certain questions of law were propounded by the House of Lords to the judges. There was no case pending before the House, but no doubt was expressed in debate that the House has the right to call on the judges to give their opinions on abstract questions of law. 8 Scott's N. R. 595; 1 C. & K. 131; 10 Cl. & F. 200; 4 St. Tr. N. S. 926; Kenny Crim. Cas. 43; the *trial* is only reported in 4 St. Tr. 847 and 1 Townsend Mod. St. Tr. 314.

The following were the questions and answers:—

Tindal C.J.—'My lords, her Majesty's judges (with the exception of Mr. Justice Maule, who has stated his opinion to your lordships), in answering the questions proposed to them by your lordships' house, think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions, from

the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and, as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing arguments of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordships' questions.

They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your lordships; and as they deem it unnecessary, in this peculiar case, to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your lordships.

The first question proposed by your lordships is this: What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

In answer to which question, assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law—by which expression we understand your lordships to mean the law of the land.

Your lordships are pleased to inquire of us, secondly: What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence? And, thirdly: In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed? And, as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved, that at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put

generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your lordships have proposed to us is this: If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?

To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your lordships is: Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time? In answer thereto, we state to your lordships that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.'

For a detailed criticism of these opinions, see *Mercier* on Criminal Responsibility (1905), c. viii.

Maule J.—'I feel great difficulty in answering the questions put by your lordships on this occasion:—First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable

to every possible state of facts not inconsistent with those assumed in the questions; and this difficulty is the greater, from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases; secondly, because I have heard no argument at your lordships' bar or elsewhere on the subject of these questions, the want of which I feel the more, the greater is the number and extent of questions which might be raised in argument: and, thirdly, from a fear, of which I cannot divest myself, that, as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal trials. For this reason I should have been glad if my learned brethren would have joined me in praying your lordships to excuse us from answering these questions; but, as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have mentioned, fearing that my answers may be as little satisfactory to others as they are to myself.

The first question, as I understand it, is, in effect, What is the law respecting alleged crime, when, at the time of the commission of it, the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for their solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done; and therefore request to be permitted to answer the question only so far as it comprehends the question whether a person, circumstanced as stated in the question, is for that reason only to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding; and I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as to render him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which devolves or is necessarily connected with such an unsoundness, this is not a matter of law, but of physiology, and not of that obvious and familiar kind as to be inferred without proof.

Second, the questions necessarily to be submitted to the jury are those questions of fact which are raised on the record. In a criminal trial the question commonly is, whether the accused be guilty or not guilty; but, in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made it convenient to direct their

attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the judge—a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if, on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject.

Third, there are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

Fourth, the answer which I have given to the first question is applicable to this.

Fifth, whether a question can be asked, depends, not merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has been present and heard the witnesses; these circumstances, of his never having seen the person before, and of his having been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful, though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect.

Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence, it is to be considered whether that is enough to sustain the question. In principle, it is open to this objection, that, as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence, most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, was received in the case of *The Queen* v. *M'Naughten*, tried at the Central Criminal Court in March last, before the Lord Chief Justice, Mr. Justice Williams, and Mr. Justice Coleridge, in which counsel of the highest eminence were engaged on both sides; and I think the course and practice of receiving such evidence, confirmed by the very high authority of these judges, who not only received it, but left it, as I understand, to the jury without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of parliament.'

C. 1843—1908.

For the meaning of 'delusions,' see *Burton*, 3 F. & F. 772, 1863; *Townley, ib.* 839, 1863. The headnote of the former is: 'The delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility are delusions of the senses, or such as relate to facts or objects—not mere wrong notions, or impressions of a moral nature; and the aberration must be mental, not moral, to affect the *intellect* of the individual. It is not enough that they show a diseased or depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong being still, although it may be perverted, yet not destroyed. And the theory of a moral insanity, or insanity of the moral feelings, while the sense of right and wrong remains, is not to be reconciled with the legal doctrine on the subject.' This is a fair summary of Wightman J.'s remarks and summing up which, with the learned reporter's comments, should be read as representing the state of thought on the subject at the time. Defendant, who was eighteen, murdered a child without any apparent motive except (it was said) a desire to be hanged. He was executed, having previously acknowledged his responsibility.

'The questions put to the judges had reference only to the effect of insane delusions and insane ignorance': *Prof. Kenny*, as above.

The progress of science since 1843 has, according to this authority, taken the direction of 'conferring immunity from criminal responsibility' on those forms of insanity which 'affects not only men's beliefs, but also, and, indeed, more frequently, their emotions and their wills. . . . The result has been that though the doctrines laid down in the judges' answers . . . remain theoretically unaltered, the practical administration of them has been such as to afford a wider immunity than their language would at first sight seem to recognise. For many forms of insanity, which do not in themselves constitute those particular defects of reason which the judges recognised as conferring exemption from responsibility, are now habitually treated as being sufficient evidence to show that one or other of those exemptive defects was also actually present.'

'How far an insane impulse to do an act is to be regarded as affecting the criminal responsibility for doing it is a question which is not yet definitely settled.'

Of 'the legal effect of kleptomania it is impossible to speak with certainty, as there seems to be no reported case in which any judge of assize has dealt with this subject.' 'The more novel subject of hypnotism has not yet become a subject of judicial consideration in this country at all.' *Ib.*

D. *Since* 1908—*The Court of Criminal Appeal.*

The following cases may be noticed:—

Temporary insanity] 'is not known to English law': *per* Darling J., *E. Harding*, 1 Cr. A. R. 223, 1908.

This must not be confused with

Partial insanity] of which 'the existence is recognised both in the criminal law (*Macnaghten*, 10 Cl. & F. 209-11; *E. Ferrers*, at 947) and after strenuous denial in the civil law': 19 Halsbury, 396. In

E. Ferrers, Yorke S.-G., giving a summary of Hales, said, 'If there be a total permanent want of reason it will acquit the prisoner. If there be a total temporary want of it, when the offence was committed, it will acquit the prisoner'; this is perhaps in conflict with the dictum of Darling J. in *Harding,* above—'but if there be only a partial degree of reason, not a full and complete use of reason but . . . a competent use of it, sufficient to have restrained those passions which produced the crime, if there be thought and design . . . then the judgment of the law must take place.'

Mental affection short of insanity] may reduce murder to manslaughter: *Meade,* 1909, which see under 2, below.

Eccentricity] is not a ground for mitigating sentence: *F. R. King,* 2 Cr. A. R. 306, 1909: appellant inheriting 'brain trouble'; nor mere *neurasthenia: Gee,* 3 Cr. A. R. 268, 1909.

Feeble-mindedness] not amounting to insanity, may mitigate sentence: *McQueen,* 8 Cr. A. R. 89, 1912: housebreaking; but does not in law alter the amount of provocation necessary to reduce murder to manslaughter: *T. Alexander,* 1913; *Lesbini,* 24 Cox C. C. 516; 11 Cr. A. R. 7, 1914.

In *V. Jones,* 4 Cr. A. R. 207, 1910: murder, the C. C. A. said: 'Neither the letter [written after the act] nor the other facts adduced were sufficient to prove insanity existing at the time of the crime, yet the evidence did show that the appellant was to a certain extent off his mental balance; the statements which from time to time he had made about his health and his desire to throw himself under motor-cars, and other circumstances of that sort, pointed to some kind of mental infirmity. But all these matters taken together fall short of such proof of insanity as would justify us in saying that the jury were wrong in finding' guilty. 'It is enough to say that appellant knew the nature and quality of the act which he did. . . . There seems to have been some evidence of mental infirmity and of a partial unhingeing of the mind. . . . It is not made out in this case that appellant was not in a condition to be aware of the nature of his act or that he was prevented from exercising self-control.'

'*Impulsive' insanity—irresistible impulse*] was described by the C. C. A. in *F. Thomas,* 7 Cr. A. R. 37, 1911: murder, as the last refuge of a hopeless defence. The same judge who said that directed a jury to find the special verdict where the prison doctor said the case was 'unique' in his experience; defendant 'suffered from impulsive homicidal mania, which was very rare indeed; also from suicidal mania and claustrophobia': *Hay,* 22 Cox C. C. 268; 75 J. P. 480, 1911. But he, 'independently of any impulse, 'did not know the quality' of his act': Kenny, as above; see 155 Sess. Pap. 337. See *Mercier,* Crim. Responsibility, p. 128; cf. *Loake,* 1911; *Harper,* 9 Cr. A. R. 41, 1913. 'In England,' Prof. Kenny, as above, p. 56, 'the balance of authority is' against acknowledging 'irresistible impulse as being a sufficient defence,' though elsewhere this is admitted, 'even when accompanied by a knowledge that the act was wrong. . . . Judges have held—cf. Bray J. in *R.* v. *Coelho,* in 1914 (10 Cr. A. R. at p. 212 [30 T. L. R. 535])—that an insane impulse, even when uncontrollable, affords no defence,' citing *Burton,* 1863. In *Aughet,* the C. C. A. said this defence was 'unknown in English law': 13

Cr. A. R. 106, 1918. In *F. R. Holt*, 15 Cr. A. R. 10, 1920, an attempt was made, by way of this defence, to attack the *McNaughten* doctrine, but the C. C. A. did not accept the argument.

Delusions] See *T. Gilbert*, below.

Kleptomania] 'one form of insane impulse': Kenny, cited above; a similar defence is 'unconscious automatism, as in sleep-walking or epilepsy': *ib.* For a case of *epilepsy*, see *H. Perry*, 14 Cr. A. R. 48, 1919.

Rules in McNaughten's *case*] The only case in which some of the rules in *McNaughten* have been judicially discussed is *G. Codere*, 12 Cr. A. R. 21, 1916. There defendant was admittedly 'abnormal mentally,' having 'a mind of very inferior quality.' He openly made arrangements for murdering a man, by whose death he could conceal certain defalcations, the persons to whom he told his intention not taking him seriously, and some not believing him 'responsible.' He murdered the man; the only defence was insanity. In the C. C. A. L. Reading C.J. said: 'Mr. Foote [K.C.] has addressed an argument to us based on *M'Naghten's case* . . . which in substance resolved itself into this, that we must assume that when the law says that the question is whether the accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, we must read 'nature' to have reference to the physical act and 'quality,' to refer to the morality of the act, and that therefore the jury should be asked if he knew he was doing wrong. The argument advanced is that the judge ought to tell the jury that 'quality' means 'Did the accused person know that the act was immoral?' and when one stops and asks the meaning of 'immoral' we get to the first of the difficulties which faced Mr. Foote.

It is said that 'quality' is to be regarded as characterising the moral as contrasted with the physical aspect of the deed. The court cannot agree with that view of the meaning of the words* 'nature and quality,' by which the judges were only dealing with the physical character of the act, and were not intending to distinguish between the physical and moral aspects of the act. That is the law as it has been laid down by judges in many directions to juries and as the court understands it to be at the present time.

We then come to the second branch of the test, namely, if he knew the physical nature of the act, did he know that he was doing wrong? Mr. Foote has argued that it is not enough that he knew the act was contrary to law, and punishable by law, and that even if he did know that when killing' the deceased, 'yet the jury ought to have been told that they must find a special verdict . . . unless they came to the conclusion that he knew that the act was morally wrong. The question of the distinction between morally and legally wrong opens wide doors. In a case of this kind, namely, killing, it does not seem debatable that the appellant could have thought that the act was not morally wrong, judged by the ordinary standards, when the act is punishable by law and is known by him to be punishable by law. . . . It is conceded . . . that the standard to be applied is, whether according to the ordinary standard adopted by reasonable men the act was right or wrong'; the learned judge cited the judges' 2nd and

* Dr. Kenny interprets this: 'these two words are mere synonyms,' p. 54 n.

3rd answers: 'once it is clear that the appellant knew that the act was wrong in law then he was doing an act which he was conscious he ought not to do, and as it was against the law, it was punishable by law; assuming, therefore, that he knew the nature and quality of the act, he was guilty of murder. . . . The difficulty no doubt arises over the words, 'conscious that the act was one which he ought not to do,' but looking at all the answers in *M'Naghten* . . . it seems that if it is punishable by law it is an act which he ought not to do, and that is the meaning in which the phrase is used in that case. There may be minor cases before a court of summary jurisdiction where that view may be open to doubt, but in cases such as these the true view is what we have just said.' See also *F. R. Holt*, 1920.

The Court of Criminal Appeal has therefore not advanced beyond *M'Naghten*.

'*Disease of the mind*'] In *Fryer*, 24 Cox C. C. 403, 1915: murder without apparent motive, Bray J., after expounding 'the recognised law,' added, 'I am bound to say it does not seem to me completely to state the law as it now is, and for the purpose of to-day I am going to direct you in the way indicated by a very learned judge, Fitzjames Stephen [2 Hist. Cr. L.] . . . that, if it is shown that defendant is in such a state of mental disease or natural mental infirmity as to deprive him of the capacity to control his actions, I think you ought to find him what the law calls 'insane,' because it seems to me, if there is such a disease of the mind, not caused by any accident, but an actual disease of the mind, such as to deprive him of the capacity of controlling his actions, in my opinion a jury should find him insane, if that is shown to have existed at the time of doing the act': special verdict.

Apparently, incapacity to control one's actions is the same thing as *Irresistible Impulse*, which see.

Relation between medical and legal views] The reasoning of a scientific alienist cannot be reproduced here, but the conclusions of Dr. Mercier, *ib.*, may be conveniently quoted.

'1. Some persons are so deeply and completely insane or idiotic that we are not warranted in punishing them for any offence they may commit.

2. The majority of insane persons are sane in a considerable proportion of their conduct; and when in this part of their conduct they commit offences they are rightly punishable. It is a question for the jury whether the insanity did or did not influence the conduct.

3. Since the limits between the sane and the insane areas of conduct of insane persons are ill defined, no insane person should be punished with the same severity that would be awarded to a sane person for the same offence.

4. The foregoing propositions apply to persons who are insane in the ordinary sense, that is to say, who, whether deluded or not, exhibit intellectual defect or disorder. All such persons will be as completely or partially exonerated from punishment as justice requires, if the test is satisfied that they did not know the nature and quality of the act, and that it was wrong, provided that this knowledge includes knowledge and appreciation of the circumstances in which the act was done; and provided also it is held in mind that knowledge is a matter of degree, and that a person may know his act is wrong without knowing how wrong it is.

5. The test of ignorance will not suffice in cases of moral insanity and moral imbecility as hereinbefore defined.* It can scarcely be contended that morally insane persons should be completely exonerated from punishment for offences done to satisfy morbid desire. It does not, however, appear just to punish them with full severity. Although they are not exonerable under the test of insanity at present in force, yet, when the facts are brought before the judge, the punishment is usually in practice mitigated. It seems desirable that the state of moral insanity should be recognised as a morbid state and the practice made universal in such cases.

6. The test of ignorance will not suffice to exonerate moral imbeciles from the penal consequences of their offences. Yet it is repugnant to the sense of justice to punish persons who, it is clear, are morbidly constituted and on whom punishment has no deterrent effect. It seems desirable that the state of moral imbecility should be recognised as a morbid state and that, when proved to exist, the subject of it should not be convicted as an ordinary criminal, but should be relegated to special treatment, directed to the removal of his disability.'

In *T. Gilbert,* 1914, where the C. C. A. substituted a verdict of insanity, which the jury had rejected, it was expressly alleged that the legal and the medical views in this case differed, and Horridge J. is reported thus, 11 Cr. A. R. 24: 'Two defences appear to me to have been possible, (1) that the delusion was that he was committing the act in self-defence, (2) that delusions are evidence of general insanity. I think that there was medical evidence in support of both defences.'

The McNaughten *rules*] 'An incapability as great as this [cutting off the head of a sleeping man to witness his surprise when he should awake] of estimating degrees of wrongness of acts is no doubt rare, but less degrees are very frequent, especially among those who are insane in various degrees or mentally deficient. It is this inability that vitiates the famous doctrine laid down by the judges in 1843 in respect to the responsibility of madmen. The madman is responsible, they say, if he knows the nature and quality of the act, and that it was wrong. This supposes that there is not only a sharp and unmistakable division between right and wrong acts, but also that there is but one degree of rightness and wrongness. According to the dictum an act is right or wrong, and there's an end on't; but this is a very crude and imperfect view.' *Mercier,* Crimes and Criminals, 1918, c. 2, p. 58.

* 'In neither is there necessarily or usually any intellectual defect. Moral insanity is a perversion of feeling and conduct leading to vicious or criminal acts in those who have previously lived upright and reputable lives. The criminal acts are themselves often of morbid character, but are pursued furtively and with precautions against detection. Moral imbecility is an original defect of character displayed from an early age and consists in inability to be deterred by punishment, however severe, certain and prompt, from wrongful acts. The wrongful acts are often done openly and without concealment,' p. 204. See 3-4 G. 5, 28, 1 *d.*

E.

Summary of the present law] 'English law divides, and would seem to be fully justified in dividing, insane persons into two classes:—

(*a*) Those lunatics over whom the threats and prohibition of the criminal law would exercise no control, and on whom, therefore, it would be gratuitous cruelty to inflict its punishments; and

(*b*) Those whose form of insanity is only such that—to use Lord Bramwell's apt test—'they would not have yielded to their insanity if a policeman had been at their elbow.'

But the very difficult practical question where the line of demarcation should be drawn between the two classes, is one upon which the views of English judges have undergone grave, though gradual, changes, and even now cannot be said to have developed into a complete or even a perfectly stable form.' *Kenny*, Outlines (1917), c. iv. See, for instance, *J. W. Smith*, 1910.

2. INTOXICATION.

a. *Amounting to insanity*] 'The legal aspects of intemperance are very involved. Till recently it was generally held that drink was no excuse for crime. This doctrine must now, however, be modified; and it is held that total deprivation of self-control, or at all events delusions induced by excess, as in *delirium tremens*, renders an individual irresponsible for his actions.' *Taylor*, Medical Jurisprudence, 6th ed. (1910), p. 897 foll. The older doctrine here mentioned goes back at least as far as Coke (4 R. 125 *a*), but was already modified in Hale's time, as the following on '*voluntary* and contracted madness (*dementia affectata*)' shows:—'Altho the *simplex* phrenzy occasion'd immediately by drunkennesse, excuse not in criminals, yet if, by one or more such practices, an *habitual* or fixed phrenzy be caus'd, tho this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caus'd puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first.' 1 Hale P. C. 32. For practically the same statement of the law in 1823, see 3 Paris and Fonblanque, Medical Jurisprudence, pp. 139-40, and *Dey* and other cases there cited.

It was held by Park and Littledale JJ. that *Grindley*, 1 Russ. Cri. 88 *b*, 1819, is not law, otherwise 'there would be no safety for human life'; there he ruled that 'though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated' was 'a circumstance proper to be taken into consideration,' *Carroll*, 7 C. & P. 145, 1835; but *Grindley*, the earliest modern *case* mitigating the old strict view, was not disapproved by the C. C. A. in *Meade*, 1909. Where it is essential to prove the intention with which the act is done, the jury may find that defendant was so drunk as not to be capable of forming *any* intention whatever,' and may acquit him: *per* Patteson J., *Cruse;* and by Coleridge J., *Monkhouse*, 4 Cox C. C. 55, 1849, which seems to be what Holroyd J. had said. Where defendant, 'in liquor,' stabbed a man with a fork, Alderson B. said, 'If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous weapon is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party.' *Meakin*, 7 C. & P. 297, 1836. In *Thomas*, 1837, a similar case, Parke B. said, 'Drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. So where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous deter-

mination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse.' In *Hopper,* 1915, besides drunkenness, there were a recent fight, a threat, insubordination, and perhaps a menace with a bayonet. In *Letenock,* one ground allowed for mitigation was that defendant was so drunk that he supposed that violence was about to be used on him; see b., below.

Where defendant was tried for attempting to commit suicide, she at the time being so drunk that she did not know what she did, Jervis C.J. held that negatived the *intent* to commit suicide. *Moore,* 3 C. & K. 319, 1852.

A disease of the mind caused by drunkenness—such as *delirium tremens,* though only temporary—relieves from criminal responsibility. Drunkenness is 'one thing' (and no excuse), 'and the diseases to which drunkenness leads are different things': *per* Stephen J., *Davis,* 14 Cox C. C. 563, 1881. Day J. in *Baines* (the *Times,* January 25, 1886) is reported to have expressly dissented from the view that, to excuse, the mental affection must be permanent, and 'said it was immaterial whether the mental derangement was permanent or temporary so long as it prevented prisoner from knowing the nature and moral quality of his acts.' *Wood Renton* on Lunacy (1896), p. 912. See p. 1098.

b. Not amounting to insanity.

Cases in the C. C. A.

Mitigation of sentence] See *Drunkenness* under *Sentence.*

It by no means follows that sentence is mitigated on this ground: *Stennett,* 4 Cr. A. R. 148, 1900: neglect of children.

Habitual drunkards] See *Briggs* and *F. Prince.*

Murder] In *T. Meade,* 1909, 1 K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 25 T. L. R. 359; 53 S. J. 378; 2 Cr. A. R. 47, 54, the court said: 'It is not expedient to confer upon voluntary drunkenness a wider immunity than the partial immunity it has enjoyed since 1819. . . . The presumption that everyone intends the natural consequences of his acts, may be rebutted in the case of a man who is drunk by shewing his mind to have been so affected by the drink . . . that he was incapable of knowing that what he was doing was dangerous. . . . If this be proved, the presumption that he intended to do grievous bodily harm may be rebutted.' The language of the judge at the trial 'did not vary from the true rule, and it did not imply that short of insanity drunkenness could not reduce murder to manslaughter.' So in *Scholey,* 1909, 'deliberate acts, whether done by a sober or a drunken man, constitute murder, not manslaughter.' It is for the jury whether defendant was so drunk as to be unable to form an intention: *Mowbray,* 8 Cr. A. R. 8, 1912. Nothing but inability to distinguish between right and wrong is a defence to murder: *Galbraith,* 8 Cr. A. R. 101, 1912. So *Bentley,* 1913. See *A. Beard,* 1920, below.

Manslaughter] See *Jones,* 1870, and last paragraph.

Larceny] In *W. Chapman,* 4 Cr. A. R. 54, drunkenness was set up as a defence at the trial, but the C. C. A. 'was not aware that this defence had ever been applied to' larceny.

Provocation] Perhaps less is required to reduce to manslaughter in the case of a drunken person: *T. Mason,* 1912: murder; *Letenock,* 1917.

Corroboration] A statement by a drunken defendant may be corroboration: *Hedges,* 1909.

Summary] 'Drunkenness,' says *Kenny,* Outlines Cr. L. c. 4, 1917, 'is ordinarily no excuse for the commission of a criminal act; even though it have produced for the time great aberration of mind. For, unlike insanity, it has been produced voluntarily, and to produce it was wrong, both morally and legally. Accordingly, the law will not allow one wrong act to be an excuse for another. . . . Though drunkenness is thus no excuse for a guilty state of mind, it often affords a defence for an *actus reus* by being evidence that no guilty state of mind existed. For intoxication may cause—even on grounds slighter than could reasonably lead a sober person to the same erroneous conclusion—a mistake of fact such as is incompatible with *mens rea.* The drunken man fancies some one else's umbrella to be his own; or takes an innocent gesture to be an attempted assault and hits back in supposed self-defence. (*Gamlen,* 1 F. & F. 90 [1858: assault]: n. g.) Or, although some *mens rea* does exist, the misapprehension caused by drunkenness may preclude a more aggravated form which, at first sight, appears to have existed. The man did strike his enemy unjustifiably, but was so drunk as to be incapable of realising how fatally excessive was the number of blows he inflicted, and how dangerous was the weapon he used . . . (*Meade; Griffiths,* 1913 [unreported])': thus reducing the crime, *e.g.* from murder to manslaughter.

The law was finally settled by the House of Lords in *A. Beard,* 14 Cr. A. R. 159, 1920, where a conviction of murder, the C. C. A. having substituted that of manslaughter, 14 Cr. A. R. 110, was restored. Birkenhead C. delivered the judgment of an exceptionally strong house, reviewing all the previous cases. According to the headnote:—

Insanity, whether produced by intoxication or otherwise, is a defence to a criminal charge.

When a specific intent is a necessary ingredient of the offence charged, the jury may take into consideration evidence going to show that the defendant was so intoxicated as to be unable to form such intent.

Evidence of intoxication falling short of such incapacity, though it may establish a more ready tendency to some violent passion (than if defendant were sober), does not rebut the presumption of the existence of an intent to produce the natural consequences of his acts.

There is an essential difference between a defence founded on insanity and one founded on intoxication, and in a direction to a jury care must be taken to distinguish between the tests in each case respectively, and in the latter there should be a distinct warning that there is no plea of insanity, and except on that plea, the question whether defendant knew that he was doing wrong is irrelevant.

It follows that the true rule in *Meade,* 1909, is narrower than that accepted by the C. C. A.

3. COERCION BY HUSBAND.

In certain felonies a *married* woman is privileged from punishment, on the ground of the actual or presumed command and coercion of her husband compelling her to the commission of the offence: *Hughes*, 1813, below. The presumption 'extends to most felonies, *e.g.* to burglary, larceny, forgery': *Kenny*, Outlines, ch. 4, who adds in a note, 'Kel. 31. In 1891, Cave J. allowed this exemption in a case of arson.' That learned writer thinks 'the exact line of demarcation has not yet been drawn.' 'But this [joint larceny with husband] I take to be only a presumption till the contrary appear, for I have always thought that if upon the evidence it can clearly appear that the wife was not drawn to it by her husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband . . . tho *primâ facie* the wife cannot be guilty of larceny, no nor of burglary, where the husband is partly in the fact (tho she may be guilty of murder or manslaughter jointly with her husband), and therefore *primâ facie* the wife in such case must be acquitted, yet for my part I think the circumstances may be such that the wife may be as well guilty in larceny or burglary as her husband.' 1 Hale P. C. 516. 'The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton's time, if the wife was voluntarily a party to the . . . crime, her coverture furnished no defence': citing Bracton, Bk. 3, c. 32 [10 De Legibus, Tr. II. or De Corona, 151 *b;* 2 Rolls Transln. p. 519]; decisions 'how far the mere presence of the husband' furnishes the presumption 'have not been entirely uniform': *per* L. Halsbury C., *Brown* v. *A.-G. of New Zealand*, 1898, A. C. 234; 18 Cox C. C. 658: P. C. 'In one case it appears to have been held by all the judges, upon an indictment against a married woman for falsely swearing herself to be next of kin, and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath,' *Dicks*, 1 Russ. Cri. 97, 1817. Mere preconcert, 'collusion,' does not rebut the presumption; in fact it may support it: *H. Caroubi*, below: larceny: c. q. So where a wife enticed a man to a spot where the husband feloniously wounded him, for which both were indicted as principals, and it was expressly found that she took no part in the violence and acted under coercion, c. q.: *S. and S. Smith*, D. & B. 553, 1858.

Proof of marriage] A man and a woman had lived together and passed for man and wife for some months; they put off forged notes, the man disposing of them to a person in her presence, and the woman, who had gone with him, having some of them in her pocket; she was held entitled to an acquittal, on the presumption of her being his wife, for reputation and cohabitation is in such a case sufficient evidence of marriage. *Atkinson*, 1 Russ. Cri. 100, 1814 (in all cases except bigamy: *Greaves*, *ib.* 101 *n.*).

But where it is not alleged that she is the wife of the man, the *onus* of proving that she is so rests on her. A woman refused to

plead (in burglary) as *Jones*, saying she was Mrs. Wharton. The judges sent for the jury which found the indictment—with their consent altered her name to '*Jane Wharton, alias Jones*, spinster' (taking care not to say *wife of T. Wharton*). She could not prove the marriage, and judgment was given against her. *Jane Jones and Wharton*, J. Kel. 37, 1664.

But where a man and woman addressed each other as husband and wife, and passed as such, and were so spoken of by the witnesses for the prosecution, Patteson J. held that it was for the jury to be satisfied that they were in fact husband and wife (even though the woman had pleaded—by mistake—to the indictment (larceny), which described her as a single woman). *Woodward*, 8 C. & P. 561, 1838. See also *Mary Good*, 1 C. & K. 185, 1845, who was indicted for harbouring a man, to all intents and purposes her husband (cf. 1 Hale, 47, below), though possibly by an irregular marriage (about which there was no proof), after a murder, of which he was convicted; an acquittal was directed. In *Martha Torpey*, 12 Cox C. C. 45, 49, 1871, indicted for robbery with violence with a man of that surname (who had absconded) but not as his wife, she was not called on to prove a marriage, and the jury expressly found that she acted under the coercion of her husband: not guilty.

The presumption is not to be extended beyond the wife: *Thyra Court*, 7 Cr. A. R. 129, 1912: receiving. Apparently it applies to defendants of polygamous races: *Hadijah Caroubi*, 76 J. P. 262; 23 Cox C. C. 177; 28 T. L. R. 248; 107 L. T. 415; 7 Cr. A. R. at 151, 1912. When it appeared that an *undefended* couple had not set up the woman's coverture (and had perhaps suppressed it), the C. C. A. took notice of the *admitted* fact, though it was not a *ground* of appeal, but would not have interfered if the point had been deliberately concealed till appeal: *Mary Green*, 78 J. P. 224; 24 Cox C. C. 41; 30 T. L. R. 170; 110 L. T. 240; 9 Cr. A. R. 228, 1913: larceny: c. q.

Presence of husband] The presumption of coercion on the part of the husband does not arise, unless it appear that he was present at the time of the offence committed. 1 Hale P. C. 45, and above. See *Morris*, 1814; *Archer*, 1826; and *Torpey*.

So if a husband deliver a threatening letter ignorantly, merely as the agent of his wife, she alone may be punishable: *per* two judges. *John and Mary Hammond*, Lea. 444, 1787.

Indictment for forging, &c. bank-notes. A witness, in consequence of a conversation with defendant's husband, went to his shop; he being absent, she took him into an inner room, and, after his telling her what her husband had said, sold him the notes, for which he paid; while he was putting them into his pocket the husband put his head in and said (only), 'Get on with you.' On returning to the shop he saw the husband, who saw him get his change, and, as well as the wife, desired him to be careful. It was objected that the offence was committed under coercion, and, as, if both had been on trial, he must be convicted on these facts, she must, therefore, be acquitted (East P. C. 559; Hale, 46; and J. Kel. 37, above cited), but Thompson B. thought otherwise. 'The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *primâ facie* and *primâ facie* only (as is strongly laid down by L. Hale) that it was done under his coercion. But it is absolutely necessary that the husband should be actually present, and taking a part in the transaction. Here it is entirely the act of the wife. It is,

indeed, in consequence of a communication previously with the husband that the witness applies to the wife, but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came, and it was sufficient if, before that time, she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law, out of tenderness, refers it *primâ facie* to his coercion; but when it has been completed in his absence, no subsequent act of his (although it might possibly make him an accessary to the felony of the wife) can be referred to what was done in his absence.' *Hughes,* 2 Lew. C. C. 229, 1813. But where a wife uttered counterfeit coin, but the husband accompanied her as she went from door to door, though he did not go in, Bayley J. directed an acquittal. *Sarah Conolly,* 2 Lew. C. C. 229, 1829.

Presence now, perhaps, means effective presence, for in *Pollard,* 8 C. & P. 553, 1838: arson, Vaughan J. repelled the presumption where the husband was a bedridden cripple. But earlier, an acquittal had been directed for highway robbery where the man was reluctant and the wife insisted: *ib.* 545, 555.

Receiving stolen property] See under that title, *Archer,* 1826; *Brooks,* 1853; *Wardroper,* 1860; and cf. *Will and Ellen Matthews,* 1 Den. C. C. 596; 4 Cox C. C. 214, 1850: joint indictment, but (only) wife's c. for receiving q.

Exceptions] There are crimes for which the wife is *not* excused on this ground, *e.g.* treason and murder or 'homicide,' 'in regard of the heinousness of those crimes': 1 Hale P. C. 44, 45, 47, citing 'Mr. Dalton's Just. Ca. 104 [new edn. c. 157]. And hence it was that in the case of the treasons committed by *Arden* and *Somerville* [1 Anderson, 104, 1583] against Queen Elizabeth, both their wives were attaint of high treason . . . and yet they were only assenters to their husbands' treasons, and not immediately actors in it, and so were principals in the second degree; and upon the same account the *Earl of Somerset* and his wife were both attaint as accessaries before in murder [2 St. Tr. 951, 965, 1616].' See note at end of *Manning,* 2 C. & K. 903, 1849: murder. According to Bl. 4 Comm. 29, those crimes are excepted 'that are *mala in se* and prohibited by the law of nature.' Greaves remarks, 'This position of Blackstone J. is obviously much too large, as it includes larceny and burglary.' 1 Russ. Cri. (6th edn.) 147, *note.* 'Some of the books [*e.g.* Hawk. P. C. I. 1, 11] also except robbery. It may be, that in cases of felony, committed with violence, the doctrine of coercion does not apply': *per* Patteson J., *Cruse and wife,* 8 C. & P. 545, 1838: indictment under a rpd. A. for inflicting an injury dangerous to life (a capital offence); that judge seemed of opinion (but with doubt) that as the wife took an active part in the transaction, she might be found guilty of the offence with her husband. Defendants, however, were only convicted of an assault. But see *Torpey,* above. See also *Mary Buncombe,* 1 Cox C. C. 183, 1845, where Coleridge J. expressed his intention, if she were convicted of *robbery,* of reserving this point for the judges, and only allowed the case to proceed on the authority of a passage in Russell on Crimes, which, however, thinks, 6th edn. v. i. p. 146, that she is not punishable for robbery, and 7th edn. p. 93, *note,* says 'the authorities are inconsistent,' citing *Torpey* and *Dykes,* 15 Cox C. C. 771, 1885, where Stephen J. expressly asked the jury whether the wife, if both were guilty of highway robbery, acted under her husband's

coercion; they found both guilty, but her under coercion: her acquittal was directed. Contrast with this, *Anon.*, 8 C. & P. 545, above, where the coercion was by the wife.

Misdemeanours] 'In all misdemeanours it appears that the wife may be found guilty with the husband.' Christian's note to 4 Bl. Com. 29, but the learned editor, Mr. Welsby, thinks it is still (1844) doubtful whether she is punishable for *all*. In *Ingram and wife* (assault), 1 Salk. 384, 1712, both were convicted, but the facts are not reported.

And, generally, in offences 'as to the government of the house, in which the wife has a principal share,' *e.g.* keeping a bawdy-house, it is implied that coercion is not presumed. Hawk. P. C. 1, 1, 12; see *Dixon*, 1716, and other cases under *Nuisance*. So Kenny, as above, except *such* misdemeanours 'all' are under the presumption, 'so the majority of writers assert.'

The C. C. A. did not deny that the presumption may extend to a misdemeanour in a proper case: *Mabel Smith*, 12 Cr. A. R. 42, 1916: fraudulent conversion and falsification: husband only bound over.

But on a joint indictment for uttering counterfeit coin, misdemeanour (the wife merely being present), the Common Serjeant, after consulting two judges, held, on the authority of *Connolly*, above, that she was entitled to an acquittal, and, perhaps, that there is no sound distinction, in the rule on coercion, between felonies and misdemeanours. *Price*, 8 C. & P. 19, 1837, the last note to which states that *Connolly* was a misdemeanour.

However, in *Cruse*, where the jury convicted a husband and wife of an assault, the judges affirmed the conviction, being unanimously of opinion that the point did not arise, as the ultimate result was a conviction for misdemeanour. Nevertheless, in an assault case, Russell Gurney, Recorder of London, after consulting Bramwell B., left the question of coercion to the jury. *Torpey*, above.

It is not easy to draw the line between the coercion cases and those in which the wife is to be considered as merely the servant of her husband. See, for instance, *Squire*, 1799, and *Saunders*, 1836; in the former, however, the judge said that if the husband had given her food for the apprentice and she had withholden it, she would have been guilty of murder; but she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct.

Accessory] A woman, by knowingly receiving her husband who has done treason or felony, cannot be indicted as an accessory 'after as to the felony, nor principal as to the treason, for such bare reception, for she is *sub potestate viri*, and she is bound to receive' him; 'but otherwise it is' of his receiving her in such cases. 1 Hale P. C. 47. But she may be an accessory *before* to murder; and 'if alone and without her husband,' but *not* together with him, she may be an accessory *after* to a felony. *Ib.*

Whether she can be guilty of *misprision* of her husband's treason is doubtful: *ib.*

Evidence] See that title. Stolen goods were found in a man's house; his wife, in his presence, made a statement exonerating him and criminating herself; Pollock B. was 'careful not to admit' this statement against her at her trial, because it may have been said in consequence of his coercion: *Laugher*, 1846.

4. 'NECESSITY.'

This defence, except in the case of self-defence (for which see further, Index), has been very little discussed, *i.e.* where there has been no positive attack on the accused. See, however, Dr. Kenny, Outlines Crim. Law, c. iv, where *Dudley*, the *Mignonette* case, 1884, 'the only English case where this defence has been expressly raised,' is commented on. The decision therein implies that English law does not accept the proposition 'Self-preservation is the first law of nature' if 'first' means paramount or overriding, but adopts the principle of Blackstone (1 Comm. 129), who speaks of 'Life [as] a right inherent by nature in every individual,' *i.e.* one life in law is as good as another—relied upon in that judgment. That principle may be traced to Hale, 1 P. C. 51: 'If a man be menaced with death unless he will commit an act of treason, murder or robbery, the fear of death does not excuse him if he commit the fact, for the law hath provided a sufficient remedy. Again, if a man be desperately assaulted and in perill of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him . . . for he ought rather to die himself than kill an innocent'; *à fortiori* when he is not assailed. A contrary dictum of Bacon, Max Reg. 5, on a very similar state of facts to those here, was expressly contradicted by L. Coleridge C.J. and four other judges. This view of the law logically makes the 'stealing' of food by a starving person theft—the doctrine of Hale,* again: *ib.* 54, but repudiated by Bacon, above—and would condemn as larceny the taking of a horse or boat belonging to an innocent third person by one escaping from brigands or pirates. Whether this uncompromising moral standard in cases of extreme necessity is justified is, perhaps, an ethical question; in practice it has always been mitigated by considerable leniency in punishment, as Hale, 54, points out, and as in the *Mignonette* case. The truth perhaps is that law is not applicable to extreme abnormal circumstances when reason is paralysed.

Necessity was a defence of *Warren Hastings* to several charges, and was admitted as a possible defence in *Governor Eyre's* case by Blackburn J. in his charge to the grand jury: Finlason's Report, 82, 84, 1868; but was emphatically repudiated by Cockburn C.J. as a ground for 'the removal of Mr. Gordon from Kingston into the proclaimed district for the purpose of subjecting him to martial law': *ib.* 105. See *Coercion* under *Murder* and *Treason*. For the doctrine in *Conspiracy*, see under that title, *Hearsay*.

* He did not apparently always as a judge act on this view: 'Hale once tried a poor fellow who, being cast upon the shores of Cornwall, in the extremity of his hunger opened a window and taking a loaf began to eat it. The jury brought him in guilty of the burglary, and even after the judge argued with them that it was but to supply his hunger, they at first persisted in their verdict, nor was it without much trouble that the judge induced them to acquit the lad': 7 Foss's *Judges*, 112.

PART IV.

INTERPRETATION OF COMMON LAW AND STATUTES (CRIMINAL).

1. The progress of science.

In *Graves* v. *Ashford*, 1867, where the question was whether 'piracy' of an engraving by photography was within certain statutes between 1735 and 1777, and it was contended that 'if photography had been intended it would doubtless have been mentioned, for the art was about fifteen years old at the time of the passing of that statute' (apparently 15-6 V. 12, in 1852, or 6-7 W. 4, 59, in 1836: some form of photography, however, was known about 1800). Kelly C.B., delivering the judgment of the Exchequer Chamber, said: 'It is as if the legislature had contemplated that there might be some other hitherto undiscovered mode of copying works of art which they were unable at the time to describe in apt words, and therefore resort was had to the large and comprehensive words 'or otherwise or in any other manner.' It is obvious that the legislature could not, in providing for the protection of works of art, describe a piracy by means of a process not then within the knowledge of mankind. But it by no means follows that when words large enough to embrace it are used, the prohibition should not, as well as the protection, be extended to a subsequently discovered mode of reproducing and multiplying copies . . . the effect of all the Acts taken together is that any process whether known at the time or the result of subsequent invention or discovery by which pictures or engravings may be imitated or copied, is within the mischief as well as within the express words which the legislature has used. And we cannot help thinking that a more limited construction would be contrary to the whole spirit of the legislation on the subject and productive of great injustice.' Cf. *Moore*, 1826. 'It could hardly be contended that printing a treasonable pamphlet was not an offence against the statute of Edw. III. because printing was not invented until a century after it was passed; or that it would not be treason to shoot the king with a pistol or poison him with an American drug.' *Maxwell* on Statutes, 5th edn. p. 440, who also cites 3 Inst. 35; *Riley*, 1896: a telegram may be a forged 'instrument'; and *A.-G.* v. *Edison*, 6 Q. B. D. 244, 1888: a telephone is a 'telegraph': *ib.* 129.

On this reasoning it is submitted that when railways superseded highways to a great extent, obstruction of the former would have been, at common law, as criminal as of the latter, even if the former had not been protected by statutes. Cf. *Severn and Wye Rly. Co.*, 2 B. & Ald. at p. 48, 1819.

See *Mental Shock* under *Manslaughter* and *Murder*, and *Gallagher* under *Treason*. Cf. p. 1097.

2. New felonies.

'If a statute creates a new variety of something which previously existed at common law (for instance, if a new kind of felony is created by statute), all common law incidents will attach to that new variety.' *Craies* on Statute Law, 2nd edn. p. 309, citing Hawkins P. C. I. 40, 7 [and, apparently, II. 29, 14], and the *Coalheavers' case*. Hawk. includes in such incidents 'who shall be accounted accessaries before or after.' This rule 'appears to be applicable not only to questions of procedure and forfeiture, but also to the evidence admissible to prove or disprove the commission of the crime': *ib.* 465. But when the taking by a partner of partnership property was not made a felony by the Larceny A. of 1861, but only by that of 1868, and in 1870 a receiver was indicted under *the former A.* only in respect of partnership chattels 'feloniously' stolen by a partner, it was held that a conviction was wrong: *Smith*, 1870, followed in *Streeter:* wife taking from husband, which see.

3. Penal statutes.

'It is said that penal statutes must be construed strictly, *i.e.* that 'when the legislature imposes a penalty, the words imposing it must be clear and distinct' (*Willis* v. *Thorp*, 1875, L. R. 10 Q. B. 383, 386, Blackburn J.). . . . As to enactments creating crimes, the rule was adopted *in favorem vitae* in respect of treason and capital felonies, and extended to misdemeanours.' Craies, as above, p. 459, who adds that 'the distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules,' citing *Lyons*, 1858; and like Bramwell B., approves the principle of an American jurist whom he quotes, viz.: 'Statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature without unwarrantable severity on the one hand, or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy': *ib.* 460.

'Whether an Act is penal,' he says, *ib.* 456, 'is material' in criminal law 'for the purpose of deciding whether disobedience to the Act is or is not a misdemeanour, but this question can only arise in the absence of a specific sanction in the Act itself (*Tyler, &c.*, 1891).' Among the tests which he sets out of a penal or non-penal statute are: '*Primâ facie* the imposition of a fine or penalty or forfeiture by a statute makes the procedure criminal (*Mellor* v. *Denham*, 1880, 5 Q. B. D. 467; *Whitchurch*, 1881, 7 Q. B. D. 534; *Paget*, 1881, 8 Q. B. D. 157; *Ex p. Schofield*, 1891, 2 Q. B. 428).

That the fine, penalty or forfeiture is payable to an individual does not *per se* render the remedy civil (*Paget*, 1881. See *Tyler*, 1891).'

Procedure] In *F. Austin*, 1913, the question was whether there could be sentence of whipping under 2-3 G. 5, 20, for an offence committed before that A. passed, and the C. C. A. held that it could, Phillimore J. observing 'the ordinary rule that a penal statute is not construed retrospectively does not apply to procedure' (a rule 'for the first time distinctly enunciated by the C. of Exchequer in *Wright* v. *Hale*, 1869, 30 L. J. Ex. 40': Craies, p. 353); the 1912 A. 'is not creating a new punishable offence.' In *Vine*, L. R. 10 Q. B. 195; 44 L. J. M. C. 60; 13 Cox C. C. 43, 1875, it was held by three judges, Lush J. strongly dissenting, that 33-4 V. 29, 14, applied to any one convicted *before* the A.; the majority thinking that where

the language is not 'necessarily retrospective,' but the only intention is to increase the punishment, then the rule applies. 'But here the object is not to punish offenders, but to protect the public against public-houses'; 'it is an enactment with regard to public and social order, and the infliction of penalties is merely collateral,' and in this sense the rule is accepted: Craies, p. 358. On the point of punishment it is not easy to reconcile *Vine*—a case of disqualification—with *F. Austin*, where the object of the statute was merely to increase punishment.

4. Sentence.

Different statutes sometimes inflict different penalties for the *same* offence. Thus an officer of the Post Office embezzling a postal packet, not containing money, &c., in the course of transmission by post, is liable under s. 18 of the Larceny A. 1916, to p. s. for seven years (maximum).

By s. 55 of the Post Office A. 1908, he is liable for this offence to three years' p. s. (maximum).

Strictly the maximum sentence would be regulated by the s. under which the indictment is framed, but 'the ordinary rule . . . that the lesser punishment should be imposed': *per* L. Alverstone C.J. in *Turner*, 1903 (sentence reduced), must not be overlooked.

5. *Obsolete statutes.*

See *Barratry, Jesuits,* and *Petitioning* under *Tumultuous Disturbance*. Common and other law dealing with offices (and institutions) now obsolete is sometimes assumed to apply to the equivalent in use; *e.g.* 'peace officer' is replaced by 'constable' or 'police.'

6. The date of the 'passing' of an Act is that of the Royal Assent (and not that of the A. coming into force): *C. Smith*, 79 L. J. K. B. 1; 26 T. L. R. 23; 3 Cr. A. R. 40, 1909. Cf. 33 G. 3, 13.

PART V.

AGENCY.

For mercantile and commercial agents, see *Agents* and *Corruption*.
For *election* agents, see *Bribery* and *Elections*.
For *conspirers* as agents for one another, see *Conspiracy*.
For *commission* and other agents not servants, see under *Embezzlement*.

Principal's responsibility] 'Except where otherwise expressly or by necessary implication provided by statute, no principal is criminally liable for any act or omission of his agent unless he authorised or connived at such act or omission': *Bowstead* on Agency, 6th edn., 1919, Art. 146. The only *illustration* of indictment he gives is *Stephens*, 1866, and of information is *A.-G.* v. *Siddon*, 1 C. & J. 220; 35 R. R. 701, 1830 (smuggling), which *Baty*, Vicarious Liability, 1916, thinks only shows that 'the servant's acts are no more than strong evidence of the master's complicity' (p. 203; it is wrong to include revenue cases among those where the master *cannot* be excused for the servant's act: *ib.*). Perhaps the true rule is: 'The master is indictable when indictment is the only remedy, as it is when there is no proof of special damage (*Holbrooke*, 1877).' *Medley* and *Stephens* are, therefore, merely examples of a very special class of cases, in which a civil liability is enforced by the forms of criminal law. *Ib.* p. 204. '. . . it will be seen that the law is in a state which it is not too much to call discreditable to English jurisprudence. Vicarious criminal liability is imposed haphazard and with an arbitrary hand.' *Ib.* p. 218. See also *Newman* v. *Jones*, 17 Q. B. D. 132, 1886: c. q.

See *Mens Rea*.

In practice the point only arises through some act of a servant. 'The liability of a principal for the acts, negligence, misfeasances, &c. of an agent is confined to those cases where the agent is a servant,' cited by *Baty*, Preface. A servant, like any one else, may be an *innocent* agent of his principal's crime; see instances in Index. Servants, of course, may be criminally guilty without involving their masters, and in one case represented by *Stephens*, above, their guilt may legally involve his (though otherwise he is not guilty). Or they, like any one else, may criminally *conspire* with their master (*Bernard*, 1908), or they may execute his criminal behests (*Earl of Macclesfield*), or yield to his criminal solicitations, in which case both are respectively criminal in their degrees; no doctrine of coercion protects the servant: 1 Hale P. C. 516. 'No impunity is given to servants who are as much free agents as their masters': 4 Bl. Comm. 29.

Possession] of the servant may be the possession of his master even for criminal purposes, but not unless there is evidence that the latter was aware of and consented to it: *Pearson* (No. 2), 1908: c. q.

Evidence of representation to agent] See *W. Fisher*, 1910.

Admissions by agents] See *Incriminating Statements.*

Superior orders] 'In a criminal case an inferior officer must be held justified in obeying the directions of a superior not obviously improper or contrary to law': *per* Willes J., *Trainer, &c.*

By s. 19 (3) of the Merchandise Marks A. 1887: 'Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom who *bonâ fide* acts in obedience to the instructions of such master, and on demand made by or on behalf of the prosecutor, has given full information as to his master': cf. s. 2 (2).

Statute] Note that *Stephens* was at common law. Each statute must be looked at for its own terms: see, *e.g. D. P. P.* v. *Witkowski:* master held not liable; in *H. Key*, 1908, it seems that if the employer had, as he alleged, forbidden his manager to send the packet, he must have been acquitted. Whether a bookmaker can use a public-house with the knowledge of a servant, but against the landlord's authority, was not decided in *I. Moss*, 1910: c. q. A master may permit such an user by allowing one of his employees to act as an intermediary between his customers and a bookmaker: *Wyton*. For cruelty to animals, see *Greenwood* v. *Backhouse*, 66 J. P. 519; 20 Cox C. C. 196; 88 L. T. 566, 1902: Q. B. D.: c. q.

For the exoneration of sheriffs, see 50-1 V. 55, 34, *d*, and *Escape.*

False trade descriptions] See *Coppen and Moore.*

Wife] See under *Coercion.*

Libel] See under that title, *Constructive Publication* and *Booksellers.*

Letters to Principal] See *Fisher*, 1910.

Offences by agents, &c.] See *Agents* and *Employers.*

Corporations] aggregate can only be criminally liable through acts and defaults of their servants and agents. See that title.

Road trustees] See p. 824.

ADDITIONS AND CORRECTIONS.

P. 58, last l. but one. *For 1913 read 1915.*

P. 68. *For* 'if *defendant* be unable to attend' *read* 'if *deponent*,' &c.

P. 78. S. 4 (2) of the Criminal Evidence A. is:
'Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.'
It is difficult to see with what object this sub-s. was inserted.

P. 79. *For* 'Incest Act, *1898*,' *read 1908.*
For '3 & 4 Geo. 5, c. 3,' *read* c. 38.
For 'Section 4 (3),' in margin, *read* Section 46 (3).
For 'Section fifty' *read* Section fifty-six.
For 'Section 4 (6),' in margin, *read* Section 56 (6).

P. 97. *Add* (last par. but one):
Averments] 'are preliminary or prefatory or subsidiary statements in an indictment which the prosecutor proposes to verify in support of the charge, as an element in constitution or aggravation of the offence. They are in some cases described as inducements when they merely lead up to the main allegations.' 7 Encyc. Laws Eng. 116.

P. 112. *For Fisher*, '1899,' *read* '1909.'

P. 127, l. 12. *For* 'see rules' *read* 'see *Judges*.'

P. 141. Add: When a spouse-witness for the prosecution is competent before a petty jury, she or he is competent before the grand jury.

P. 146, l. 20. *Read* p. 148.

P. 173, l. 33. *For* 'in proof' *read* '*on* proof.'

P. 174. *Add* (as par. 3):

Larceny A. 1916, *s.* 43] '(2) No person shall be liable to be convicted of any offence against sections 6, 7 sub-section (1), 20, 21, and 22 of this Act upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been *bonâ fide* instituted by any person aggrieved.

(3) In any proceedings in respect of any offence against sections 6, 7 sub-section (1), 20, 21 and 22 of this Act, a statement

or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence against that person.'

P. 175, last l. but one. *For 1889 read 1898.*

P. 177. It seems that 'since the Reformation' this point (clergymen) has never been decided. See a letter from L. Coleridge C.J. to Mr. Gladstone in 1890: 2 Life of L. Coleridge, 365.

P. 204. *Add to first par.:* It is stated (Dict. Nat Biog., *Dugdale, Sir William*) that it was asserted in 1693 that his 'Monasticon' (completed in 1673) 'had been admitted in the courts at Westminster as 'good circumstantial evidence' when the records transcribed in it could not otherwise be recovered.' Cf. p. 170.

P. 212. *To* iii. *add:* See also pp. 221, 618, 619-20.

P. 219, l. 6. *For* 'judged' *read* 'judges.'

P. 233. *Add: Offences by children*] See 8 E. 7, 67, 94-6.

P. 237. *Add:* About 1565 Sir Thomas Smith wrote in 'The Commonwealth of England,' B. III. c. 3, 'If I began first to pursue him [accused of felony] by information or denunciation to enditement I am now no partie but the Prince who for his dutie to God and his Commonwealth and Subiects must see Justice executed against all Malefactors and Offenders against the Peace, which is called Gods and his.'

P. 240, last par. *Read 'and Stubbs'* (not '*v.*'); and for 1866, 1886.

P. 273. *Add under* X.: By s. 1 of 9-10 G. 5, 71, Sex Disqualification (Removal) A.: '. . . a person shall not be exempted by sex or marriage from the liability to serve as a juror: Provided that—(*b*) any judge, chairman of quarter sessions, recorder or other person before whom a case is or may be heard may, in his discretion, on an application made by or on behalf of the parties (including in criminal cases the prosecution and the accused) or any of them or at his own instance, make an order that the jury shall be composed of men only or of women only as the case may require, or may, on an application made by a woman to be exempted from service on a jury in respect of any case by reason of the nature of the evidence to be given or of the issues to be tried, grant such exemption. Rules of court may be made'—*inter alia*—'exempting from attendance as jurors any women who are for medical reasons unfit to attend' by, for *criminal* courts, the Rule Committee under the Indictments A. 1915.

Accordingly, 33-4 V. 77, 5, and 34-5 V. 65, 3, are amended.

P. 299. After *Intoxication add:* and *A. Beard,* 1920.

P. 301, l. 2. See also s. 5 (5) (*a*) of the Indictments A., p. 82.

P. 337. 'Defectives.' *Transfer before* '8.'

P. 340. *Add:* 16. When at the conclusion of a trial (*W. Stone*) a spectator applauded, L. Kenyon fined him 20*l.* summarily and refused 'his check for the sum,' and he was taken into custody.

Pp. 485-94. The ss. cited are in the Children A., 8 E. 7, 67, unless it is otherwise stated.

P. 623. *Add:*

FIREARMS, &c., UNLAWFUL POSSESSION OF.

By s. 6 of 10-11 G. 5, 43, the Firearms A. 1920, it is an indictable offence 'for any person without the authority of the Admiralty or the Army Council or the Air Council to manufacture sell purchase carry or have in his possession any weapon of whatever description designed for the discharge of any noxious liquid, gas, or other thing or any ammunition containing or designed or adapted to contain any such noxious thing and such a weapon is in this Act referred to as a prohibited weapon': maximum punishment, imp. w. (or without) h. l. for two years.

S. 7: 'Any person who has in his possession or under his control any firearm or ammunition with intent by means thereof to endanger life or cause serious injury to property or to enable any other person by means thereof to endanger life or cause serious injury to property shall whether any injury to person or property has been caused or not be deemed to have been guilty of an offence under s. 3 of the Explosive Substances Act,' 46-7 V. 3, and is subject to that A.

By s. 9 (3), any police officer may search for and seize firearms or ammunition moved, &c. in contravention of a Secretary of State's order.

By other ss. justices of the peace may issue search-warrants for such suspected things (and order them to be destroyed), and the police have powers of demand, search and seizure.

By s. 5 (1), certain convicted persons may not, for certain periods, possess, &c., and no one may sell them, such articles.

By s. 11 (1), on conviction and sentence (except, apparently, when only a fine is inflicted) the court may order the forfeiture, &c. of such things in defendant's possession and may cancel his firearm certificate.

S. 12 (1): ''firearm' means any lethal firearm or other weapon of any description from which any shot bullet or other missile can be discharged or any part thereof,' and . . . 'ammunition' means ammunition for any such firearms and includes grenades bombs and other similar missiles whether such missiles are capable of use with a firearm or not and ingredients and components thereof,' saving for certain shot-guns, air-guns and air-rifles.

S. 16: The power under the Unlawful Drilling Act, 1819, of authorising meetings and assemblies of persons for the purpose of training and drilling themselves or of being trained and drilled to the use of arms or for the purpose of practising military exercises, manœuvres or evolutions, shall be exerciseable by a Secretary of State or any officer deputed by him for the purpose, instead of by the lieutenant or two justices of the peace of a county.

P. 635, l. 3. *Add:* (But for civil purposes *Newton* v. *Harland* and *Beddall* v. *Maitland* are overruled: *Hemmings* v. *Stoke Poges Club*, 1920, 1 K. B. 720; 89 L. J. K. B. 744; 122 L. T. 479; 36 T. L. R. 77: C. A.).

P. 691, last par. (691-2). *Transfer to Statutes*] p. 690 (end); then follows last par. but one on p. 691.

P. 698. *Jury*] *Add:* The same jury must try both the primary charge and the allegation: *C. Hunter*, 15 Cr. A. R.: 1920.

P. 700, last par. but one. *For* '*b*' *read:* '(*a*) by par. (*b*) thereof: *W. Davis*, 1917, 2 K. B. 855; 87 L. J. K. B. 119; 117 L. T. 704; 34 T. L. R. 25; 13 Cr. A. R. 10, relying on *Collins*, 1916, unreported.'

P. 703, 2nd par. l. 1. Transfer *that* after 'cases.'

P. 785, l. 15: *omit* 'so.'

P. 791. *Add after Almon;* 20 St. Tr. 838; *J. Miller, ib.* 893.

P. 803, l. 12. *After* 2-3 G. 5, 20, 7 (6), *add:* This sub-s. substantially repeats s. 4 of the Crim. Ev. A. 1898; see sub-s. (2), above (addition to p. 78). The remark there applies.

P. 1056. The cases *on this point* were reviewed and *Miard* overruled by the C. C. A. in *E. Dymond*, 1920, 2 K. B. 260; 84 J. P. 103; 64 S. J. 571; 36 T. L. R. 421; 15 Cr. A. R. 1, where defendant convicted under s. 29 (1) (*i*) of the L. A. 1916, had written to a man that unless he paid her she would summon him for an indecent assault upon her at a time and a place she mentioned. Cross-examination of the man to show that in fact such an assault had taken place (and that, therefore, she had reasonable ground for making the demand) was not allowed, Darling J. ruling that this would not be a defence unless she established that she had in fact such ground for making the demand. This was upheld by the court: 'It is for the jury to decide whether there was reasonable or probable cause for making the demand, and it is not for them to decide whether the accused believed that she had reasonable and probable cause for making it. The belief of the accused may, of course, be taken into consideration by the judge in passing sentence, but in our view it is not material in ascertaining whether the crime has been committed.'

P. 1065. *In his realm*] *Add:* 'The common law is the same in both countries' (viz. Ireland and England): *per* L. Carleton C.J., *Sheares*, 27 St. Tr. 388, 1798: treason.

P. 1087. *Add:* For an amendment of 60 G. 3 & 1 G. 4, 1, see s. 16 of the Firearms A. 1920 (above, *addendum* to p. 623).

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